



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

Author and Title

The American State Reports.

Call Number	Volume	Copy
KF 133 A42	114	

THIS BOOK DOES NOT CIRCULATE
OUTSIDE THE BUILDING

NAME	LOCATION

The American State Reports.

KF
133
A42

vol.
114

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

THE
AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN.

VOLUME 114.

SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY,
LAW PUBLISHERS AND LAW BOOKSELLERS.
1907.

Copyright, 1907.

BY

BANCROFT-WHITNEY COMPANY.

SAN FRANCISCO:

THE FILMER BROTHERS ELECTROTYPE COMPANY,
TYPOGRAPHERS AND STEREOTYPERS.

AMERICAN STATE REPORTS.

VOLUME 114.

SCHEDULE

showing the original volumes of reports in which the cases herein selected and re-reported may be found, and the pages of this volume devoted to each state.

	PAGE.
RHODE ISLAND REPORTS Vol. 27.	17- 75
SOUTH CAROLINA REPORTS Vol. 73.	76-105
WASHINGTON REPORTS Vol. 42.	106-146
COLORADO REPORTS Vol. 34.	147-180
GEORGIA REPORTS Vol. 125.	181-254
IDAHO REPORTS Vol. 11.	255-304
ILLINOIS REPORTS Vol. 223.	305-366
INDIANA APPEALS Vol. 36.	367-401
IOWA REPORTS Vol. 130.	402-461
KANSAS REPORTS Vol. 71.	462-537
LOUISIANA REPORTS Vol. 116.	538-590
MASSACHUSETTS REPORTS Vol. 191.	591-639
MICHIGAN REPORTS Vol. 143.	640-687
MINNESOTA REPORTS Vol. 97.	688-742
MISSOURI REPORTS Vol. 197.	743-798
MONTANA REPORTS Vol. 33.	799-843
OREGON REPORTS Vols. 46, 47.	844-948
PENNSYLVANIA REPORTS Vol. 215.	949-985
SOUTH CAROLINA REPORTS Vol. 74.	986-1017

SCHEDULE

SHOWING IN WHAT VOLUMES OF THIS SERIES THE CASES
REPORTED IN THE SEVERAL VOLUMES OF OFFICIAL
REPORTS MAY BE FOUND.

State reports are in parentheses, and the numbers of this series in bold-faced figures.

- ALABAMA.**—(83) 3; (84) 5; (85) 7; (86) 11; (87) 13; (88) 16; (89) 18; (90, 91) 24; (92) 25; (93) 30; (94) 33; (95) 36; (96, 97) 38; (98) 39; (99) 42; (100, 101) 46; (102) 48; (103) 49; (104, 105) 53; (106, 107, 108) 54; (109, 110) 55; (111) 56; (112) 57; (113) 59; (114) 62; (115, 116) 67; (118, 119) 72; (120) 74; (121) 77; (122, 123, 124, 125) 82; (126, 127) 85; (128) 86; (129) 87; (130) 89; (131, 132) 90; (133) 91; (134) 92; (135) 93; (136) 96; (137) 97; (138) 100; (139) 101; (140) 103; (141) 109; (142) 110; (143) 111; (144) 113.
- ARKANSAS.**—(48) 3; (49) 4; (50) 7; (51) 14; (52) 20; (53) 22; (54) 26; (55) 29; (56) 35; (57) 38; (58) 41; (59) 43; (60) 46; (61, 62) 54; (63) 58; (64) 62; (65) 67; (66) 74; (67) 77; (68) 82; (69) 86; (70) 91; (71) 100; (72) 105; (73) 108; (74) 109; (75) 112; (76, 77) 113.
- CALIFORNIA.**—(72) 1; (73) 2; (74) 5; (75) 7; (76) 9; (77) 11; (78, 79) 12; (80) 13; (81) 15; (82) 16; (83) 17; (84) 18; (85) 20; (86) 21; (87, 88) 22; (89) 23; (90, 91) 25; (92, 93) 27; (94) 28; (95) 29; (96) 31; (97) 33; (98) 35; (99) 37; (100) 38; (101) 40; (102) 41; (103) 42; (104) 43; (105) 45; (106) 46; (107) 48; (108) 49; (109) 50; (110, 111) 52; (112) 53; (113) 54; (114) 55; (115) 56; (116) 58; (117) 59; (118) 62; (119) 63; (120) 65; (121) 66; (122) 68; (123) 69; (124) 71; (125) 73; (126) 77; (127) 78; (123, 129) 79; (130) 80; (131) 82; (132) 84; (133) 85; (134) 86; (135) 87; (136) 89; (137) 92; (138) 94; (139) 96; (140) 98; (141) 99; (142) 100; (143) 101; (144) 103; (145) 104; (146) 106; (147) 109; (148) 113.
- COLORADO.**—(10) 3; (11) 7; (12) 13; (13) 16; (14) 20; (15) 22; (16) 25; (17) 31; (18) 36; (19) 41; (20) 46; (21) 52; (22) 55; (23) 58; (24) 65; (25) 71; (26) 77; (27) 83; (28) 89; (29) 93; (30) 97; (31) 102; (32) 106; (33) 108; (34) 114.
- CONNECTICUT.**—(54) 1; (55) 3; (56) 7; (57) 14; (58) 18; (59) 21; (60) 25; (61) 29; (62) 36; (63) 38; (64) 42; (65) 48; (66) 50; (67) 52; (68) 57; (69) 61; (70) 66; (71) 71; (72) 77; (73) 84; (74) 92; (75) 96; (76) 100; (77) 107; (78) 112.
- DELAWARE.**—(5 Houst.) 1; (6 Houst.) 22; (7 Houst.) 40; (9 Houst.) 43; (1 Marv.) 65; (2 Marv.) 69; (1 Pennewill) 73; (2 Pennewill) 82; (3 Pennewill) 94; (4 Pennewill) 103.
- FLORIDA.**—(22) 1; (23) 11; (24) 12; (25, 26) 23; (27) 26; (28) 29; (29) 30; (30) 32; (31) 34; (32) 37; (33) 39; (34) 43; (35) 48; (36) 51; (37) 53; (38) 56; (39) 63; (40) 74; (41) 79; (42) 89; (43) 99; (44) 103; (45, 46, 47) 110; (48, 49, 50) 111.
- GEORGIA.**—(76) 2; (77) 4; (78) 6; (79) 11; (80, 81) 12; (82) 14; (83, 84) 20; (85) 21; (86) 22; (87) 27; (88) 30; (89) 32; (90) 35; (91, 92, 93) 44; (94) 47; (95, 96) 51; (97) 54; (98) 58; (99) 59;

(100) 62; (101) 65; (102) 66; (103) 68; (104) 69; (105) 70; (106) 71; (107) 73; (108) 75; (109) 77; (110, 111) 78; (112) 81; (113) 84; (114) 88; (115) 90; (116) 94; (117) 97; (118) 98; (119) 100; (120) 102; (121) 104; (122) 106; (123) 107; (124) 110; (125) 114.

IDAHO.—(2) 35; (3, 4, 5) 95; (6) 96; (7) 97; (8) 101; (9) 108; (10) 109; (11) 114.

ILLINOIS.—(121) 2; (122) 3; (123) 5; (124) 7; (125) 8; (126) 9; (127) 11; (128) 15; (129) 16; (130) 17; (131) 19; (132) 22; (133, 134) 23; (135) 25; (136) 29; (137) 31; (138, 139) 32; (140, 141) 33; (142) 34; (143, 144, 145) 36; (146, 147) 37; (148) 39; (149, 150) 41; (151) 42; (152) 43; (154) 45; (153, 155) 46; (156) 47; (157) 48; (158) 49; (159) 50; (160, 161) 52; (162) 53; (163) 54; (164, 165) 56; (166) 57; (167) 59; (168, 169) 61; (170) 62; (171) 63; (172, 173) 64; (174) 66; (175) 67; (176) 68; (177, 178) 69; (179) 70; (180, 181) 72; (182) 74; (183, 184) 75; (185) 76; (186) 78; (187) 79; (188) 80; (189) 82; (190) 83; (191, 192) 85; (193) 86; (194, 195) 88; (196) 89; (197) 90; (198) 92; (199, 200), 93; (201) 94; (202) 95; (203) 96; (204, 205) 98; (206, 207) 99; (208) 100; (209) 101; (210) 102; (211, 212) 103; (213) 104; (214) 105; (215) 106; (216, 217) 108; (218, 219) 109; (220) 110; (221) 112; (222) 113; (223) 114.

INDIANA.—(112) 2; (113) 3; (114) 5; (115) 7; (116) 9; (117, 118) 10; (119) 12; (120, 121) 16; (122) 17; (123) 18; (124) 19; (125) 21; (126, 127) 22; (128) 25; (129) 28; (130) 30; (131) 31; (132) 32; (133) 36; (134) 39; (135) 41; (136) 43; (137) 45; (138) 46; (139) 47; (140) 49; (1, 2, 3 Ind. App.; 141) 50; (4, 5, 6 Ind. App.; 142) 51; (7, 8 Ind. App.; 143) 52; (9, 10 Ind. App.) 53; (11 Ind. App.) 54; (13 Ind. App.; 144) 55; (14 Ind. App.) 56; (15 Ind. App.; 145) 57; (146) 58; (16 Ind. App.) 59; (17 Ind. App.) 60; (147, 148) 62; (18 Ind. App.; 149) 63; (150, 19 Ind. App.) 65; (20 Ind. App.) 67; (151) 68; (21 Ind. App.) 69; (152) 71; (22 Ind. App.) 72; (153) 74; (23 Ind. App.; 154) 77; (24 Ind. App.) 79; (155) 80; (25 Ind. App.) 81; (156) 83; (26 Ind. App.) 84; (157; 27 Ind. App.) 87; (28 Ind. App.) 91; (158) 92; (29 Ind. App.) 94; (159) 95; (30 Ind. App.) 96; (160) 98; (31 Ind. App.) 99; (161) 100; (32 Ind. App.; 162) 102; (33 Ind. App.) 104; (163) 106; (34 Ind. App.) 107; (164) 108; (35 Ind. App.) 111; (165) 112; (36 Ind. App.) 114.

IOWA.—(72) 2; (73) 5; (74) 7; (75) 9; (76, 77) 14; (78) 16; (79) 18; (80) 20; (81) 25; (82) 31; (83) 32; (84) 35; (85) 39; (86) 41; (87) 43; (88) 45; (89, 90), 48; (91) 51; (92) 54; (93) 57; (94, 95) 58; (96, 97) 59; (98) 60; (99) 61; (100) 62; (101, 102) 63; (103) 64; (104) 65; (105) 67; (106) 68; (107) 70; (108) 75; (109) 77; (110) 80; (111) 82; (112) 84; (113) 86; (114) 89; (115) 91; (116) 93; (117) 94; (118) 96; (119) 97; (120) 98; (121) 100; (122, 123) 101; (124) 104; (125, 126) 106; (127) 109; (128) 111; (129) 113; (130) 114.

KANSAS.—(37) 1; (38) 5; (39) 7; (40) 10; (41) 13; (42) 16; (43) 19; (44) 21; (45) 23; (46) 26; (47) 27; (48) 30; (49) 33; (50) 34; (51) 37; (52) 39; (53) 42; (54) 45; (55) 49; (56) 54; (57) 57; (58) 62; (59) 68; (60) 72; (61) 78; (62) 84; (63) 88; (64) 91; (65) 93; (66) 97; (67) 100; (68) 104; (69) 105; (70) 109; (71) 114.

KENTUCKY.—(83, 84) 4; (85) 7; (86) 9; (87) 12; (88) 21; (89) 25; (90) 29; (91) 34; (92) 36; (93) 40; (94) 42; (95) 44; (96) 49; (97) 53; (98) 56; (99) 59; (100) 66; (101) 72; (102) 80; (103)

82; (104) 84; (105) 88; (106) 90; (107) 92; (108) 94; (109) 95; (110) 96; (111) 98; (112) 99; (113) 101; (114) 102; (115) 103; (116) 105; (117, 118) 111.

LOUISIANA.—(39 La. Ann.) 4; (40 La. Ann.) 8; (41 La. Ann.) 17; (42 La. Ann.) 21; (43 La. Ann.) 26; (44 La. Ann.) 32; (45 La. Ann.) 40; (46, 47 La. Ann.) 49; (48 La. Ann.) 55; (49 La. Ann.) 62; (50 La. Ann.) 69; (51 La. Ann.) 72; (52 La. Ann.) 78; (104) 81; (105) 83; (106) 87; (107) 90; (108) 92; (109) 94; (110) 98; (111) 100; (112, 113) 104; (114) 108; (115) 112; (116) 114.

MAINE.—(79) 1; (80) 6; (81) 10; (82) 17; (83) 23; (84) 30; (85) 35; (86) 41; (87) 47; (88) 51; (89) 56; (90) 60; (91) 64; (92) 69; (93) 74; (94) 80; (95) 85; (96) 90; (97) 94; (98) 99; (99) 105; (100) 109.

MARYLAND.—(67) 1; (68) 6; (69) 9; (70) 14; (71) 17; (72) 20; (73) 25; (74) 28; (75) 32; (76) 35; (77) 39; (78) 44; (80) 45; (79) 47; (81) 48; (82) 51; (83) 55; (84) 57; (85) 60; (86) 63; (87) 67; (88) 71; (89) 73; (90) 78; (91) 80; (92) 84; (93) 86; (94) 89; (95) 93; (96) 94; (97) 99; (98) 103; (99) 105; (100) 108; (101) 109; (102) 111.

MASSACHUSETTS.—(145) 1; (146) 4; (147) 9; (148) 12; (149) 14; (150) 15; (151) 21; (152) 23; (153) 25; (154) 26; (155) 31; (156) 32; (157) 34; (158) 35; (159) 38; (160) 39; (161) 42; (162) 44; (163) 47; (164) 49; (165) 52; (166) 55; (167) 57; (168) 60; (169) 61; (170) 64; (171) 68; (172) 70; (173) 73; (174) 75; (175) 78; (176) 79; (177) 83; (178) 86; (179) 88; (180) 91; (181) 92; (182) 94; (183) 97; (184) 100; (185) 102; (186) 104; (187) 105; (188) 108; (189) 109; (190) 112; (191) 114.

MICHIGAN.—(60, 61) 1; (62) 4; (63) 6; (64, 65) 8; (66, 67) 11; (68, 69, 75) 13; (70) 14; (71, 76) 15; (72, 73, 74) 16; (77, 78) 18; (79) 19; (80) 20; (81, 82, 83) 21; (84) 22; (85, 86, 87) 24; (88) 26; (89) 28; (90, 91) 30; (92) 31; (93) 32; (94) 34; (95, 96) 35; (97) 37; (98) 39; (99) 41; (100) 43; (101) 45; (102) 47; (103) 50; (104) 53; (105) 55; (106) 58; (107) 61; (108) 62; (109) 63; (110) 64; (111) 66; (112, 113) 67; (114) 68; (115) 69; (116, 117) 72; (118) 74; (119) 75; (120) 77; (121, 122) 80; (123) 81; (124) 83; (125) 84; (126) 86; (127) 89; (128) 92; (129) 95; (130) 97; (131) 100; (132) 102; (133) 103; (134) 104; (135) 106; (137) 109; (138) 110; (139) 111; (136, 140) 112; (141, 142) 113; (143) 114.

MINNESOTA.—(36) 1; (37) 5; (38) 8; (39, 40) 12; (41) 16; (42) 18; (43) 19; (44) 20; (45) 22; (46) 24; (47) 28; (48) 31; (49) 32; (50) 36; (51, 52) 38; (53) 39; (54) 40; (55) 43; (56) 45; (57) 47; (58) 49; (59) 50; (60) 51; (61) 52; (62) 54; (63) 56; (64) 58; (65) 60; (66) 61; (67, 68) 64; (69) 65; (70) 68; (71) 70; (72) 71; (73) 72; (74) 73; (75) 74; (76, 77) 77; (78, 79) 79; (80) 81; (81, 82) 83; (83) 85; (84) 87; (85) 89; (86) 91; (87) 94; (88) 97; (89) 99; (90) 101; (91) 103; (92) 104; (93) 106; (94) 110; (95) 111; (96) 113; (97) 114.

MISSISSIPPI.—(65) 7; (66) 14; (67) 19; (68) 24; (69) 30; (70) 35; (71) 42; (72) 48; (73) 55; (74) 60; (75) 65; (76) 71; (77) 78; (78) 84; (79) 89; (80) 92; (81) 95; (82) 100; (83) 102; (84) 105; (85) 107; (86) 109; (87) 112.

MISSOURI.—(92) 1; (93) 3; (94) 4; (95) 6; (96) 9; (97) 10; (98) 14; (99) 17; (100) 18; (101) 20; (102) 22; (103) 23; (104, 105) 24; (106) 27; (107) 28; (108, 109) 32; (110, 111) 33; (112) 34; (113, 114) 35; (115) 37; (116, 117) 38; (118) 40; (119, 120) 41; (121) 42; (122) 43; (123) 45; (124, 125) 46; (126) 47; (127) 48; (128) 49; (129) 50; (130) 51; (131) 52; (132) 53; (133) 54; (134)

- 56; (135, 136) 78; (137) 59; (138) 60; (139) 61; (140) 62; (141, 142) 64; (143) 65; (144) 66; (145) 68; (146) 69; (147, 148) 71; (149, 150) 73; (151) 74; (152) 75; (153, 154) 77; (155) 78; (156) 79; (157) 80; (158, 159) 81; (160) 83; (161) 84; (162, 163) 85; (164) 86; (165) 88; (166) 89; (167, 168) 90; (169) 92; (170, 171) 94; (172) 95; (173) 96; (174, 175) 97; (176) 98; (177) 99; (178, 179) 101; (180, 181, 182) 103; (183, 184, 185, 186) 105; (187) 106; (188, 189) 107; (190, 191) 109; (192) 111; (193, 194) 112; (195, 196) 113; (197) 114.
- MONTANA.**—(9) 18; (10) 24; (11) 28; (12) 33; (13) 40; (14) 43; (15) 48; (16) 50; (17) 52; (18) 56; (19) 61; (20) 63; (21) 69; (22) 74; (23) 75; (24) 81; (25) 87; (26) 91; (27) 94; (28) 98; (29) 101; (30) 104; (31) 107; (32) 108; (33) 114.
- NEBRASKA.**—(22) 3; (23, 24) 8; (25) 13; (26) 18; (27) 20; (28, 29) 26; (30) 27; (31) 28; (32, 33) 29; (34) 33; (35) 37; (36) 38; (37) 40; (38) 41; (39, 40) 42; (41) 43; (42, 43) 47; (44) 48; (45, 46) 50; (47) 53; (47, 48) 58; (49) 59; (50) 61; (51, 52) 66; (53) 68; (54) 69; (55) 70; (56) 71; (57) 73; (58) 76; (59) 80; (60) 83; (61) 87; (62) 89; (63) 93; (64) 97; (65) 101; (66) 103; (67) 108; (68) 110; (69) 111; (70) 113.
- NEVADA.**—(19) 3; (20) 19; (21) 37; (22) 58; (23) 62; (24) 77; (25) 83; (26) 99; (27) 103; (28) 113.
- NEW HAMPSHIRE.**—(64) 10; (62) 13; (65) 23; (66) 49; (67) 68; (68) 73; (69) 76; (70) 85; (71) 93; (72) 101; (73) 111.
- NEW JERSEY.**—(43 N. J. Eq.) 3; (44 N. J. Eq.) 6; (50 N. J. L.) 7; (51 N. J. L.; 45 N. J. Eq.) 14; (46 N. J. Eq.; 52 N. J. L.) 19; (47 N. J. Eq.) 24; (53 N. J. L.) 26; (48 N. J. Eq.) 27; (49 N. J. Eq.) 31; (54 N. J. L.) 33; (50 N. J. Eq.) 35; (55 N. J. L.) 39; (51 N. J. Eq.) 40; (56 N. J. L.) 44; (52 N. J. Eq.) 46; (57 N. J. L.; 53 N. J. Eq.) 51; (54 N. J. Eq.; 58 N. J. L.) 55; (59 N. J. L.) 59; (55 N. J. Eq.) 62; (60 N. J. L.) 64; (56 N. J. Eq.) 67; (61 N. J. L.) 68; (62 N. J. L.) 72; (57 N. J. Eq.) 73; (63 N. J. L.) 76; (58 N. J. Eq.) 78; (64 N. J. L.) 81; (59, 60 N. J. Eq.) 83; (65 N. J. L.) 86; (61 N. J. Eq.; 66 N. J. L.) 88; (62 N. J. Eq.) 90; (67 N. J. L.) 91; (63 N. J. Eq.) 92; (68 N. J. L.) 96; (64 N. J. Eq.) 97; (69 N. J. L.) 101; (65 N. J. Eq.; 70 N. J. L.) 103; (66 N. J. Eq.) 106; (71 N. J. L.) 108; (67 N. J. Eq.) 110; (68 N. J. Eq.; 72 N. J. L.) 111.
- NEW YORK.**—(107) 1; (108) 2; (109) 4; (110) 6; (111) 7; (112) 8; (113) 10; (114) 11; (115) 12; (116, 117) 15; (118, 119) 16; (120) 17; (121) 18; (122) 19; (123) 20; (124, 125) 21; (126) 22; (127) 24; (128, 129) 26; (130, 131) 27; (132, 133) 28; (134) 30; (135) 31; (136) 32; (137) 33; (138) 34; (139) 36; (140) 37; (141) 38; (142) 40; (143) 42; (144) 43; (145) 45; (146) 48; (147) 49; (148) 51; (149) 52; (150) 55; (151) 56; (152) 57; (153) 60; (154) 61; (155) 63; (156) 66; (157) 68; (158, 159) 70; (160) 73; (161, 162) 76; (163, 164) 79; (165) 80; (166, 167) 82; (168) 85; (169, 170) 88; (171) 89; (172) 92; (173) 93; (174) 95; (175) 96; (176) 98; (177) 101; (178) 102; (179) 103; (180) 106; (181) 108; (182) 108; (183) 111; (184) 112; (185) 113.
- NORTH CAROLINA.**—(97, 98) 2; (99, 100) 6; (101) 9; (102) 11; (103) 14; (104) 17; (105) 18; (106) 19; (107) 22; (108) 23; (109) 26; (110) 28; (111) 32; (112) 34; (113) 37; (114) 41; (115) 44; (116) 47; (117) 53; (118) 54; (119) 56; (120) 58; (121) 61;

(122) 65; (123) 68; (124) 70; (125) 74; (126) 78; (127) 80;
 (128) 83; (129) 85; (130) 89; (131) 92; (132) 95; (133) 98;
 (134) 101; (135) 102; (136) 103; (137, 138) 107; (139, 140) 111.

NORTH DAKOTA.—(1) 26; (2) 33; (3) 44; (4) 50; (5) 57; (6, 7) 66; (8) 73; (9) 81; (10) 88; (11) 95; (12) 102; (13) 112.

OHIO.—(45 Ohio St.) 4; (46 Ohio St.) 15; (47 Ohio St.) 21; (48 Ohio St.) 29; (49 Ohio St.) 34; (50 Ohio St.) 40; (51 Ohio St.) 46; (52 Ohio St.) 49; (53 Ohio St.) 53; (54 Ohio St.) 56; (55, 56 Ohio St.) 60; (57 Ohio St.) 63; (58 Ohio St.) 65; (59 Ohio St.) 69; (60 Ohio St.) 71; (61 Ohio St.) 76; (62 Ohio St.) 78; (63 Ohio St.) 81; (64 Ohio St.) 83; (65 Ohio St.) 87; (66 Ohio St.) 90; (67 Ohio St.) 93; (68 Ohio St.) 96; (69 Ohio St.) 100; (70 Ohio St.) 101; (71 Ohio St.) 104; (72 Ohio St.) 106; (73 Ohio St.) 112; (74 Ohio St.) 113.

OREGON.—(15) 3; (16) 8; (17) 11; (18) 17; (19) 20; (20) 23; (21) 28; (22) 29; (23) 37; (24) 41; (25) 42; (26) 46; (27) 50; (28) 52; (29) 54; (30) 60; (31) 65; (32) 67; (33) 72; (34) 75; (35) 76; (36) 78; (37) 82; (38) 84; (39) 87; (40) 91; (41) 93; (42) 95; (43) 99; (44) 102; (45) 106; (46, 47) 114.

PENNSYLVANIA.—(115, 116, 117 Pa. St.) 2; (118, 119 Pa. St.) 4; (120, 121 Pa. St.) 6; (122 Pa. St.) 9; (123, 124 Pa. St.) 10; (125 Pa. St.) 11; (126 Pa. St.) 12; (127 Pa. St.) 14; (128, 129 Pa. St.) 15; (130, 131 Pa. St.) 17; (132, 133, 134 Pa. St.) 19; (135, 136 Pa. St.) 20; (137, 138 Pa. St.) 21; (139, 140, 141 Pa. St.) 23; (142, 143 Pa. St.) 24; (144, 145 Pa. St.) 27; (146 Pa. St.) 28; (147, 150 Pa. St.) 30; (151 Pa. St.) 31; (148 Pa. St.) 33; (149, 152, 153 Pa. St.) 34; (154, 155 Pa. St.) 35; (156 Pa. St.) 36; (157 Pa. St.) 37; (158 Pa. St.) 38; (159 Pa. St.) 39; (160 Pa. St.) 40; (161 Pa. St.) 41; (162 Pa. St.) 42; (163 Pa. St.) 43; (164, 165 Pa. St.) 44; (166 Pa. St.) 45; (167 Pa. St.) 46; (168, 169 Pa. St.) 47; (170, 171 Pa. St.) 50; (172, 173 Pa. St.) 51; (174, 175 Pa. St.) 52; (176 Pa. St.) 53; (177 Pa. St.) 55; (178 Pa. St.) 56; (179, 180 Pa. St.) 57; (181 Pa. St.) 59; (182 Pa. St.) 61; (183, 184 Pa. St.) 63; (185 Pa. St.) 64; (186 Pa. St.) 65; (187 Pa. St.) 67; (188 Pa. St.) 68; (189 Pa. St.) 69; (190 Pa. St.) 70; (191 Pa. St.) 71; (192 Pa. St.) 73; (193 Pa. St.) 74; (194 Pa. St.) 75; (195 Pa. St.) 78; (196 Pa. St.) 79; (197 Pa. St.) 80; (198 Pa. St.) 82; (199 Pa. St.) 85; (195, 200 Pa. St.) 86; (201 Pa. St.) 88; (202 Pa. St.) 90; (203, 204 Pa. St.) 93; (205 Pa. St.) 97; (206 Pa. St.) 98; (207 Pa. St.) 99; (208 Pa. St.) 101; (209 Pa. St.) 103; (210 Pa. St.) 105; (211 Pa. St.) 107; (212 Pa. St.) 108; (213 Pa. St.) 110; (214 Pa. St.) 112; (215 Pa. St.) 114.

RHODE ISLAND.—(15) 2; (16) 27; (17) 33; (18) 49; (19) 61; (20) 78; (21) 79; (22) 84; (23) 91; (24) 96; (25) 105; (26) 106; (27) 114.

SOUTH CAROLINA.—(26) 4; (27, 28, 29) 13; (30) 14; (31, 32) 17; (33) 26; (34) 27; (35) 28; (36) 31; (37) 34; (38) 37; (39) 39; (40) 42; (41) 44; (42) 46; (43) 49; (44) 51; (45) 55; (46) 57; (47) 58; (48) 59; (49) 61; (50) 62; (51) 64; (52) 68; (53) 69; (54) 71; (55) 74; (56, 57) 76; (58) 79; (59) 82; (60, 61) 85; (62) 89; (63) 90; (64) 92; (65) 95; (66) 97; (67) 100; (68) 102; (69) 104; (70) 106; (71) 110; (73, 74) 114.

SOUTH DAKOTA.—(1) 36; (2) 39; (3) 44; (4) 46; (5) 49; (6) 55; (7) 58; (8) 59; (9) 62; (10) 66; (11) 74; (12) 76; (13) 79; (14) 86; (15) 91; (16) 102; (17) 106; (18) 112.

TENNESSEE.—(85) 4; (86) 6; (87) 10; (88) 17; (89) 24; (90) 25; (91) 30; (92) 36; (93) 42; (94) 45; (95) 49; (96) 54; (97) 56; (98) 60; (99) 63; (100) 66; (101) 70; (102) 73; (103) 76; (104) 78; (105) 80; (106) 82; (107) 89; (108) 91; (109) 97; (110) 100; (111) 102; (112) 106; (113) 106; (114) 108; (115) 112.

TEXAS.—(68) 2; (69; 24 Tex. App.) 5; (70; 25, 26 Tex. App.) 8; (71) 10; (27 Tex. App.) 11; (72) 13; (73, 74) 15; (75) 16; (76) 18; (77; 28 Tex. App.) 19; (78) 22; (79) 23; (29 Tex. App.) 25; (80, 81) 26; (82) 27; (30 Tex. App.) 28; (83) 29; (84) 31; (85) 34; (31 Tex. Cr. Rep.; 86) 37; (86; 32 Tex. Cr. Rep.) 40; (87; 33 Tex. Cr. Rep.) 47; (34 Tex. Cr. Rep.; 88) 53; (89, 90) 59; (35 Tex. Cr. Rep.) 60; (36 Tex. Cr. Rep.) 61; (91; 37 Tex. Cr. Rep.) 66; (38 Tex. Cr. Rep.) 70; (92) 71; (39 Tex. Cr. Rep.) 73; (40 Tex. Cr. Rep.) 76; (93) 77; (94) 86; (95) 93; (41, 42, 43 Tex. Cr. Rep.) 96; (96) 97; (44 Tex. Cr. Rep.) 100; (97) 104; (98) 107; (45, 46 Tex. Cr. Rep.) 108.

UTAH.—(13) 57; (14) 60; (15) 62; (16) 67; (17) 70; (18) 72; (19) 75; (20) 77; (21) 81; (22) 83; (23) 90; (24) 91; (25) 95; (26) 99; (27) 101; (28) 107; (29) 110.

VERMONT.—(60) 6; (61) 15; (62) 22; (63) 25; (64) 33; (65) 36; (66) 44; (67) 48; (68) 54; (69) 60; (70) 67; (71) 76; (72) 82; (73) 87; (74) 93; (75) 98; (76) 104; (77) 107; (78) 112.

VIRGINIA.—(82) 3; (83) 5; (84) 10; (85) 17; (86) 19; (87) 24; (88) 29; (89) 37; (90) 44; (91) 50; (92) 53; (93) 57; (94, 95) 64; (96) 70; (97) 75; (98) 81; (99) 86; (100) 93; (101) 99; (102) 102; (103) 106; (104) 113.

WASHINGTON.—(1) 22; (2) 26; (3) 28; (4) 31; (5) 34; (6) 36; (7) 38; (8) 40; (9) 43; (10) 45; (11) 48; (12) 50; (13) 52; (14) 53; (15) 55; (16) 58; (17) 61; (18) 63; (19) 67; (20) 72; (21) 75; (22) 79; (23) 83; (24) 85; (25) 87; (26) 90; (27) 91; (28, 29) 92; (30) 94; (31) 96; (32) 98; (33) 99; (34) 101; (35) 102; (36) 104; (37, 38) 107; (39) 109; (40, 41) 111; (42) 114.

WEST VIRGINIA.—(29) 6; (30) 8; (31) 13; (32, 33) 25; (34) 26; (35) 29; (36) 32; (37) 38; (38, 39) 45; (40) 52; (41) 56; (42) 57; (43) 64; (44) 67; (45) 72; (46) 76; (47) 81; (48) 86; (49) 87; (50) 88; (51) 90; (52) 94; (53) 97; (54) 102; (55) 104; (56) 107; (57) 110; (58) 112.

WISCONSIN.—(69) 2; (70, 71) 5; (72) 7; (73) 9; (74, 75) 17; (76, 77) 20; (78) 23; (79) 24; (80) 27; (81) 29; (82) 33; (83) 35; (84) 36; (85, 86) 39; (87) 41; (88) 43; (89) 46; (90) 48; (91) 51; (92) 53; (93) 57; (94) 59; (95) 60; (96, 97) 65; (98, 99) 67; (100) 69; (101) 70; (102) 72; (103) 74; (104, 105) 76; (106) 80; (107, 108) 81; (109) 83; (110) 84; (111) 87; (112) 88; (113) 90; (114) 91; (115) 95; (116) 96; (117) 98; (118) 99; (119) 100; (120) 102; (121) 105; (122) 106; (123) 107; (124) 109; (125, 126) 110.

WYOMING.—(3) 31; (4) 62; (5) 63; (6) 71; (7) 75; (8) 80; (9) 87; (10) 98; (11) 100; (12) 109; (13) 110.

AMERICAN STATE REPORTS.

VOLUME 114.

CASES REPORTED.

NAME.	SUBJECT.	REPORT.	PAGE.
Abbott v. Oregon R. R. Co.....	<i>Railroads</i>	46 Or. 549.....	885
Abererombie v. Simmons.....	<i>Deeds</i>	71 Kan. 538...	509
Ackerman v. Cincinnati etc. R. R. Co.	<i>Railroads</i>	143 Mich. 58....	640
Allen v. Riley.....	<i>Patent Right</i> ..	71 Kan. 378...	481
Anderson v. Kirby.....	<i>Brch. of Prom.</i>	125 Ga. 62.....	185
Atchison etc. Ry. Co. v. Armstrong.	<i>Railroads</i>	71 Kan. 366...	474
Atchison etc. Ry. Co. v. Holloway.	<i>Carriers</i>	71 Kan. 1.....	462
Atlantic etc. R. R. Co. v. McDilda.	<i>Death</i>	125 Ga. 468....	240
Bank v. Doherty.....	<i>Usury</i>	42 Wash. 317..	123
Banning v. Roy.....	<i>Execution</i>	47 Or. 119.....	908
Barnes v. Banks.....	<i>Parent & Child</i> .	223 Ill. 352....	331
Barnett v. Thomas.....	<i>Partition</i>	36 Ind. App. 441.	385
Barre v. City of Cape Girardeau.	<i>Mun. Corps.</i> ...	197 Mo. 382....	763
Beatty v. Wardell.....	<i>Homestead</i>	130 Iowa, 651..	457
Beggs v. James Hanley Brewing Co.	<i>Sales</i>	27 R. I. 385....	44
Benson v. Ross.....	<i>Joint Tort</i>	143 Mich. 452...	675
Blake v. Yount.....	<i>Usury</i>	42 Wash. 101...	106
Bonness v. Felsing.....	<i>Vendor & Ven.</i>	97 Minn. 227...	707
Boogren v. St. Paul City Ry. Co..	<i>Atty. & Client.</i>	96 Minn. 51....	691
Brooks v. Sawyer.....	<i>Infants</i>	191 Mass. 151...	594
Burke v. Davis.....	<i>Mast. & Serv.</i> ..	191 Mass. 20....	591
Burns v. Ross.....	<i>Judgments</i>	215 Pa. 293....	963
Burton v. Anthony.....	<i>Infancy</i>	46 Or. 47.....	847
Campbell v. Harris Lithia Springs Co.	<i>Dower</i>	74 S. C. 282....	1001
Capelli v. Wood.....	<i>Garnishment</i> ..	27 R. I. 411....	54
Carleton, In re.....	<i>Attorneys</i>	33 Mont. 431...	826
Carnahan v. Carnahan.....	<i>Judgments</i>	143 Mich. 390...	660
Chicago etc. Ry. Co. v. Greer.....	<i>Local Option</i> ..	223 Ill. 104....	313
Chicago Union Traction Co. v. Brethauer	<i>Street Railways</i> .	223 Ill. 521....	353

NAME.	SUBJECT.	REPORT.	PAGE.
Clark v. Ball.....	<i>Innkeepers</i>	34 Colo. 223....	154
Clemmons v. Gillette.....	<i>Public Lands</i> ..	33 Mont. 321....	814
Coe, Estate of.....	<i>Death</i>	130 Iowa, 307....	416
Cornia Glove Co. v. Merchants'			
Dispatch etc. Co.....	<i>Carriers</i>	130 Iowa, 327....	419
Cox v. Philadelphia etc. R. R. Co.	<i>Em. Domain</i> ...	215 Pa. 506....	979
Cranston Print Works v. Whalen..	<i>Notice to Quit</i> ..	27 R. I. 445....	56
Creyts v. Creyts.....	<i>Divorce</i>	143 Mich. 375....	656
Crochet v. McCamant.....	<i>Community</i> ...	116 La. 1.....	538
Crossman v. Keister.....	<i>Trusts</i>	223 Ill. 69.....	305
Croze v. St. Mary's Canal etc. Co..	<i>Mortgage</i>	143 Mich. 514....	677
Dallavo v. Snider.....	<i>Slander</i>	143 Mich. 542....	684
Dalliba v. Winschell.....	<i>Receivers</i>	11 Idaho, 364..	267
Davenport v. Davenport.....	<i>Notary Public</i> ..	116 La. 1009....	575
Delahunt v. United Tel. & Tel. Co.	<i>Telephone Cos.</i> ..	215 Pa. 241....	958
Del Ponte v. Societe Italiana.....	<i>Benefit Society</i> ..	27 R. I. 1.....	17
Denver v. Spencer.....	<i>Negligence</i>	34 Colo. 270....	158
Deaver Public Warehouse Co. v.			
Holloway	<i>Libel</i>	34 Colo. 432....	171
Edwards v. Manufacturers' etc. Co.	<i>Elevators</i>	27 R. I. 248....	37
Elsar v. Village of Gross Point....	<i>Waters</i>	223 Ill. 230....	326
Farmers' etc. Nat. Bank v. West-			
ern etc. Co.....	<i>Land & Ten</i>	215 Pa. 115....	949
First Congregational Church v.			
Terry	<i>Life Tenant</i> ...	130 Iowa, 513..	443
Ford v. People's Bank.....	<i>Banking</i>	74 S. C. 180....	986
Foster Lumber Co. v. Harlan			
County Bank.....	<i>Mortgage</i>	71 Kan. 158....	470
Fred v. Bramen.....	<i>Homestead</i>	97 Minn. 484..	740
Fuller v. Hager.....	<i>Judicial Sales</i> ..	47 Or. 242....	916
George G. Fox Co. v. Glynn.....	<i>Trade Names</i> ..	191 Mass. 344....	619
Georgia Railway etc. Co. v. Baker.	<i>Street Railways</i> ..	125 Ga. 562....	246
Goodell v. Auditor General.....	<i>Judgments</i>	143 Mich. 240....	646
Gorgas v. Philadelphia etc. R. R.			
Co.	<i>Em. Domain</i> ...	215 Pa. 501....	974
Grand Rapids Nat. Bank v. Ford.	<i>Deeds</i>	143 Mich. 402....	668
Grimberg v. Columbia Packers'			
Assn.	<i>Vessels</i>	47 Or. 257....	927
Haley v. Missouri Pac. Ry. Co....	<i>Railroads</i>	197 Mo. 15....	743
Harrington v. Butte etc. Mining			
Co.	<i>Bills & Notes</i> ..	33 Mont. 330....	821
Hartley v. Hartley.....	<i>Con. of Laws</i> ..	71 Kan. 691....	519

NAME.	SUBJECT.	REPORT.	PAGE.
Haycock v. Johnston.....	<i>Land. & Ten.</i> ...	97 Minn. 289...	715
Heckman v. Heckman.....	<i>Hus. & Wife.</i> ...	215 Pa. 203....	953
Henderson v. Louisville etc. R. Co.	<i>Bill of Lading.</i>	116 La. 1047....	582
Hildebrand v. United Artisans....	<i>Corporations</i> ..	46 Or. 124.....	852
Hillman v. Hillman.....	<i>Divorce</i>	42 Wash. 595...	135
Howe v. Coates.....	<i>Vendor & Ven.</i>	97 Minn. 385...	723
Howes v. Barmon.....	<i>Stat. of Frauds.</i>	11 Idaho, 64...	255
Huffman v. Huffman.....	<i>Divorce</i>	47 Or. 610.....	943
Huffman v. Smyth.....	<i>Public Lands.</i>	47 Or. 573.....	938
Inland Lumber etc. Co. v. Thompson	<i>Taxation</i>	11 Idaho, 508...	274
Jacobs v. Jacobs.....	<i>Parent & Child.</i>	130 Iowa, 10....	402
Jenks v. Hart Cedar & Lumber Co.	<i>Mortgages</i>	143 Mich. 449...	673
Johnson v. Agurs.....	<i>Homestead</i>	116 La. 634.....	562
Jones v. North Pacific Fish & Oil Co.	<i>Chattel Mtg.</i> ...	42 Wash. 332..	131
Joplin Brewing Co. v. Payne.....	<i>Adv. Possession.</i>	197 Mo. 422.....	770
Kansas City etc. Ry. Co. v. Davis.	<i>Em. Domain.</i> ...	197 Mo. 669.....	790
Kaston v. Paxton.....	<i>Mortgage</i>	46 Or. 308.....	871
Kaston v. Storey.....	<i>Judgments</i>	47 Or. 150.....	912
Kinard v. First Nat. Bank.....	<i>Payment</i>	125 Ga. 228.....	201
Kistner v. Peters.....	<i>Bills & Notes.</i>	223 Ill. 607.....	362
Krapp v. Metropolitan Life Ins. Co.	<i>Insurance</i>	143 Mich. 369...	651
Lane v. Lane.....	<i>Wills</i>	125 Ga. 386.....	207
Leonard v. State Mutual Life Assur. Co.	<i>Insurance</i>	27 R. I. 121....	30
Levin v. Goodwin.....	<i>Nuisance</i>	191 Mass. 341...	616
Lipham v. State.....	<i>Incest</i>	125 Ga. 52.....	181
Livesley v. Litchfield.....	<i>Elections</i>	47 Or. 248.....	920
Lloyd v. Matthews.....	<i>Corporations</i> ..	223 Ill. 477.....	346
Loan and Savings Bank v. Farmers' etc. Bank.....	<i>Banking</i>	74 S. C. 210....	991
McCaffery v. Burkhardt.....	<i>Payment</i>	97 Minn. 1.....	688
McCrary v. Biggers.....	<i>Husb. & Wife.</i> ..	46 Or. 465.....	882
McElveen v. Goings.....	<i>Exemption</i>	116 La. 978.....	574
McGowan v. Probate Court.....	<i>Wills</i>	27 R. I. 394....	52
McLeod v. New York etc. R. R. Co.	<i>Railroads</i>	191 Mass. 389...	628
Manchester Assur. Co. v. Oregon R. R. Co.....	<i>Evidence</i>	46 Or. 162.....	863
Messinger v. Pennsylvania R. R. Co.	<i>Railroads</i>	215 Pa. 497....	970
Moore v. Skyles.....	<i>Agency</i>	33 Mont. 135...	801

NAME.	SUBJECT.	REPORT.	PAGE.
Moore v. Woonsocket St. Ry. Co.	<i>Street Railways.</i>	27 R. I. 450...	59
Moran v. Moran.....	<i>Wills</i>	143 Mich. 322...	648
Mulderig v. Wilkes-Barre Times.	<i>Libel</i>	215 Pa. 470....	967
Murphy v. Metropolitan Nat. Bank.	<i>Banking</i>	191 Mass. 354...	595
New Orleans v. Smyth.....	<i>Liquors</i>	116 La. 685....	566
Nolin v. Pearson.....	<i>Husb. & Wife.</i>	191 Mass. 283...	605
O'Donnell v. Kansas City etc. R. R. Co.	<i>Carriers</i>	197 Mo. 110....	753
Parker, Ex parte.....	<i>Contempt</i>	74 S. C. 466....	1011
Parks v. Fogelman.....	<i>Agency</i>	97 Minn. 157...	703
Patterson v. Gulf Bag Co.....	<i>Libel</i>	116 La. 963....	570
People v. Horan.....	<i>Contempt</i>	34 Colo. 336....	163
Pittsburgh etc. R. R. Co. v. Cox.	<i>Garnishment</i> ..	36 Ind. App. 291.	377
Platt v. Brannan.....	<i>Wills</i>	34 Colo. 125....	147
Pogue v. Simon.....	<i>Judgments</i>	47 Or. 6.....	903
Reynolds, Ex parte.....	<i>Parent & Child.</i>	73 S. C. 296...	86
Roberts v. Western Union Tel. Co.	<i>Telegraph Cos.</i>	73 S. C. 520...	100
Saxe v. Walworth Mfg. Co.....	<i>Mast. & Serv.</i>	191 Mass. 338...	613
Schneider v. Local Union No. 60.	<i>Labor Unions.</i>	116 La. 270....	549
Schultz v. Grimwood.....	<i>Replevin</i>	27 R. I. 137....	33
Seaboard Air Line Ry. v. Bradley.	<i>Carriers</i>	125 Ga. 193....	196
Seeley v. Seeley-Howe-Le Van Co.	<i>Receivers</i>	130 Iowa, 626...	452
Shaver v. Home Tel. Co.....	<i>Mast. & Serv.</i>	36 Ind. App. 233.	373
Shute v. Bills.....	<i>Land. & Ten.</i>	191 Mass. 433...	631
Singer v. Merchants' Dispatch etc. Co.	<i>Carriers</i>	191 Mass. 449...	635
Skeffington v. Eylward.....	<i>Malicious Pros.</i>	97 Minn. 244...	711
Smith v. Bayer.....	<i>Bills & Notes.</i>	46 Or. 143....	858
Snyder v. Miller.....	<i>Mortgage</i>	71 Kan. 410....	489
Southern Ry. Co. v. State.....	<i>Railways</i>	125 Ga. 287....	203
Southworth v. Perring.....	<i>Party-wall</i>	71 Kan. 755....	527
Spencer v. Spencer.....	<i>Divorce</i>	97 Minn. 56....	695
Sperier v. Ott.....	<i>Parent & Child.</i>	116 La. 1087....	587
State v. Calloway.....	<i>Saloons</i>	11 Idaho, 719.	285
State v. Cudahy Packing Co.....	<i>Monopolies</i> ...	33 Mont. 179...	804
State v. Gillis.....	<i>Former Jeop.</i>	73 S. C. 318....	95
State v. Higby Co.....	<i>Corporations</i> ..	130 Iowa, 69....	409
State v. Kansas Natural Gas etc. Co.	<i>Highway</i>	71 Kan. 508....	507
State v. Lauth.....	<i>Insanity</i>	46 Or. 342....	873
State v. Matheson.....	<i>Evidence</i>	130 Iowa, 440...	427
State v. Miller.....	<i>Homicide</i>	73 S. C. 277...	82

NAME	SUBJECT.	REPORT.	PAGE.
State Savings Bank v. Shinn.....	<i>Execution</i>	130 Iowa, 365...	424
State v. Smith.....	<i>Licenses</i>	42 Wash. 237...	114
Stephenson v. Corder.....	<i>Negligence</i>	71 Kan. 475....	500
Thresher, In re.....	<i>Attorneys</i>	33 Mont. 441...	834
Tinsley v. Lombard.....	<i>Limitations</i> ...	46 Or. 9.....	844
Topper v. Perry.....	<i>Marriage</i>	197 Mo. 531....	777
Ure v. Ure.....	<i>Judgments</i>	223 Ill. 454....	336
Verrone v. Rhode Island etc. Ry. Co.	<i>Street Railways.</i>	27 R. I. 370....	41
Wabash R. R. Co. v. Erb.....	<i>Railroads</i>	36 Ind. App. 650.	392
Walker v. Bacon.....	<i>Herding Stat.</i> ..	11 Idaho, 127..	262
Ward v. Goodrich.....	<i>Contracts</i>	34 Colo. 369....	167
Wardlaw v. Troy Oil Mill.....	<i>Mech. Lien</i>	74 S. C. 368...	1004
Weander v. Claussen Brewing Assn.	<i>Leases</i>	42 Wash. 226...	110
Weld v. Weld.....	<i>Stat. of Frauds.</i>	71 Kan. 622....	517
Wellington Nat. Bank v. Robbins.	<i>Banking</i>	71 Kan. 748....	523
Western Indiana Coal Co. v. Brown	<i>Mining</i>	36 Ind. App. 44.	367
Western Lumber Co. v. Kalama River Lumber Co.....	<i>Stat. of Frauds.</i>	42 Wash. 620...	137
Western Plumbing Co. v. Fried...	<i>Mech. Lien</i>	33 Mont. 7.....	799
Whelan v. McMahan.....	<i>Judgments</i>	47 Or. 37.....	906
Wilson v. Comer.....	<i>Sale</i>	125 Ga. 500....	245
Woodward v. Santee River etc. Lumber Co.	<i>Partition</i>	73 S. C. 31.....	76
Wright v. Council Bluffs.....	<i>Boundaries</i> ...	130 Iowa, 274...	412
Wrynn v. Downey.....	<i>Brch. of Prom.</i>	27 R. I. 454...	63
Wyman, Petitioner.....	<i>Treaties</i>	191 Mass. 276...	601

AMERICAN STATE REPORTS.

VOLUME 114.

(15)

CASES
IN THE
SUPREME COURT
OF
RHODE ISLAND.

DEL PONTE v. SOCIETA ITALIANA.

[27 R. I. 1, 60 Atl. 237.]

BENEFICIAL ASSOCIATION—Police Power.—The Power of Expulsion in a corporation is included in what may be denominated its police power, which is derived from the law of self-preservation. It must have the power to relieve itself of its discordant elements in order that harmony may prevail. (p. 22.)

BENEFICIAL ASSOCIATION—Expulsion of Member.—A beneficial association has the right to establish by-laws providing for the expulsion of members, "for defaming the members of the directive council or any member whatsoever for reasons connected with the society, causing dissension and disorders in the midst of the association." (p. 22.)

LIBEL—Defamation of Beneficial Association.—An article published by members of a beneficial association, holding the officers thereof up to ridicule for reasons connected with the society, and tending to disorder and dissension within the association, is defamatory. (p. 23.)

Richard E. Lyman, for the petitioners.

Barney & Lee, for the respondents.

¹ DUBOIS, J. The petitioners, members of the respondent society, an incorporated Italian beneficial association in Providence, ² Rhode Island, on the tenth day of September, 1904, inserted for publication in "L'Eco del Rhode Island," an Italian newspaper published in said Providence, an article in Italian, which they have had translated into English, as follows:

"Paid Communication.

"A Little Light.

"Last June the Society G. Marconi reunited in General Assembly, elected to hold a celebration (to celebrate a festi-

Am. St. Rep. Vol. 114—2 (17)

val) for the inauguration and consecration of the Society's flag. For this purpose it appointed two committees, one from the active members, and the other, honorary, to the end that together they should work for the successful outcome of the celebration.

"The committee from the active members, also greatly aided by the honorary committee, did nevertheless reserve to itself the exclusive direction of the celebration, and the duties referred to, and that not because of vain pride, but because it knew and understood that it would have been dishonorable to the Society if by strangers should have been covered (carried out) the chief duties of the committee, and they should have been an integral part of the celebration (according to what is established in the By-laws). Thus organized, the two committees had already made considerable and satisfactory progress (reached a good point) when some attacks, unjust and stupid and some insinuations low and vile, and a thousand other bits of gossip emanated (came to move) from the accustomed (same old majority of) members unconscionable (unreasonable) and ignorant, against the members of committee of directors. These, offended in their own dignity, were obliged to present their resignations.

"The assembly, little caring that in their own midst (or among their own members) they did not any more have (there did not remain) persons capable of such an enterprise (or mission), accepted the resignations and appointed another committee. The new brave (estimable) committee assumed the duty, but nevertheless were soon persuaded of their incapacity and their almost inability (illiteracy) to read and write, were compelled to replace in the hands of the honorary commission (committee) the entire direction of the celebration 'with what propriety on the part of the Marconi' every one thinks (is apparent to every one).

"For this reason we members here subscribed have demanded of Sig. Adam Aiello, president of the committee of the festival of our society, although not a member, however, how in the world he, who is a person old (experienced) in matters and questions of (pertaining to) associations, however in the world he had accepted a duty (undertaking) in our society, a duty that on such an occasion, since performed by a stranger, had brought upon us grave dishonor? To which the Sig. Aiello in public assembly answered that he had believed it necessary for the decorum (dignity, credit) of the

Marconi to accept such a duty seeing that no one of the members making a part of (forming) the new committee was capable of organizing, or directing such a celebration; which thing or fact was not proved toward (in the breast (midst) of) the first commission (committee) now resigned; very true it is that he at the invitation of this (committee) on account of some (a certain) interest (reward) offered (made, given) to him, to accept that is, the position of president, thought it well to refuse because the Sig. V. Del Ponte and the other colleagues (members) of the committee were persons more than capable of performing the duties intrusted to them.

"Now, we, the undersigned, seeing that this celebration on account of a majority unconscionable (unreasonable) led by a certain one more unconscionable (unreasonable) still, and childishly ambitious, brings to the society other than honor (dishonor), we declare that we do not recognize the celebration in question as a celebration of the 'Guglielmo Marconi,' and that to safeguard the decorum (dignity, credit) of the members and of citizens of Fori.

"V. Del Ponte, G. Monte, M. Del. Ponte, F. Calise,

"F. Esposito, A. Zabbo, T. Esposito, G. Esposito."

In consequence of this publication, on the first day of November, 1904, the petitioners were expelled from membership ⁴ in the society, as they claim, illegally and wrongfully. They therefore pray that a writ of mandamus may issue, commanding the respondent to restore them to membership.

To this petition the respondent has filed its answer, and in reply thereto the petitioners have filed their demurrer and replication.

The petitioners claim that, among others, the following questions are raised by the pleadings:

1. Was the publication, by the petitioners, of the article in "L'Eco del Rhode Island" an act for the commission of which the respondent had the right to expel the petitioners under clause 1, article 29, chapter 6 of its by-laws?

2. Was the publication, by the petitioners of the article in "L'Eco del Rhode Island" an act for the commission of which the respondent had the right, at common law, to expel the petitioners?

3. If the act done by the petitioners in publishing the article in "L'Eco del Rhode Island" is within the acts pro-

hibited by the terms of the by-law, clause 1, article 29, chapter 6, is such by-law valid?

Article 29, chapter 6, clause 1, as translated, is of the tenor following:

“CHAP. VI.

“*Expulsion of Members.*

“Article 29. Members will cease to form part of the society: 1. For defaming the members of the Directive Council or any member whatsoever for reasons connected with the Society, causing dissension and disorders in the midst of the association.”

The substantial question raised in this case is, Had the respondent the right to expel the petitioners for publishing the article in question, either at common law or under its by-law?

In the first place, it is necessary to consider the purpose and object of the published article.

The petitioners claim that the whole tenor of the article shows that it was written for the purpose of re-establishing the reputation of the society in the community after that reputation had suffered by reason of the acts and conduct of certain persons, and that nothing therein suggests malice on the part of the authors.

The article is published as a “paid communication.” We take this to mean that it is inserted as an advertisement, although it may appear in the editorial or literary portion of the paper, and possibly, as notice that the paper does not hold itself responsible for the accuracy of the statements therein contained, but for that refers its readers to the persons over whose signatures the article appears. It is entitled, “A Little Light,” and therefore purports to be of an enlightening or explanatory character.

Thereby it appears that the petitioners, well knowing that they were the only members of the society fit and capable to conduct a celebration for the inauguration and consecration of the society’s flag, and having been appointed members of an active committee for that purpose, resigned said office and left the society helpless and powerless to proceed; that when the society feebly attempted to proceed without their aid by appointing a new and consequently incapable committee who, with alacrity, rushed in where the petitioners had declined to tread, the new committee, as might have been an-

ticipated, were obliged to rely almost entirely upon the honorary committee, to the society's loss of dignity; that when the petitioners inquired of Mr. Adam Aiello, chairman of the honorary committee, but not a member of the society, why he with his experience of society matters accepted office in their society, dishonoring them, he answered, in public, that it was necessary to do so to organize and direct the celebration, because none of the members of the new committee were competent.

The petitioners further explain that when they offered him the post of chairman, before they resigned, he declined to accept because of the pre-eminent ability of the members of the active committee to discharge their duties. Foreseeing that the celebration, through fault of the ignorant majority in accepting their resignations, will be unsuccessful, they hasten to declare that they will not recognize it as a celebration of the * Marconi Society, hoping in this way to protect their dignity as members and citizens of Fori.

It is difficult to understand how such an article could tend to re-establish the reputation of the society. It is rather a prophecy that the celebration will be a failure, made by a minority against the majority of the members of the society. Doubtless the wish was father to the thought, and it was hardly likely that the writers of such an article would lend their aid to make the celebration a success.

The members of the society, including the petitioners, until the time of their resignations from the active committee, evidently regarded the proposed celebration, to be held for the inauguration and consecration of its flag, a celebration including ceremonies ecclesiastical and lay, as one eminently appropriate and likely to redound greatly to the credit of the society and to the enhancement of its dignity.

In the article in question it appears that the members of the society are peculiarly sensitive concerning their own dignity, and that of the society. The dignity of dignitaries in olden times was under especial protection, while words spoken in derogation of a common person were, at the most, mere slander; such words spoken in derogation of a peer, a judge, or other great officer of the realm were called "*Scandalum Magnatum*." Dignity, being sensitive, is peculiarly obnoxious to the attacks of ridicule.

The strength of a beneficial association lies in its cohesive and expansive qualities, or its capacity to increase and hold

its membership. Anything that tends to loosen the bond of fellowship that binds the members together is injurious to the welfare of the society. The object of the society is to live and increase. It is therefore interested to preserve itself. Self-preservation has been termed the first law of nature. It is of the most ancient origin; it antedates all constitutions and statutes made by man. It is the law under which we live, move, and have our being; it is a law governing all persons, natural and artificial. High and low, rich and poor, wise and foolish, old and young, are subject to its inexorable sway. Obedience to it is rewarded, while disobedience to it is inevitably ⁷ punished. Out of its observance arises the doctrine of the survival of the fittest. It is an attribute of all corporations, from the state itself down to the least of its creatures. Upon it depends the police power of the state, which, in its broadest acceptation, means the general power of a government to preserve and promote public welfare by prohibiting all things hurtful to the comfort, safety and welfare of society, and by establishing such rules as may be conducive of public benefit: 22 Am. & Eng. Ency. of Law, 2d ed., p. 916, note 2.

The highest offense that can be committed against a state is treason, for it tends to the disruption of the state itself, and therefore is the offense most severely punished. Hence loyalty to the state is one of the first requisites of citizenship. So membership in a corporation or society is based upon the implied, if not express, condition of loyalty. Disloyalty is punishable by the corporation. The power of expulsion in a corporation is included in what may be denominated its police power, which is derived from the law of self-preservation. It must have the power to relieve itself of its discordant elements in order that harmony may prevail: *Commonwealth v. St. Patrick Ben. Soc.*, 2 Binn. 441, 4 Am. Dec. 453; *Otto v. Tailors' P. & B. Union*, 75 Cal. 308, 7 Am. St. Rep. 156, 17 Pac. 217. The corporation, therefore, had the right to establish by-laws providing for the expulsion of members transgressing their reasonable provisions. Is the provision for expelling members, "For defaming the members of the directive council or any member whatsoever for reasons connected with the society, causing dissension and disorders in the midst of the association," a reasonable one? We think that it is; it clearly comes within its police power. It does not

provide for the expulsion of members who merely libel or slander members of the directive council or any member whatsoever, but such defamation must be "for reasons connected with the society"; and not that alone, but it goes further and provides for a result, to wit, "causing dissension and disorders in the midst of the association." Does the article published by the petitioners fall within the acts prohibited by the terms of the by-law, clause 1, article 29, chapter 6? We think it does. In the first place, the article is libelous. ⁸ A libel has been defined to be "that which is written or printed and published, calculated to injure the reputation of another by bringing him into ridicule, hatred or contempt": 15 Mees. & W. 344. In the article the petitioners charge against a majority of their fellow-members that they made unjust and stupid attacks and low and vile insinuations against the petitioners and caused them to resign. They charge the assembly with being incapable of executing such an enterprise, and, not caring for that, with accepting their resignations, which appears to have been the unpardonable sin in the minds of the petitioners. The words, "The new brave committee," are evidently sarcastic, meaning more brave than discreet, because they immediately charge them with illiteracy. But the concluding paragraph contains even more: "Now, we, the undersigned, seeing that this celebration on account of an unreasonable majority"—that is, unreasonable because they accepted the resignations of the petitioners and appointed another committee—"led by a certain one," meaning the president of the society, who, of course, leads the majority, "more unreasonable still and childishly ambitious, brings to the society dishonor," they declare that they, the minority, do not recognize the celebration of the majority, "as a celebration of the 'Guglielmo Marconi,' and that to safeguard the dignity of the members and citizens of Fori."

After reading the article the feelings of the majority of the members of the society toward the petitioners might well be expressed in the words of Job: "No doubt but ye are the people, and wisdom shall die with you."

The article is certainly defamatory, holding the society and its officers up to ridicule, for reasons connected with the society, and manifestly does tend to disorder and dissension in the midst of the association. It is a most disloyal attempt to

discountenance, discourage and to cause to be regarded as counterfeit a genuine celebration undertaken as a solemn, if not sacred, duty by the society.

The dignity of the society is greater than that of any of its parts. While the withdrawal of the petitioners from the active committee may have been an appropriate penalty for ⁹ the offense committed against their dignity, the expulsion of the petitioners from the society is not too severe a punishment for the society to inflict upon them for their infraction of its dignity by the publication of the defamatory article of which they were the authors.

The cases cited by the petitioners do not conflict with the views above stated.

Petition for writ of mandamus denied.

RIGHTS OF CORPORATION OR ASSOCIATION TO EXPEL MEMBERS.

- I. Scope of Note—References to Prior Notes, 24.**
- II. Implied Power of Expulsion.**
 - a. In Moneyed Corporations, 25.
 - b. In Nonstock Corporations, 25.
- III. Delegation of Power to Committee or Directors, 26.**
- IV. Adoption of Rules to Govern Expulsions, 26.**
- V. Notice to Member and Opportunity for Defense, 27.**
- VI. Grounds for Expulsion.**
 - a. In General, 27.
 - b. Acts Hostile to Corporation, 27.
 - c. Defamation of Corporation or Members, 28.
 - d. Injury to Reputation of Corporation, 28.
 - e. Disorderly and Ungentlemanly Conduct, 29.
 - f. Questionable Business Practices—Breach of Contracts, 29.
 - g. Engaging in Liquor Business, 30.

I. Scope of Note—References to Prior Notes.

Various phases of the law relative to the expulsion of members of corporations, associations and societies have heretofore been discussed in this series of reports. Thus in the monographic notes to *Otto v. Journeyman Tailor's P. & B. Union*, 7 Am. St. Rep. 160-170, *Kearnes v. Howley*, 68 Am. St. Rep. 856-871, the jurisdiction of courts over voluntary unincorporated associations is considered at length. In the monographic note to *Robinson v. Templar Lodge*, 59 Am. St. Rep. 198-209, the remedies of members of fraternal and other associations are discussed. And in the more recent note to *Morris St. Baptist Church v. Dart*, 100 Am. St. Rep. 734-750, the jurisdiction of civil courts over church controversies is considered. The discussion in the present note, therefore, will be confined to the power of a corporation or voluntary association to expel a member, omitting, for the most part, any consideration of his remedies in the event of a

wrongful expulsion, or of the jurisdiction of the courts to afford him relief.

II. Implied Power of Expulsion.

a. **In Moneyed Corporations.**—A corporation organized for pecuniary profit appears to have no power, merely as an incident to its incorporation, to expel a member or declare a forfeiture of his stock: *Westcott v. Minnesota Min. Co.*, 23 Mich. 145; *People v. Fire Department*, 31 Mich. 457; *Matter of Long Island R. R. Co.*, 19 Wend. 37, 32 Am. Dec. 429; *People v. New York Cotton Exchange*, 8 Hun, 216; *Budd v. Multnomah St. Ry. Co.*, 15 Or. 413, 3 Am. St. Rep. 169, 15 Pac. 659; *Evans v. Philadelphia Club*, 50 Pac. 107; *Commonwealth v. Union League*, 135 Pa. 301, 20 Am. St. Rep. 870, 19 Atl. 1030, 8 L. R. A. 195; *Cartwright v. Dickinson*, 88 Tenn. 476, 17 Am. St. Rep. 910, 12 S. W. 1030, 7 L. R. A. 706; 1 *Thompson on Corporations*, sec. 853. In the language of *Purdy v. Bankers' Life Assn.*, 91 Mo. App. 101, 74 S. W. 486: "Corporations organized for gain have no power of expulsion or forfeiture, unless granted by their charter or general municipal law; that is to say, the power must be derived from the legislative sovereignty of the state."

b. **In Nonstock Corporations.**—A different rule prevails, however, in respect to nonstock corporations, associations and societies organized for purposes other than pecuniary gain. Such organizations possess inherent power to expel members for good cause and upon due opportunity for hearing and defense. This authority is essential in order to preserve the internal harmony of the corporation or association and to accomplish the purposes for which it has been organized. The supreme court of Rhode Island, in the principal case, refers to the power of expulsion as included in what may be denominated the police power of corporations, which is derived from the law of self-preservation, for they must have the power to relieve themselves of discordant elements in order that harmony may prevail. The authority of a nonstock corporation to expel a member, then, does not exist by virtue of the general law of the land, but rather by virtue of the contract of membership between the corporation and its members: *Otto v. Journeyman Tailors' P. & B. Union*, 75 Cal. 308, 7 Am. St. Rep. 156, 17 Pac. 217; *Grand Grove of Druids v. Garibaldi Grove*, 130 Cal. 116, 80 Am. St. Rep. 80, 62 Pac. 486; *Commonwealth v. St. Patrick's Society*, 2 Binn. 441, 4 Am. Dec. 453; *Smith v. Smith*, 3 Desaus. (S. C.) 557.

Said the supreme court of Pennsylvania: "Every incorporation possesses inherently the power of expulsion in certain cases, because such power is necessary to the good order and government of corporate bodies. There is a tacit condition annexed to the franchise of a member, which, if he breaks, he may be disfranchised. The cases in which this inherent power may be exercised are of three kinds: 1. When an offense is committed which has no immediate relation to a member's corporate duty, but is of so infamous a nature as ren-

ders him unfit for the society of honest men. Such are the offenses of perjury, forgery, etc. But before an expulsion is made for a cause of this kind it is necessary that there should be a previous conviction by a jury, according to the law of the land. 2. When the offense is against his duty as a corporator; and in that case he may be expelled on trial and conviction by the corporation. 3. The third is an offense of a mixed nature, against the member's duty as a corporator, and also indictable by the law of the land': Commonwealth v. St. Patrick's Society, 2 Binn. 441, 4 Am. Dec. 453.

III. Delegation of Power to Committees or Directors.

The power of expulsion may properly be vested in a board of directors or in a committee. It is a proper method of procedure, also, to take the testimony bearing on the charges through the agency of a committee, to be afterward submitted to and considered by the members of the corporation at a full meeting: *Pitcher v. Board of Trade*, 121 Ill. 412, 13 N. E. 187; *Bradenburger v. Jefferson Club*, 88 Mo. App. 148; *State v. St. Louis Medical Society*, 91 Mo. App. 76; *State v. Milwaukee Chamber of Commerce*, 47 Wis. 670, 3 N. W. 760.

IV. Adoption of Rules to Govern Expulsions.

It is competent for associations and corporations not organized for pecuniary gain to adopt rules and regulations for their own government, and the government of their members, and to visit on members violating such rules and regulations the penalty of expulsion or disfranchisement. The rules and regulations so adopted, however, must, to be valid, be reasonable, and not contrary to the policy of the law or natural justice; and expulsions must be made in accordance with such rules and regulations, when they have been adopted. Members cannot be expelled arbitrarily and without proper cause: *Green v. Board of Trade*, 174 Ill. 585, 51 N. E. 599, 49 L. R. A. 365; *Nelson v. Board of Trade*, 58 Ill. App. 399; *Board of Trade v. Riordan*, 94 Ill. App. 298; *Bryam v. Sovereign Camp etc.*, 108 Iowa, 430, 75 Am. St. Rep. 265, 79 N. W. 144; *Stewart v. Father Matthew Soc.*, 41 Mich. 67, 1 N. W. 931; *Farmer v. Board of Trade*, 78 Mo. App. 557; *State v. St. Louis Medical Society*, 91 Mo. App. 76; *People v. Medical Society*, 24 Barb. 570; *People v. Board of Fire Underwriters*, 54 How. Pr. 240; *Stein v. Marks*, 44 Misc. Rep. 140, 89 N. Y. Supp. 921; *Young v. Eames*, 78 App. Div. 229, 79 N. Y. Supp. 1068; *Woodmen of the World v. Gilliland*, 11 Okla. 384, 67 Pac. 485; *Pepin v. Societie St. Jean Baptiste*, 24 R. I. 550, 54 Atl. 47, 60 L. R. A. 626; *United States v. Metropolitan Club*, 11 App. D. C. 180. It is said that unless the conduct of a member is subversive of the fundamental objects of the corporation, he cannot be expelled, except for a violation of some explicit provision of the law of the corporation creating the offense with which he is charged and prescribing expulsion as the penalty: *Grand Grove etc. v. Garibalidi Grove*, 130 Cal. 116, 80 Am. St. Rep. 80, 62 Pac. 486.

V. Notice to Member and Opportunity for Defense.

It is generally a condition precedent to the legal expulsion of a member from a voluntary association that he be given notice of the charges brought against him, and of the time and place of the action to be taken, and also that he be given an opportunity to appear and make his defense at the hearing or trial: *Grand Grove etc. v. Garibaldi Grove*, 130 Cal. 116, 80 Am. St. Rep. 80, 62 Pac. 486; *Seehorn v. Supreme Council*, 95 Mo. App. 233, 68 S. W. 949; *Berkhout v. Supreme Council*, 62 N. J. L. 103, 43 Atl. 1; *Weiss v. Musical Mutual Protective Union*, 189 Pa. 446, 69 Am. St. Rep. 820, 42 Atl. 118; *People v. East Buffalo Livestock Assn.*, 88 App. Div. 619, 84 N. Y. Supp. 795; affirmed in 179 N. Y. 598, 72 N. E. 1148; *Pepin v. Societe St. Jean Baptiste*, 24 R. I. 550, 54 Atl. 47, 60 L. R. A. 626; note to *Robinson v. Templar Lodge*, 59 Am. St. Rep. 202, 205. He may waive his right to a notice of and specification of the charges, however, by appearing at the trial and making a defense: *Durel v. Perseverance Fire Co.*, 47 La. Ann. 1101, 17 South. 591; *People v. Coachman's Union Ben. Assn.*, 4 Misc. Rep. 424, 24 N. Y. Supp. 114.

VI. Grounds for Expulsion.

a. In General.—Where the charter of a nonstock corporation is either silent upon the power of expulsion, or grants it in general terms, there are only three legal causes for the expulsion or disfranchisement of a member, namely: 1. Offenses of an infamous nature indictable at the common law; 2. Offenses against the corporator's duty to the corporation, as a member to it; and 3. Offenses compounded of the two: *State v. Chamber of Commerce*, 20 Wis. 63. To the same effect, see *People v. Medical Society*, 24 Barb. 570; *People v. New York Com. Assn.*, 18 Abb. Pr. 271; *Commonwealth v. Union League*, 135 Pa. 301, 20 Am. St. Rep. 870, 19 Atl. 1030, 8 L. R. A. 195; *Weiss v. Musical Mutual Protective Assn.*, 189 Pa. 446, 69 Am. St. Rep. 820, 42 Atl. 118. "The offenses for which a corporate officer may be removed," to quote from *Commonwealth v. Guardians of the Poor*, 6 Serg. & R. 469, "have been divided into three classes: 1. Such as relate to his corporate or official character, amounting to breaches of the condition tacitly or expressly annexed to his office; 2. Such as have no immediate relation to his official character, but are, in themselves, of so infamous a nature as to render him unfit to enjoy any public office; and 3. Offenses of a mixed nature, being not only against his corporate or official duty, but indictable at common law." Probably associations or nonstock associations have no power to expel members for minor offenses not immediately connected with their duties as corporations: *Commonwealth v. Union League*, 135 Pa. 301, 20 Am. St. Rep. 870, 19 Atl. 1030, 8 L. R. A. 195.

b. Acts Hostile to Corporation.—Acts of disloyalty to an association, or acts calculated to injure its reputation, may constitute good cause for the expulsion of a member, as has already been pointed

out. Merely for a member of one association to unite with another, unless his conduct or purpose in so doing or as thereafter manifested is calculated to injure the first association, is ordinarily not ground for his expulsion from it: *Brandenburger v. Jefferson Club*, 88 Mo. App. 148; *Farrell v. Cook*, 5 N. Y. Supp. 727, affirmed in 11 N. Y. Supp. 326, 58 Hun, 603. And for a member of a society, just prior to an election therein, to circulate literature criticising the officers of the society and proposing an opposite ticket, is not ground for expulsion, if the constitution does not authorize it: *Gleiforst v. Workmen's Sick etc. Fund*, 37 Misc. Rep. 221, 75 N. Y. Supp. 44.

c. Defamation of Corporation or Members.—While probably a member of an association cannot be expelled for vilifying or slandering another member as an individual, he may be expelled, at least if the rules of the association so provide, if he directs contemptuous or slanderous remarks or publications toward the association itself, or toward its members in respect to matters related to the association: See the principal case, ante, p. 17; *Josich v. Austrian Benevolent Soc.*, 119 Cal. 74, 51 Pac. 18; *Fuller v. Plainfield Academic School*, 6 Conn. 532; *People v. Mechanics' Aid Soc.*, 22 Mich. 86; *Mulroy v. Supreme Lodge K. of H.*, 28 Mo. App. 463; *People v. Alpha Lodge*, 13 Misc. Rep. 677, 35 N. Y. Supp. 214, affirmed in 8 App. Div. 591, 40 N. Y. Supp. 1147; *Commonwealth v. St. Patrick's Society*, 2 Binn. 441, 4 Am. Dec. 453.

d. Injury to Reputation of Corporation.—A provision in the constitution of a mutual benefit association which prescribes the penalty of expulsion against members who impugn or stain the honor or fair name of the society by word or act, refers to acts and words, not in debate at regular meetings of the society among its own members, but with or in the presence of persons outside the society: *Radice v. Italian-American etc. Soc.*, 67 N. J. L. 196, 50 Atl. 691. And a by-law of a fire company rendering a member liable for expulsion who is guilty of any act whereby the reputation of the company may be injured has no reference to the ordinary business transactions of the company with its members, but only to acts of moral turpitude or of cowardice or neglect in the performance of active duties by a member: *De Hart v. Good Will Hook & Ladder Co.*, 61 N. J. L. 507, 40 Atl. 570.

Under articles of an association providing for the expulsion of members guilty of conduct calculated to bring the society into disrepute, the receiving of an initiation fee from an applicant for membership, and failing to pay it over to the society or return it to the applicant, who complains thereof to divers persons, may constitute such misconduct on the part of a member guilty of it as will authorize his expulsion: *Burton v. St. George's Soc.*, 28 Mich. 261. It may also be good cause for expulsion that a member, claiming relief from the society, has altered a physician's bill from four to forty dollars, and presented it to the society as the ground for his claim: *Commonwealth v. Philanthropic Soc.*, 5 Binn. 486. To feign sickness and

obtain sick benefits from a society is just cause for expulsion: *Slater v. Supreme Lodge*, 88 Mo. App. 177; *Society for the Visitation of the Sick v. Commonwealth*, 52 Pa. 125, 91 Am. Dec. 139.

e. **Disorderly and Ungentlemanly Conduct.**—It is competent for a society or club to provide in its rules and regulations that a member may be expelled for minor offenses, or for conduct which may be deemed disorderly, ungentlemanly, or hostile to the interests of the society: *State v. Georgia Medical Soc.*, 38 Ga. 608, 95 Am. Dec. 408; *Evans v. Philadelphia Club*, 50 Pa. 107. And under such rules, a member may be expelled by charging a fellow-member, in the clubhouse, without provocation, with acting like a blackguard: *Commonwealth v. Union League*, 135 Pa. 301, 20 Am. St. Rep. 870, 19 Atl. 1030, 8 L. R. A. 195.

f. **Questionable Business Practices—Breach of Contract.**—A board of trade, chamber of commerce, or the like concern may provide in its by-laws for the expulsion of a member for the nonfulfillment of his business contracts; and it is immaterial, so far as concerns the enforcement of such by-laws, that a contract may be invalid under the statute of frauds: *People v. Board of Trade*, 45 Ill. 112; *Board of Trade v. Nelson*, 162 Ill. 431, 53 Am. St. Rep. 312, 44 N. E. 743; *Dickinson v. Chamber of Commerce*, 29 Wis. 45, 9 Am. Rep. 544. Clearly, the fact that the contract is enforceable by an action at law does not withdraw the matter from the jurisdiction of the proper corporate authorities: *People v. New York Produce Exch.*, 149 N. Y. 401, 44 N. E. 84.

Under a by-law which empowers the board of managers of an exchange to suspend or expel a member upon a charge of "willful violation of the charter or by-laws, or of fraudulent breach of contract, or of any proceedings inconsistent with just and equitable principles of trade, or of other misconduct, a mere breach or non-performance of an agreement, unaccompanied by any moral delinquency, is not a cause for suspension or expulsion; but the by-law embraces conduct in respect to a contract, either in its inception or execution, or in the failure to execute it, which is inconsistent with just and fair dealing, although it may fall short of actionable fraud, and although it is not of that specific and definite character of which the law, in an action between the parties, will take notice: *People v. New York Produce Exch.*, 149 N. Y. 401, 44 N. E. 84.

Such by-laws are intended to regulate the conduct of members in commercial transactions as well when contracts are made outside as when made on the floor of the exchange, as well when contracts are made with strangers as when made with fellow-members of the corporation or association: *In re Haebler v. New York Produce Exch.*, 149 N. Y. 401, 44 N. E. 84; *Wood v. Chamber of Commerce*, 119 Wis. 367, 96 N. W. 835.

A rule of a chamber of commerce prohibiting members from gathering in any public place in the vicinity of the exchange-room and "forming a market" for the purpose of making any trade or con-

tract for the future delivery of grain or provisions, before the time fixed for opening the exchange-room for general trading, or after the time fixed for closing the same, daily, is upheld in *State v. Milwaukee Chamber of Commerce*, 47 Wis. 670, 3 N. W. 760.

g. Engaging in Liquor Business.—A by-law of a beneficial association which forbids saloon-keepers and bartenders from becoming members, and authorizing the expulsion of members for conduct unbecoming or likely to bring disrepute upon themselves, their families, or their craft, or drunkenness, is broad enough to authorize the expulsion of a member "for being a saloon-keeper and a bartender and for drunkenness": *Noel v. Modern Woodmen*, 61 Ill. App. 597. But if it be conceded that such associations have a right to purge themselves of members engaged in the liquor business, members who entered such business when the by-laws permitted them so to do should be given a reasonable time in which to abandon the forbidden vocation and withdraw their investments therefrom: *Modern Woodmen v. Wieland*, 109 Ill. App. 340.

LEONARD v. STATE MUTUAL LIFE ASSURANCE COMPANY.

[27 R. I. 121, 61 Atl. 52.]

LIFE INSURANCE—Misrepresentations by Insured.—The Statutes of Rhode Island providing that "no misstatement made in procuring a policy of life insurance shall be deemed material or render the policy void unless the matter thus represented shall have actually contributed to the contingency or event on which the policy is to become payable; and whether the matter so represented contributed to said contingency or event, in any case, shall be a question for the jury," does not apply to contracts in existence at the time of its enactment. (pp. 31, 32.)

LIFE INSURANCE—Misrepresentations by Insured.—The Statutes of Massachusetts providing that no misrepresentation made in the negotiation of a contract of insurance, by the insured, shall be deemed material or defeat the policy, unless made with the actual intent to deceive, or unless the matter represented or warranted increased the risk, applies to a policy written in Massachusetts by a Massachusetts company and sued upon in the courts of Rhode Island. (p. 32.)

Irving Champlin and Hugh J. Carroll, for the plaintiff.

Edward D. Bassett, for the defendant.

¹²¹ DOUGLAS, C. J. This case came before the court upon the defendant's petition for a new trial after verdict for the plaintiff, and the petition was granted March 7, 1902,

in accordance with the opinion reported in 24 R. I. 7. Since that decision, April 4, 1902, the General Assembly passed an act as follows: Chapter 997. "An act in amendment of and in addition to chapter 244 of the General Laws and any amendment thereof, entitled 'of views, witnesses, depositions, and evidence.' It is enacted by the General Assembly as follows:

"Section 1. No misstatement made in procuring a policy ¹²³ of life insurance shall be deemed material or render the policy void unless the matter thus represented shall have actually contributed to the contingency or event on which the policy is to become due and payable; and whether the matter so represented contributed to said contingency or event, in any case, shall be a question for the jury, and the court shall instruct the jury on the law relative thereto.

"Sec. 2. This act shall take effect on and after its passage, and all acts and parts of acts inconsistent herewith are hereby repealed."

It is claimed by the plaintiff that this statute has a retro-active effect and requires us to ignore the misrepresentations made by the insured in his applications, which were urged by the defendant as grounds for its petition for a new trial.

The plaintiff also claims that these policies, which were written in 1898 in Massachusetts by a Massachusetts company, were subject to chapter 522 of the Revised Laws of Massachusetts, enacted in 1894, as amended by chapter 271 of the Laws of 1895. Section 21 as amended is as follows: "No oral or written misrepresentation or warranty made in the negotiation of a contract or policy of insurance, by the assured or in his behalf, shall be deemed material or defeat or avoid the policy, or prevent its attaching, unless such misrepresentation or warranty is made with actual intent to deceive, or unless the matter misrepresented or made a warranty increased the risk of loss."

These claims were not suggested to the court at the former hearings, but are now urged as reasons for denying a new trial.

The Rhode Island statute has no application to the present case. The contract of insurance was agreed upon long before it was enacted, and there is no provision in it that it shall apply to contracts already existing. It is difficult to see how such a provision could have been effective under the constitution of Rhode Island or under the constitution of the

United States; but no such provision can be implied in the absence of express words to that effect: *Dash v. Van Kleeck*, 7 Johns. 477, 5 Am. Dec. 291; *Sanford v. Bennett*, 24 N. Y. 20; *Dodge v. Nevada Nat. Bank*, 109 Fed. 726, 48 C. C. A. 626.

¹²³ The second claim, however, seems to us well founded. The contract was made in Massachusetts, to be executed there, and, it cannot be disputed, must be construed by the law of that state. The provision referred to was enacted in 1887, chapter 214, and has been construed in the supreme judicial court in several cases.

In *Ring v. Phoenix Assur. Co.*, 145 Mass. 426, 14 N. E. 525, it was held that a misrepresentation made in obtaining a policy of fire insurance is to be deemed material if the matter represented increases the risk of loss, although not made with intent to deceive.

In *Durkee v. India Mutual Ins. Co.*, 159 Mass. 514, 34 N. E. 1133, the statute was held to apply to a marine insurance policy.

In *White v. Provident Savings Life Assur. Soc.*, 163 Mass. 108, 39 N. E. 771, 27 L. R. A. 398, decided in 1895, the legislation on the subject is traced from the first provisions of this character, which applied in 1861 only to fire insurance, and which later were made to include "all statements made in the negotiation of contracts and policies of insurance of whatever kind." The court say (pages 113, 114): "The statutes above referred to show a general intention on the part of the legislature to make, in lieu of the rules which spring from the doctrines held in the law of insurance as to technical warranties and representations, a statute rule by which to determine the effect upon the contract of all statements on the part of the assured, and also the effect of by-laws and similar matters which it might otherwise be contended would avoid or modify the contract."

In *Levie v. Metropolitan Life Ins. Co.*, 163 Mass. 117, 39 N. E. 792, it is decided that the questions whether answers and statements made in an application for insurance were misrepresentations, and, if so, whether, under statute of 1887, chapter 214, section 21, they were "made with actual intent to deceive," or "the matter misrepresented increased the risk of loss," are questions for the jury.

After the opinion of the court, in *Leonard v. State Mutual Life Assur. Co.*, 24 R. I. 7, 96 Am. St. Rep. 698, 51 Atl.

1049, the plaintiff moved for a reargument, then first presenting the Rhode Island and Massachusetts statutes quoted above, and the court granted the motion.

¹²⁴ We cannot doubt that, if the reargument had taken place before the court as then constituted, it would have modified its opinion as applied to this case. The criteria of validity under the Rhode Island law were correctly declared by the court, but the view to which our attention is now directed shows them to be inapplicable.

The questions which are made important by the Massachusetts statute have never been categorically presented to the jury, and for that purpose a new trial is necessary. The parties have not had an opportunity fairly to try these issues.

We are of the opinion that until such an opportunity is given, it would be improper for this division to assume that all the evidence bearing upon them has been introduced, or that the evidence already presented is so conclusive as to warrant a direction to enter judgment at the present time.

The petition for a new trial is granted, and the cause will be remitted to the common pleas division for further proceedings.

On the Construction of Statutes similar to those involved in the principal case, see *First Nat. Bank v. Fidelity etc. Co.*, 110 Tenn. 10, 100 Am. St. Rep. 765; *McGannon v. Michigan etc. Fire Ins. Co.*, 127 Mich. 636, 89 Am. St. Rep. 501; *Boyer v. Grand Rapids Fire Ins. Co.*, 124 Mich. 455, 83 Am. St. Rep. 338.

SCHULTZ v. GRIMWOOD.

[27 B. L. 137, 60 Atl. 1065.]

REPLEVIN.—The Surety in a Bond Given to Release an Attachment has no such property in or right of possession to the goods attached as entitles him to maintain replevin against the vendee of his principal. (p. 34.)

George T. Brown and Irving Champlin, for the plaintiff.

George H. Huddy, Jr., for the defendant.

¹²⁸ DUBOIS, J. This is an action of replevin.

The defendants plead, first, the general issue; and, secondly, property in a third person. To the second plea the plaintiff replied, setting out a special title in himself to the goods

and chattels replevied, acquired from one Edward O. Thurston, former owner and possessor thereof, in manner following: After attachment of the goods and chattels at the suit of a creditor of Thurston, the plaintiff became surety for him, at his request, upon a bond to dissolve the attachment, with condition to return them, after final judgment in the action, or pay the judgment; that in consideration of his signing the bond as aforesaid, Thurston and the plaintiff agreed that in case judgment should be rendered against Thurston he would forthwith return the goods attached and released by the bond to the deputy of the sheriff, and that upon his failure to do so, the plaintiff might take possession of the same to so return them; that afterward judgment in the suit was rendered against Thurston and execution was issued thereon and placed for service with the deputy sheriff who made demand upon Thurston for payment of said judgment, which, being refused, he demanded of Thurston a return of the property attached, which was also refused; that the sheriff then demanded the goods and chattels of the plaintiff, and he demanded them of Thurston for the purpose of returning them to the deputy sheriff in discharge of himself as surety on the bond, but Thurston refused to surrender the same to him. And the plaintiff avers that the property attached was in the possession of the defendants, and that he demanded from them possession of the goods for the purpose of returning them to the deputy sheriff, which demand was refused by the defendants, whereupon he brought this suit.

And the plaintiff avers that the defendants and Thurston had conspired to keep the property beyond the reach of the plaintiff to prevent his returning the same to the sheriff, without this, that said goods and chattels were the property of the 139 H. A. Grimwood Company and not the property of the plaintiff.

To this replication the defendants have demurred for six reasons, of which only the first two are substantial, viz.: 1. "That said replication avers and shows no such general or special property or right to possession in or to the chattels replevied as to entitle him to maintain his said action against the defendants." And 2. "That for aught that appears by said replication and the record, said H. A. Grimwood Company had the general property and title and right to possession of the chattels replevied as averred in the defendants' plea thereof."

The following question arises out of the pleadings: Has the surety in a bond, given to release an attachment of goods and chattels, by virtue of such suretyship alone, any property in or right of possession to such goods and chattels which he can enforce by replevin against the vendee of his principal in the bond? It is stated by the parties, and we therefore assume that the bond upon which the plaintiff is surety, like the bond referred to in *Easton v. Ormsby*, 18 R. I. 309, 27 Atl. 216, is a common-law bond, and governed by that case. "The officer was not compelled to surrender the goods on being tendered such a bond, it not being in compliance with the statute; but by surrendering them, and accepting said bond in lieu thereof as he did, he put it out of his power in any circumstances to compel their return to him, and thereby discharged his attachment thereon. Such surrender of the goods ipso facto works a dissolution of the attachment, and from that moment reinvests the defendant with the absolute control thereof." Thurston, being thus vested with the absolute control of the goods, could dispose of them at his pleasure; his legal right to do so was not affected by his oral agreement to return the goods or permit the plaintiff to do so in case of final judgment against him. These were mere promises, for the breach of which an action might lie; but which did not in any way confer title or right of possession in the plaintiff as against a third person not a party to such agreement. Neither is the legal title in the goods affected by the alleged conspiracy. This is not an equitable ¹⁴⁰ proceeding brought to set aside the conveyance upon the ground of fraud. The plaintiff argues that his rights are similar to those of a receiptor of goods, and cites cases in which a receiptor has been allowed to maintain trover, trespass and replevin. But the plaintiff in the circumstances set out in the pleadings cannot be deemed to be a receiptor.

"In quite a number of states, and by long practice, it has become a well-established law that the officer may give the immediate custody of the property attached into the hands of some responsible person and take his receipt therefor, conditioned that the property will be returned on demand, or within a certain time after the rendition of judgment, or the like. Such bailee of the officer is usually termed the receiptor or keeper, and what is hereinafter said concerning him should not be confounded with the duties or liabilities of a custodian or keeper in other states where such custodian or keeper is the

immediate servant of the officer, and holds as the officer himself without a receipt. Nor is the law concerning receiptors in confusion with special statutes of other states which provide for the retaining of the possession of the property by the debtor upon the giving of a forthcoming bond": Shinn on Attachment and Garnishment, sec. 264.

"In many states where no practice has been established of receipting for the property in the manner hereinbefore shown, special statutes have provided a means whereby a debtor, whose property has been seized by attachment, may at any time before final judgment give a bond with sufficient surety, conditioned as required by such statute, and have the possession of his property surrendered to him. It will be noticed that while the practice of receipting is founded wholly upon custom, the law regarding bonds for the return of property attached is wholly statutory, and that while the effect of the former is to continue the liability of the officer for the safe keeping of the property, the effect of the latter is to fix such responsibility upon the parties, principal and sureties, to the bond.

"The provisions and practice regarding bonds are far from uniform, but in general there are two kinds of bonds to procure ¹⁴¹ the release of property from the possession of the attaching officer. One kind contains the principal condition, that if judgment in the attachment suit be rendered against the defendant the property shall be forthcoming to satisfy the execution on such judgment; otherwise that the sureties will be bounden to the extent, in some instances, of the value of the property, and in other instances to the amount of the indebtedness. These bonds are variously called 'bail bonds,' 'forthcoming bonds,' and 'delivery bonds.' Such bonds, of course, only release the property from the custody of the officer and do not release it from the lien of the attachment. Another class of bonds contains the principal condition that the defendant in the attachment suit will 'perform whatever judgment may be entered against him,' in such attachment suit, and in default thereof, and in the event that judgment is entered against such defendant, that the sureties will pay the amount thereof. A bond of this class not only releases the officer from further liability as to the care and custody of the property, but also releases the property itself from the lien of such attachment, working an entire dissolution of the attachment so far as the property is concerned, and thereafter the bond

itself is held as a substitute of the res': Shinn on Attachment and Garnishment, sec. 286.

This state is not one of those in which such practice prevails, but is one where a bond is provided for by statute: Gen. Laws R. I., cap. 253, secs. 14 and 18.

The demurrer, therefore, must be sustained, and, as this is decisive of the plaintiff's right to recover, the case is remitted to the common pleas division with direction to enter judgment for the defendant.

The Question of When Replevin will lie is discussed in the monographic note to Sinnott v. Feiock, 80 Am. St. Rep. 741-767.

EDWARDS v. MANUFACTURERS' BUILDING CO.

[27 R. I. 248, 61 Atl. 646.]

PASSENGER ELEVATOR.—A Landlord Who Maintains a passenger elevator in his private building is not a common carrier, and is required to exercise only reasonable care for the safety of persons using it, such as employes of a tenant, who enter the premises by implied invitation. (p. 39.)

PASSENGER ELEVATOR.—Presumption of Negligence.—The fall of a loaded passenger elevator affords prima facie evidence of negligence in the person charged with the duty of operating it. (p. 41.)

John P. Beagan, for the plaintiff.

Charles A. Wilson and George H. Huddy, Jr., for the defendant.

248 DOUGLAS, C. J. The plaintiff was an employé of one of the defendant's tenants, and was injured by the falling of an elevator which the defendant maintained and operated in its building for the use of its tenants and their employes and customers. After verdict for the plaintiff the defendant brings its petition for a new trial, founded upon the allegations that the verdict is against the evidence; that the presiding justice erred in refusing to charge the jury as requested by the defendant; and that the damages were excessive.

249 The defendant's requests, which were refused, and to which exceptions were taken, were: "1. The owner of a build-

ing containing a passenger elevator therein operated by such owner is not a common carrier, and not an insurer of the safety of persons using the elevator. 2. If the jury find that the defendant used reasonable care and prudence in the construction, maintenance and operation of the elevator, the verdict should be for the defendant. . . . 4. The plaintiff was without contract relations with the defendant, and, this being so, negligence cannot be presumed from the fact of the accident alone, but some other fact must be proved by the plaintiff showing that the accident was due to the negligence of the defendant."

We think the first and second requests should have been granted. A landlord who maintains an elevator in his private building is not a common carrier, and a common carrier is not an insurer of the safety of passengers. And it seems to us unreasonable to say that such a landlord is to be held to the same degree of care which the law imposes upon a common carrier. The charge of the court was based upon the case of *Marker v. Mitchell*, 54 Fed. 637, which holds that the liability of a landlord maintaining an elevator and that of a common carrier of passengers are the same; that the standard for both is the highest degree of care which human foresight can suggest. This case is supported by *Goodsell v. Taylor*, 41 Minn. 207, 16 Am. St. Rep. 700, 42 N. W. 873, 4 L. R. A. 673, and *Treadwell v. Whittier*, 80 Cal. 574, 13 Am. St. Rep. 175, 22 Pac. 266, 5 L. R. A. 498. And the United States court of appeals confirmed the decision in *Mitchell v. Marker*, 62 Fed. 139, 10 C. C. A. 306, 25 L. R. A. 33, where the court say: "We see no distinction in principle between the degree of care required from a carrier of passengers horizontally, by means of railway cars or stage-coaches, and one who carries them vertically, by means of a passenger elevator. The degree of care required from carriers by railway or stage-coach is the highest degree. Neither is an insurer, but in regard to each care short of the highest degree becomes not ordinary care, but absolute negligence." These cases seem to have been ²⁵⁰ generally followed: *Edwards v. Burke*, 17 Am. Neg. Rep. 384.

We cannot assent to the reasoning on which they rely. It is true that whether a common carrier operates a stage-coach, a railway on the surface of the ground, or a railway up a mountainside, the law subjects him to a certain rule of re-

sponsibility, but the rule is imposed not on account of the danger of the journey, but because of his relation to the public. If a private person transports a friend in his coach or in his automobile, he is liable only for want of ordinary care, though the danger may be the same as in traveling by public coach or by railway.

The duty of a landlord toward those who enter upon his premises by implied invitation is to exercise reasonable care for their safety, and we see no reason for modifying the rule when he introduces and operates an elevator. He is not, like a common carrier, a servant of the public; his relations and duties are with a limited number of persons who have contracted with him for the use of his premises and others who have business with his tenants.

The doctrine of the cases cited above is examined and repudiated by the New York court of appeals in *Griffen v. Manice*, 166 N. Y. 188, 82 Am. St. Rep. 630, 59 N. E. 925, 52 L. R. A. 922, decided in 1901. The opinion of Judge Cullen is so clear and convincing that we cannot do better than to quote from it at length. He says: "The right of any person to be carried in the elevator was based on the implied invitation to enter, which the defendant, as owner of the property, is deemed to have extended to all who might have business on the premises. To such persons the law imposed upon the occupant or owner the duty of seeing that the premises were in a reasonably safe condition of access and entering (2 *Shearman & Redfield on Negligence*, sec. 704; *Beck v. Carter*, 68 N. Y. 283, 23 Am. Rep. 175); but 'the measure of his duty was reasonable prudence and care': *Larkin v. O'Neill*, 119 N. Y. 221, 23 N. E. 563; *Hart v. Grennell*, 122 N. Y. 371, 25 N. E. 354. If the charge of the trial court is to be sustained, we must hold that the maintenance and operation of an elevator form an exception to the general standard of care imposed by the law upon the owners and occupants of real property. We see no reason for making this exception. The ²⁵¹ operation of an elevator, no doubt, involves danger, and if accident occurs, it may result in most serious consequences. It is not, however, the only dangerous appliance used in modern buildings. The boiler which furnishes steam heat, the conductors through which electric light is furnished, may at times be the cause of serious accidents. An open hatchway is equally dangerous. Yet it

has never been attempted to impose upon the owner of a building any greater responsibility as to these matters than that of exercising reasonable care. It is very probable that, in the advance of mechanical arts, many new appliances will be introduced into buildings, which will involve danger. It seems to me impracticable to distinguish as to the measure of the owner's duty between these appliances, and that such an attempt would involve great confusion in the law. I do not wish to be misunderstood. In the exercise of the same degree of care, different degrees of precaution may be necessary. The same man with equal prudence will leave an article of furniture unguarded in his house and carefully secrete or lock up jewelry or money. So, the more dangerous an appliance may be, the more attention may be requisite. If the fair purport of the charge of the court was only that the care should be commensurate with the danger, it might not be objectionable. The charge, however, goes far beyond this. The utmost human care and foresight would require the owner of a building to use the most modern and improved form of elevator, the latest successful mechanical device, and the most skillful operators. Such is the rule in the operation of railroads, and this degree of diligence may well be required where, for a consideration, there is a contract to carry safely. But common knowledge informs us that such a rule would be unreasonable applied to elevators in ordinary buildings. There are elevators not only in great office buildings and hotels, but also in small buildings, and even in many private houses. Where there is little traffic the duty of operating the elevator is at times imposed on an employé or servant with other work to perform. To require in all these cases (and I do not see how it is possible to distinguish between them on the law) the same measure of duty that is imposed on a railroad company or ²⁵² common carrier would be going too far. I think sufficient security is afforded the public when owners or occupants of a building are required to use reasonable care in the character of the appliance they provide and in its maintenance and operation. The stairways are always open to those who deem this degree of diligence inadequate for their protection. The charge of the learned trial court was, therefore, erroneous."

The fourth request, if, as we understand, it includes in the word "accident" the injury and the surrounding circum-

stances, was rightly refused. While it is true that the mere fact that a passenger receives an injury, without regard to the circumstances which surround that fact, is not enough to throw upon the defendant the burden of explaining the cause of the injury (*Fagan v. Rhode Island Co.*, 27 R. I. 51, 60 Atl. 872; *Benedick v. Potts*, 88 Md. 52, 40 Atl. 1067, 41 L. R. A. 478), it has been held repeatedly by this court that the fall of a loaded elevator affords prima facie evidence of negligence in the person charged with the duty of operating it: *Ellis v. Waldron*, 19 R. I. 369, 33 Atl. 869, commented on in *Laforrest v. O'Driscoll*, 26 R. I. 547, 59 Atl. 923.

As the defendant must have been prejudiced by the erroneous statements of the measure of its duty, a new trial must be granted, and it is unnecessary for us to comment upon the evidence presented.

The petition is granted, and the cause is remanded to the common pleas division for further proceedings.

The Liability of Owners of Passenger Elevators is the subject of a monographic note to *Southern B. & L. Assn. v. Dawson*, 56 Am. St. Rep. 806-810. Some authorities take the view that such persons are common carriers, required to exercise the utmost care to prevent injury to passengers. Other authorities exact only a reasonable degree of care. Perhaps all of the authorities agree that the fall of an elevator, resulting in an injury to a passenger therein, raises a presumption of negligence: *Spring v. Ford*, 189 Ill. 430, 82 Am. St. Rep. 464; *Griffen v. Manice*, 166 N. Y. 188, 82 Am. St. Rep. 630.

VERRONE v. RHODE ISLAND SUBURBAN RAILWAY COMPANY.

[27 R. I. 370, 62 Atl. 512.]

STREET RAILWAY—Riding on Running-board.—It is not negligence per se to ride on the running-board of an electric car, when there is no vacant seat in the car nor standing-room between the seats. (p. 42.)

STREET RAILWAY—Riding on Running-board.—If a railroad company accepts passengers whom it cannot accommodate inside its car, it must do all that human care and vigilance reasonably can to prevent accidents happening to them. (p. 43.)

STREET RAILWAY—Riding on Running-board.—A passenger on an electric car who rides on the running-board because there is no room inside assumes such risks as ordinarily attend the position he takes, but not such as are due to violent movements of the car. He has a right to suppose that the car will be run with due care,

and this requires greater precaution when passengers are occupying the running-board than when all are safely seated. (p. 43.)

STREET RAILWAY—Riding on Running-board.—Evidence that a strong man, holding on with both hands while riding on the running-board of a car, received a shock sufficient to throw him to the ground, makes out a *prima facie* case that the car was improperly managed, and should be allowed to go to the jury. (p. 43.)

James A. Williams, David S. Baker, Thomas F. I. McDonnell and Lewis A. Waterman, for the plaintiff.

Henry W. Hayes, Frank T. Easton, Lefferts S. Hoffman and Alonzo R. Williams, for the defendant.

³⁷¹ DOUGLAS, C. J. The plaintiff's intestate was a passenger, on Labor Day, 1902, upon an open trolley car operated by the defendant. When he got upon the car at Crescent Park the seats were filled and passengers were standing between the seats, and he was able only to secure a position upon the running-board. According to all the testimony, he grasped the post, or the handle affixed to it, with both hands as long as he continued on the car. As the car approached the hill north of Barrington station, while it was proceeding along a straight and approximately level track, he fell off, and was found, a short time after, lying dead in the road.

There is no dispute that he was killed by the fall from the car. Several witnesses testified that just previous to the accident the car swayed violently and was jerked sideways with considerable force. One witness testified, without objection, that the car was going at an extraordinary rate of speed at the time of the accident. The question was asked of other witnesses how the motion compared with the usual motion of the car, and the defendant's objection to this question was sustained, and the plaintiff duly excepted.

At the conclusion of the plaintiff's evidence a nonsuit was granted. The plaintiff asks for a new trial on the grounds that it was error to exclude the testimony offered and to grant the nonsuit.

We think the nonsuit was improperly granted. The plaintiff's intestate occupied this position on the running-board because there was no vacant seat in the car nor standing room between the seats. This was not negligence per se. If the ³⁷² railroad company accepts passengers whom it cannot accommodate inside its car, it must do all that human care

and vigilance reasonably can to prevent accident happening to them: *Brunnchow v. R. I. Co.*, 26 R. I. 211, 58 Atl. 656.

The court below seems to have based its decision upon the opinion in *Elliott v. Newport St. Ry. Co.*, 18 R. I. 707, 28 Atl. 338, 31 Atl. 694, 23 L. R. A. 208, where it is said: "A passenger who rides on the foot-board of a car necessarily takes on himself the duty of looking out for and protecting himself against the usual and obvious perils of riding there, such, for instance, as injury from passing vehicles or by being thrown off by the swaying or jolting of the car; *assuming, of course, proper management of the car, and proper construction and condition of the road.*" The court interpreted this language as holding that a person riding upon the running-board of an electric car assumed the risk of being thrown off by a jolt, whether of usual or extraordinary violence. But the words we have italicized modify the general statement and introduce a new issue into the case. No doubt it is reasonable to impose upon a passenger the assumption of such risks as ordinarily attend the position he takes, but he has a right to suppose that the car will be run with due care, and this requires greater precaution when passengers are occupying the running-board than when all are safely seated. A shock sufficient to throw from the car a strong man holding on with both his hands might well be taken by the jury as evidence that the car was not properly managed. We think, therefore, that the plaintiff had made out a *prima facie* case and should have been allowed to go to the jury.

It is evident from what we have said that it was a substantial issue in this case whether the car was proceeding as usual when the accident occurred, or was propelled at an extraordinary rate of speed which would be likely to cause more violent and dangerous jolting and swaying than common.

The passenger, when he took his place on the running-board, assumed the risk of ordinary motion, not of extraordinary violence. Testimony, therefore, upon this subject would be admissible if offered by competent witnesses. The plaintiff in this case failed to qualify the witnesses whom he called on ²⁷³ that question by first showing that they had traveled on this route and knew the ordinary rate of speed at the place in question. For this reason the exceptions to the exclusion of their testimony must be overruled.

The defendant cites *Moskowitz v. Brooklyn Heights R. Co.*, 89 App. Div. 425, 85 N. Y. Supp. 960. It was held in that case that where plaintiff elected to ride on the step of a crowded street-car and was thrown off by the oscillation or "greyhound motion" of the car as it was running at the usual rate of speed maintained on that portion of its route, and there was no evidence of any unusual or abnormal motion due to any unusual condition of the car, rails, roadbed, or management, plaintiff assumed the risk of an injury so occasioned. The opinion of the majority of the court proceeds to distinguish other cases, where the accident was caused by unusual or abnormal motion of the car, from the one under consideration, and, while approving the cases reviewed, bases the decision in this case upon the fact that no unusual or abnormal motion was "proved or attempted to be proved" by the plaintiff. In this respect the case differed from the case at bar.

The petition for a new trial is granted, and the cause will be remanded to the superior court for further proceedings.

One Who Rides on the Running-board of a car is not chargeable with contributory negligence, if the car is full and he cannot get inside, and other passengers are already riding on the outside when he takes passage: *Indianapolis St. Ry. Co. v. Haverstick*, 35 Ind. App. 281, 111 Am. St. Rep. 163, and see the cases cited in the cross-reference note thereto. However, he assumes the ordinary risks incident to his exposed position: *Rice v. Philadelphia Rapid Transit Co.*, 214 Pa. 147, 112 Am. St. Rep. 738.

BEGGS v. JAMES HANLEY BREWING COMPANY.

[27 R. I. 385, 62 Atl. 373.]

SALE OF MACHINERY—Delay in Installation.—Where a vendor, in making a proposition to sell apparatus for use in a brewery, writes to the vendee: "We will have the apparatus shipped the latter part of this week so that same can be installed on Sunday. . . . It might be possible that part of the work would have to go over until the following Sunday, but there will be no delay in the operation of your plant," the clause in relation to "delay in the operation" applies to the work in installing the apparatus, and not to the operation of the plant after the installation is complete. (pp. 46, 47.)

SALE BY MANUFACTURER—Implied Warranty.—Where a known, described, and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular

purpose, still if such article actually is supplied, there is no implied warranty that it will answer the particular purpose intended by the purchaser. (p. 49.)

SALE BY MANUFACTURER—What not a Warranty.—A statement by a vendor of apparatus and boilers, known as the "McClave System," for use in a brewery, that such system "is adapted for the burning of fine anthracite fuel," is not a warranty that the boilers will furnish sufficient steam for the operation of the brewery. (p. 52.)

Cooke & Angell, for the plaintiff.

Gorman, Egan & Gorman, for the defendant.

³⁸⁶ **JOHNSON, J.** The plaintiff delivered and installed in the defendant's brewery certain grates and blowers on the contract made by the following proposition and acceptance:

"New York, May 25, 1903.

"James Hanley Brewing Co., 33 Jackson St., Providence, R. I.

"Gentlemen: We have received communication from Mr. D. N. Rothermel stating that you desire a proposition for the installation of the McClave apparatus under your three boilers. We have also received communication from our Mr. Reyhner giving us definite furnace measurements, and we herewith submit you proposition for the above installation: We will furnish and place in position ready for use, exclusive of mason work, the McClave apparatus consisting of the McClave Improved twin-lever grate and the McClave Argand Blower, under each of your boilers, for the sum of \$766.75. Seven Hundred Sixty-six & 75/100 Dollars net.

³⁸⁷ "The McClave system is adapted for the burning of fine anthracite fuel; workmanship and material first-class in every particular. Should you wire us the acceptance of the above proposition, we will have the apparatus shipped the latter part of this week so that same can be installed on Sunday. We must, however, have your prompt acceptance in order to do this, and it might be possible that part of the work would have to go over until the following Sunday, but there will be no delay in the operation of your plant. Hoping to receive your confirmation, which shall have our prompt attention, we are,

"Yours very truly,

"JAMES BEGGS & CO.,

"(Signed) Per ELLIS."

"Providence, R. I., May 26, 1903.

"To James Beggs and Co., 9 Dey St., New York.

"Will accept your proposition for the McClave apparatus for our boilers according to your letter of the twenty-fifth. Ship at once.

"THE JAMES HANLEY BREWING CO."

The apparatus was put in on May 31, June 7, and June 14, 1903, said dates falling on Sunday, and one set being installed on each date. Each set was used from the time it was installed, and several trials were made with fine anthracite coal, in mixtures of various proportions with soft coal. The apparatus remained under the boilers until about October 20, 1903, when it was taken out by the defendant on the ground that the contract had not been fulfilled by the plaintiff, because with the grates and burners in use, and burning fine anthracite coal, the boilers did not produce enough steam for the successful operation of the brewery. Suit was brought, and, jury trial being waived, the case was tried before a single justice in the appellate division of the supreme court, and a decision was rendered for the defendant.

The plaintiff petitioned for a new trial on the grounds: 1. That the decision was against the law and the evidence and the ^{sss} weight thereof; 2. That the presiding justice erred in the admission of certain testimony; and 3. That he erred in certain rulings and decisions upon the construction of the contract.

The presiding justice ruled at the trial, and embodied the same ruling in his decision, that the proposition and acceptance constitute an express contract, and that, the contract thus being express, no contract is raised by implication. This ruling was correct. He then proceeds, however, to say: "The proposition is to furnish and place in position ready for use under each of the three boilers of a brewing plant in active operation, without delay in the operation of the plant, the McClave apparatus, consisting of the McClave Twin-lever grate and the McClave Argand Blower, adapted for the burning of fine anthracite fuel, for a certain sum of money. This fairly may be said to mean that the new grates and blowers were to displace grates already burning fuel under said boilers in the operation of the plant, and that they were to continue such operation by the burning of fine anthracite fuel for which they are adapted; and furthermore, that there

will be no delay in the operation of the plant. This assumes that when the McClave system is introduced, installed, and burning fine anthracite fuel under the boilers, there will be no delay in the operation of the plant, by the proper use of such apparatus and fuel. If it does not mean that, it simply means that they will not delay the operation of the plant while they are taking out the old system and installing the new one; but what advantage would that be if the new system itself proved to be a perpetual hindrance to the successful operation of the plant?" We think this construction is erroneous. The portion of the plaintiff's proposition to which the above language of the decision applies is as follows: "Should you wire us the acceptance of the above proposition, we will have the apparatus shipped the latter part of this week, so that same can be installed on Sunday. We must, however, have your prompt acceptance in order to do this, and it might be possible that part of the work would have to go over until the following Sunday, but there will be no delay in the operation of your plant." This clearly applies to the work of installing ³⁸⁹ the apparatus, which it is proposed shall be done on Sunday in order that the operation of the plant shall not be delayed thereby. To construe this language as applying to the operation of the plant, after the completion of the work of installing the McClave apparatus, is, in our opinion, to give to the words in question a meaning which the context forbids.

The presiding justice in his decision construed the statement in the proposition that "The McClave system is adapted for the burning of fine anthracite fuel," as follows: "I am of the opinion that the words 'adapted for the burning of fine anthracite fuel,' in the contract is a warranty that the McClave system is suitable and fit to successfully burn such fuel under such boilers; that is, that it is capable of doing the work for which and in the place where it was installed." He made the same ruling at the trial. At the first glance this construction does not seem to give any added meaning to the words in question, as it may be said that if the apparatus was adapted for the burning of fine anthracite fuel, it would be so adapted wherever it might be placed. In one sense this is true, as the apparatus could not lose its adaptability for the burning of the fuel named simply from the fact of being moved. It might, however, be placed in such a position and subjected to such conditions as to reduce or destroy its

power of operation. It certainly might be placed under boilers where, although it did operate so as to successfully burn fine anthracite coal, the boilers might not produce a given amount of steam, to say nothing of producing the amount required for the successful operation of a brewery. If the decision in this regard does not so construe the words in question as to make the apparatus practically responsible for failure on the part of the boilers, under which it was installed, to produce the amount of steam required by the brewery, then it does not mean anything.

Under this ruling, however, the presiding justice admitted evidence tending to prove that the contract between the parties was that, with the McClave apparatus installed under the boilers in the defendant's brewery, and burning fine anthracite fuel, such boilers would produce the amount of steam required for the successful operation of the brewery.

³⁹⁰ James Hanley, a witness for the defendant, referring to an interview with George Ellis, general manager of plaintiff, testified:

"Q. 25. I will ask you if, as a matter of fact, Mr. Hanley, you didn't communicate to him a knowledge of the horse power of your then boilers; did you not communicate that fact? A. I did.

"Q. 26. Did you not also inform him that the demands of your business at the brewery demanded all of the steam that you were then producing? A. I did.

"Q. 27. Did you make any statement to him that you were unwilling to change the grates that you were then using unless you were assured that the same results by the grate and blowers he proposed to sell you would produce a similar result? A. I did."

He further testified: "Q. 58. Was there any reason for you not to continue the McClave system except for its incapacity to continue the results you anticipated? A. No, sir."

The prospectus of the plaintiff was also admitted in evidence.

The admission of this line of testimony illustrates the construction given to the words in question by the presiding justice more clearly than the language of the decision.

The admission of this testimony appears to rest upon the rule that where a manufacturer or dealer contracts to supply an article which he manufactures or produces, or in which he

deals, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied warranty that it shall be reasonably fit for the purpose to which it is to be applied.

The apparatus contracted for in this case, however, was shown by the evidence, without contradiction, to be well known, and in use in other places. It was defined and described in the contract. And it is the rule that where a known, described and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still if the known, defined, and described thing be actually supplied, there is no implied warranty that it shall answer the particular purpose intended by the purchaser: Benjamin on Sales, sec. 657; 1 Parsons on Contracts, 589; *Chanter v. Hopkins*, 4 Mees. & W. 319; *Seitz v. Brewer's Refrigerating Machine* ³⁹¹ Co., 141 U. S. 510, 12 Sup. Ct. Rep. 46, 35 L. ed. 837; *Grand Avenue Hotel Co. v. Wharton*, 24 C. C. A. 441, 79 Fed. 43.

In Parsons on Contracts, *supra*, the rule is stated as follows: "If a thing be ordered of the manufacturer for a special purpose, and it be supplied and sold for that purpose, there is an implied warranty that it is fit for that purpose. This principle has been carried very far. It must, however, be limited to cases where a thing is ordered for a special purpose, and not applied to those where a special thing is ordered although this be intended for a special purpose. For if the thing is itself specifically selected, and ordered, then the purchaser takes upon himself the risk of its effecting its purpose. Nor can he rely upon statements and assertions made by the maker in circulars and advertisements concerning the article, as a warranty that it will do what is stated."

In *Chanter v. Hopkins*, 4 Mees. & W. 399, which is a leading case on the subject, the defendant wrote to the plaintiff, the patentee of an invention known as "Chanter's smoke-consuming furnace," the following order: "Send me your patent hopper and apparatus, to fit up my brewing copper with your smoke-consuming furnace. Patent right 15l. 15s., ironwork not to exceed 5l. 5s; engineer's time fixing 7s. 6d. per day." The plaintiff accordingly put up on the defendant's premises one of his patent furnaces, but it was found not to be of any use for the purposes of the brewery and was returned to the plaintiff. It was held (no fraud being imputed

to the plaintiff), that there was not an implied warranty on his part that the furnace supplied should be fit for the purposes of the brewery; but that, the defendant having defined by the order the particular machine to be supplied, the plaintiff performed his part of the contract by supplying that machine.

The construction given to the words "adapted for the burning of fine anthracite fuel," was erroneous, and it follows that the line of testimony admitted under that construction was erroneously admitted.

The plaintiff took numerous exceptions to the admission of this testimony, but, as they were only pressed generally, it is not necessary to consider them in detail.

³⁹² It is not disputed that the apparatus was the identical thing ordered, and was first-class in workmanship and material.

There remains for consideration the question of fact: Was the McClave apparatus adapted for the burning of fine anthracite fuel, as stated in the contract?

The evidence showed that the McClave apparatus had been on the market for several years prior to the making of this contract, and that it was in use in several plants in Providence, one in Phillipsdale, and one in Worcester, Massachusetts; that there were six sets at the Nicholson File Company, on which fine anthracite coal was burned exclusively for three or four weeks, and afterward mixtures of said coal with soft coal were used because such mixtures were found to be more economical and produced more steam; that there were eight sets at the Glenlyon Dye Works, on which No. 3 buckwheat coal was used, and that the apparatus was satisfactory. Alexander Ogg, a machinist there, testified: "Q. 12. Has the work been satisfactory that you obtain in the use of those grates and blowers, the time when you refer to when you were using this fine anthracite coal? A. It is satisfactory to us. When we started in with one, then went to three, then to five, and then to eight. That suited us." It appeared in evidence that, at these works, the Argand Blower was removed about eight months after it was put in and a system of exhausting from the dye-house substituted for it. Mr. Ogg testifies in regard to the change: "C. Q. 20. Why did you substitute this system you speak of for the McClave Argand Blower? A. There was a double object. These fans had to blow to ex-

haust the steam and the only place to put it was under the boiler, and we didn't want to use the live steam for that purpose."

It was shown that the apparatus was started at the pumping station at the Hope reservoir in Providence, June 22, 1903, and was tried first with No. 3 buckwheat, then with No. 2 and No. 3 and a little pea coal, and finally used with No. 2 buckwheat exclusively.

Witnesses, both for the plaintiff and defendant, testified that fine anthracite coal mixed in various proportions with soft coal was used with the apparatus in defendant's brewery; ~~and~~ and that fair steam was maintained in the morning in each case, but that it receded in the afternoon. The load at the brewery was shown to be very uneven. The evidence for the defendant showed that there was a particularly heavy draught on the steam when the brewer was boiling his beer.

Warren B. Lewis, an expert witness for the defendant, testified that he had made tests of the McClave apparatus in the Manufacturers' Building in Providence. On the question of the adaptability of the apparatus, he testified: "Q. 21. I will ask you whether the McClave system as installed and operated in the Manufacturers' Building is adapted to burn fine anthracite coal? A. Any grate will burn coal, any grate might burn fine anthracite coal: I should say that question would be limited entirely by the conditions imposed."

As to the conditions in defendant's brewery, the same witness testified: "Q. 49. What were the conditions existing at the Hanley brewery which militated against the adaptability of the McClave system to this plant? A. What condition did I ever find? Q. Yes. A. Why, I found on a test made there that the maximum demand upon the boilers was about 430 horse-power, the boilers being rated at 320, and that would be, in my mind, a sufficient reason for saying that a steam blower could not maintain a high enough air pressure in the air pit to consume sufficient anthracite coal to give any such overload of capacity in the boiler." He further testified: "C. Q. 87. Suppose that the James Hanley brewing plant commenced in the morning with a certain variety of coal, fine anthracite coal for instance, and was operated right through until, say, 1 or 2 o'clock in the afternoon, with a pressure of eighty or eighty-five pounds from 6 in the morning until 2 in the afternoon, and then suddenly, within a few

minutes, it dropped to forty pounds, how would you explain that? A. If the violent pressure (depression?) was very sudden, I should think first that it was a sudden draught of steam from the boiler that caused it."

The testimony of the defendant's witnesses that, with the apparatus in use and burning mixtures of fine anthracite and soft coal, the boilers in the defendant's brewery did not maintain sufficient steam to meet all the demands of the brewery, ³⁹⁴ does not militate against the adaptability of the apparatus for the burning of fine anthracite fuel.

The defendant did not exact a warranty that, with the apparatus in use under the boilers at its brewery, the boilers would produce sufficient steam for the operation of the brewery.

That the apparatus was adapted for the burning of fine anthracite fuel is shown, not simply by a preponderance of the evidence, but without contradiction. In fact the evidence for the plaintiff on this question is corroborated by that introduced by the defendant. There was no testimony in the case that the combustion of coal in the apparatus was imperfect.

The decision was against the law and the evidence.

Petition for new trial granted. Case remitted to the superior court for further proceedings.

Implied Warranties in contracts of sale are discussed at length in the monographic note to *Gold Ridge Min. Co. v. Tallmadge*, 102 Am. St. Rep. 607-625.

MCGOWAN v. PROBATE COURT OF NEWPORT.

[27 R. I. 394, 62 Atl. 571.]

WILLS—Gift to Wife of Scrivener a Suspicious Circumstance.

Where a person writes or prepares a will for another, under which the wife of the writer takes a benefit, it is a circumstance to be considered by the jury, requiring the court and jury to be vigilant and zealous in examining the evidence in support of the instrument; and unless it appears clearly that no advantage was taken by the writer, it is sufficient to exclude the will from probate. (p. 53.)

INSTRUCTIONS—Substantial Compliance with Requests.—It is not the privilege of counsel to dictate the words that shall be given in a charge to the jury; if the law applicable to the case is correctly stated, it is all that can be required. (p. 53.)

William P. Sheffield, Jr., and Max Levy, for the appellants.

Frank P. Nolan and Gardiner, Pirce & Thornley, for the appellees.

³⁹⁵ Per CURIAM. This is a petition for a new trial of a probate appeal in which the jury have found a verdict approving the will of Ann McGowan, deceased.

The petition is based upon exceptions to the refusal of the court to charge as requested by the appellants, and also on the ground that the verdict is against the law and the evidence.

Two requests to charge were made, which were modified by the presiding justice. The first request is as follows: "Where a person writes or prepares a will for another under which the wife of the writer takes a benefit, it is a suspicious circumstance requiring the court to be vigilant and zealous in examining the evidence in support of the instrument, and is sufficient to exclude the will from probate unless the suspicion is removed." The modification of this request which was granted is as follows: "That where a person writes or prepares a will for another, under which the wife of the writer takes a benefit, it is a circumstance to be considered by you, requiring the court and the jury to be vigilant and zealous in examining the evidence in support of the instrument, and that unless it appears clearly that no advantage was taken by the person so writing a will, it would be sufficient to exclude the will from probate."

The charge given by the court was a substantial compliance with the request. It is not the privilege of counsel to dictate the words that shall be given in a charge to the jury; if the law applicable to the case is correctly stated, it is all that can be required: McGarrity v. New York etc. R. R. Co., 25 R. I. 269, 55 Atl. 718.

The second request to charge, as it was worded, was inapplicable to any evidence in the case, as was admitted by counsel at the argument before us.

The evidence in the record was, in our opinion, amply sufficient to support the verdict. Indeed, it was so strong in favor of the will that a contrary verdict would have been unreasonable.

The petition for a new trial is denied, and the cause will be remanded to the superior court, sitting in the county of Newport, with direction to enter a decree sustaining the will, with costs for the proponents.

A Court is not Required to Charge the Jury in the exact words of the request: *Edwards v. Wessinger*, 65 S. C. 161, 95 Am. St. Rep. 789; *Newby v. Harrell*, 99 N. C. 149, 6 Am. St. Rep. 503. Some authorities, however, affirm that a party has a right to have instructions given in his words: *Jordan v. Benwood*, 42 W. Va. 312, 57 Am. St. Rep. 859; *Babbitt v. Bumpus*, 73 Mich. 331, 16 Am. St. Rep. 585.

CAPPELLI v. WOOD.

[27 R. I. 411, 62 Atl. 978.]

GARNISHMENT.—A Verdict on Which Judgment has not been entered cannot be made the subject of garnishment. (pp. 55, 56.)

Simon S. Lapham, Jr., for the plaintiff.

Albert D. Bean, for the defendant.

⁴¹¹ JOHNSON, J. Assumpsit. Heard on certification from the district court of the sixth judicial district upon an agreed statement of facts, as follows:

"The defendant, Henry M. Wood, on the 13th day of October, A. D. 1905, obtained a verdict of a jury in the Superior Court, Providence county, in the case of *Henry M. Wood v. Susan A. McDermott*, for the sum of one hundred fifty dollars.

"On the 14th day of October, A. D. 1905, after verdict and before judgment in case of *Wood v. McDermott*, the plaintiff in this case sued out of the District Court of the Sixth Judicial ⁴¹² District a writ of attachment, and said Susan A. McDermott was duly served with a copy of said writ as garnishee of said Henry M. Wood. That said Susan A. McDermott duly filed her garnishee's affidavit which is part of the record hereof.

"That execution in case of *Wood v. McDermott* has been stayed.

"That said case of *Cappelli v. Wood* is now pending in the District Court of the Sixth Judicial District, in said State, on a written motion to discharge the garnishee made by the defendant Wood.

"That the defendant Wood in case *Cappelli v. Wood* does not dispute the amount of the claim of said Cappelli, and that judgment shall be entered for the plaintiff for two hundred forty-six dollars and costs, and this court shall consider the validity of the attachment only."

The garnishee's affidavit referred to in said statement is as follows:

"PROVIDENCE, SO.

District Court of the
Sixth Judicial District.

"ANTONIO CAPPELLI }
 "V. }
"HENRY M. WOOD. }

"In the above entitled case, I, Susan A. McDermott, of the City and County of Providence and State of Rhode Island, the garnishee therein named, make affidavit and say that at the time of the service of the writ of garnishment in said case the defendant in said suit, Henry M. Wood, had received a verdict in the Superior Court for the County of Providence, for the sum of one hundred and fifty dollars (\$150.), and that said decision has now become a judgment, and that execution thereon has been stayed by order of the presiding justice of the Superior Court.

"SUSAN A. McDERMOTT.

"Subscribed and sworn to before me, in Providence, this 25th day of October, A. D. 1905.

"HENRY A. PALMER,
 "Notary Public."

⁴¹³ Service of the trustee process in this case having been made after verdict and before the entry of judgment in the case of Wood v. McDermott, the question raised for consideration is, Can the garnishee be charged?

In *Foster v. Dudley*, 30 N. H. 463, the court says: "If the trustee suit be commenced while the debtor trustee has yet an opportunity to ask for delay, and to plead a recovery against him, if one should be had, he may be charged as trustee if no other objection appears." This statement of the law was approved by this court in *Smith v. Carroll*, 17 R. I. 125, 21 Atl. 343, 12 L. R. A. 301. In *Thayer v. Pratt*, 47 N. H. 470, where, as in *Foster v. Dudley*, 30 N. H. 463, the attempted garnishment was after verdict and before judgment, the court says: "Our statute must be construed in reference to existing remedies, and we are aware of no practice that will justify setting aside a verdict that has been fairly and properly rendered to let in a defense arising afterward."

These cases state the law correctly, as far as they go. They hold, substantially, that a verdict cannot be made the subject

of garnishment, because, after verdict, the opportunity to plead the garnishment has passed. There is a further reason which appears to us to be equally conclusive. Garnishment is a proceeding in the nature of an involuntary suit by the defendant against the garnishee for the benefit of the plaintiff. The person sought to be garnished must be one against whom the defendant has a present right of action. In this case the defendant had no such right of action against the garnishee at the time of the service of the trustee process. He had simply a verdict, on which the entry of judgment was necessary to give him a right of action. No matter how long a verdict remained on the records of the court, no action could ever be brought upon it. In such case garnishment, therefore, fails, not only because after verdict the time to plead the garnishment has passed, but because the verdict itself is entirely lacking in the essentials of a subject of garnishment.

The attempted garnishment was invalid, and the garnishee cannot be charged.

Case remanded to the district court of the sixth judicial ⁴¹⁴ district, with direction to enter judgment for the plaintiff in accordance with the agreement of the parties.

For Authorities in support of the principal case, see *Lehmann v. Farwell*, 95 Wis. 185, 60 Am. St. Rep. 111; *Gamble v. Central R. R. etc. Co.*, 80 Ga. 595, 12 Am. St. Rep. 276.

CRANSTON PRINT WORKS v. WHALEN.

[27 B. I. 445, 63 Atl. 176.]

LANDLORD AND TENANT.—A Notice to Quit may be served on the wife of a tenant at their domicile in his absence. (p. 58.)

Benjamin W. Grim, for the plaintiff.

P. H. Quinn and Edward M. Sullivan, for the defendant.

⁴⁴⁵ DOUGLAS, C. J. This is an action of trespass and ejectment, brought to recover a certain tenement which the defendant held of the plaintiff from month to month, the term beginning on the first day of the month.

Notice in due form, directing the defendant to quit on September 1st, was delivered on August 14th to the defendant's wife upon the premises, the defendant himself being absent.

A previous attempt to dispossess the defendant had been made which had failed through some irregularity, and the defendant's attorney directed the wife to bring him any notice which might be served upon her. Accordingly, when she received the notice in question, she took it the same afternoon to the attorney. She further testified that she did not mention the notice to her husband, who could not read or write. The husband also testified that he was not informed of the notice till he went to pay his next rent.

446 Upon this evidence the defendant moved the court to direct a verdict in his favor. This was denied, and the court left to the jury the question of service of notice, saying: "If you find in this case that this notice was delivered to the wife in the premises on the fourteenth day of August, the presumption is that the husband himself received that notice. Now, that being the presumption, it becomes necessary for the defendant to bring forth sufficient evidence to satisfy your minds that he did not get the notice."

After verdict for the plaintiff the defendant moved for a new trial, on the ground that the verdict was against the evidence, and the presiding judge denied the motion.

The defendant brings here his exceptions to the refusal of the presiding judge to direct a verdict and to his refusal to grant the motion for a new trial.

We think that both exceptions must be overruled. They involve the question whether the service was good, either because service of such a notice is good service when made upon a wife at their domicile in the absence of the husband, or because the jury were warranted in finding, as an inference from the fact of service upon the wife, that actual service was made upon the husband.

The statute requires written notice to terminate a letting from month to month, but does not prescribe either the form of the notice nor any particular mode in which it must be served: Gen. Laws, cap. 269, sec. 4. Where the notice is mailed to the tenant or given to his wife or an agent of his appointment, the usual presumptions arise that it has been received by him. The English cases cited by the defendant go to this extent, at least.

In *Jones v. Marsh*, 4 Term Rep. 464, the notice to terminate a tenancy from year to year was served on a servant at the tenant's house, which was not on the demised premises. Lord

Kenyon held the service good, absolutely, and Buller, J., held it good in the absence of contradictory evidence. In *Doe v. Lucas*, 5 Esp. 153, notice left at the tenant's house, but not given to his wife or to a servant, was held not properly served. In *Doe v. Dunbar*, M. & M. 10, it was held by Lord Chief Justice ⁴⁴⁷ Abbott that service at the tenant's house upon a servant and upon a lady there was good. In *Smith v. Clark*, 9 Dowl. Pr. Cas. 202, the four judges of the common pleas held that delivery of the notice to quit to the tenant's wife, at his dwelling-house, is sufficient evidence to sustain a finding that the notice reached the tenant. In *Roe v. Street*, 2 Ad. & El. 329, notice served upon the wife of the tenant upon the premises was held good.

1 Washburn on Real Property, sixth edition, section 816, lays it down as a general rule that "notice to quit may be left at the dwelling-house of the tenant with a servant, though it may not be upon the premises." Taylor, in 2 Landlord and Tenant, eighth edition, section 484, says: "It seems also settled that, when personal service cannot be effected, it will be sufficient if notice is left with the husband, wife, or a servant of the tenant, at his usual place of residence, whether upon the demised premises or elsewhere, and its nature and contents explained at the time, and that whether the tenant received the notice or not." To the same effect is 18 American and English Encyclopedia of Law, 399.

In Massachusetts, service upon a wife or servant is held good as matter of law: *Blish v. Harlow*, 15 Gray, 316; *Clark v. Keliher*, 107 Mass. 406.

We think the Massachusetts rule is reasonable and just. A wife is by virtue of her relationship to her husband the keeper of his house and his agent to perform such duties relating to the domicile as are necessary in his absence. Among these may be reasonably included the reception of notices relating to the tenure of the premises. If personal notice upon the tenant were necessary, it would be a difficult undertaking for a landlord to terminate a monthly tenancy if the tenant should wish to avoid service.

We hold, therefore, that the service upon the wife in the case at bar was a sufficient compliance with the statute.

The exceptions are overruled, and the case will be remanded to the superior court for judgment on the verdict.

For Authorities in support of the principal case, see *Bell v. Bruhn*, 30 Ill. App. 300; *Blish v. Harlow*, 81 Mass. (15 Gray) 316; *Beiler v. Devoll*, 40 Mo. App. 251; *Hazeltine v. Colburn*, 13 N. H. 466; *Cadwallader v. Lovece*, 10 Tex. Civ. App. 1, 29 S. W. 666, 917.

MOORE v. WOONSOCKET STREET RAILWAY COMPANY.

[27 R. I. 450, 63 Atl. 313.]

STREET RAILWAY—Injury to Passenger—Evidence.—If, in an action against a street railway company by a passenger thrown to the ground while alighting from a car, the defendant has been permitted, without objection, to put in evidence a plan of the street where the accident happened, showing the location of “white poles,” evidence is admissible to show the meaning of such poles and their relation to the rules of the company in operating and stopping its cars. (pp. 60, 61.)

STREET RAILWAY—Starting Car on Signal of Unauthorized Person.—If a street-car comes to a stop, and then, upon the signal of an unauthorized person, starts as a passenger is alighting, the carrier is not answerable for the accident which follows, if not preventable by the exercise of due care on its part after the giving of the signal. (p. 62.)

John W. Hogan and John J. Mee, for the plaintiff.

John J. Heffernan and James H. Rickard, for the defendant.

⁴⁵⁰ PARKHURST, J. This is an action of trespass on the case for alleged negligence of the defendant, whereby the plaintiff was deprived of the services and society of his wife, Catherine Moore.

It appears in evidence that on the evening of July 9, 1904, the plaintiff's wife was a passenger on one of the defendant's cars, and was injured by a fall while alighting. The case made by the plaintiff's witnesses was that, desiring to alight, and not ⁴⁵¹ being able to attract the attention of the conductor, who was in the front of the car collecting fares, Mrs. Moore pulled the bell cord herself; that the car came to a full stop and she proceeded to alight; that while she was upon the running-board, preparing to step to the ground, the usual starting signal of two bells was given, the motorman in response thereto started the car, and she was thrown to the ground. No one testified who it was who gave the starting signal, and there is no evidence that the motorman or con-

ductor knew, or had reason to know, either that Mrs. Moore desired to alight or that she was in fact attempting to alight at the time of the accident.

On the other hand, the defendant's witnesses testified that the car was moving at a uniform speed of three or four miles per hour from the last stopping place until after Mrs. Moore fell, and that, after vainly signaling to the conductor, she voluntarily left the car while it was in motion. The motorman testified that he did not hear any signal to stop or start the car just before the accident, and the conductor testified that he did not hear any signal given to stop the car, nor was any signal to start the car given to his knowledge.

The jury returned a verdict for the plaintiff, and assessed his damages at four thousand five hundred dollars. The defendant petitions for a new trial upon the grounds: 1. That the verdict is contrary to the evidence; 2. That the verdict is contrary to the law; 3. That the damages are excessive; 4. That the judge erred in excluding testimony offered by the defendant; 5. That the judge erred in refusing to instruct the jury as requested by the defendant; 6. That the defendant has discovered new evidence.

The defendant, by its engineer, without objection, placed in evidence a plan showing the street where the accident occurred, with its intersecting streets, track, location of "white poles," and other details, and showing various measurements of distances between "white poles," etc.

The defendant then proceeded, in the course of its testimony, to inquire of the motorman who ran the car in question at the time of the accident, "Did the company have any established stopping places on Social street?" which was ruled out, on objection by plaintiff's attorney, on the ground that the defendant ⁴⁵² should not be allowed to prove its own rules as a defense in the action. As shown by the arguments on the question of admissibility in the record, the purpose of this question was to lead up to an explanation of the meaning of the "white poles" already shown to exist, their relation to the rules as to operating cars, and to show what were the rules of the defendant as to stopping and starting cars; and that this explanation was offered for the purpose of giving to the jury full knowledge of the conditions under which this car was being run at the time of the accident, as a circumstance proper to be considered by the jury in weighing conflicting testimony as to the causes of the accident.

We think the trial court erred in excluding this testimony. It would have been proper to allow the defendant to explain fully what was the meaning of the "white poles," shown upon the plan; as this matter was left, by the exclusion of this testimony, without explanation, we cannot know what would have been shown; but it left a matter of apparent importance in a state of uncertainty which may have confused the jury, and may have prejudiced the defendant's case. The jury cannot be presumed to know what the meaning of the "white poles" was, and, as they had been shown to exist, they should have been explained.

If it was the fact that these "white poles" were, by rule of the defendant, "established stopping places," at the time of the accident, it would have been competent for the defendant to show that fact, and its relation to the rules as to the stopping and starting of cars for passengers to alight or board the cars. Such evidence as to regular practice or custom has been deemed admissible and competent in several cases, where its admissibility has been questioned, and when the testimony as to the cause of the accident was conflicting: *Maisels v. Dry Dock etc. Co.*, 16 App. Div. 391, 45 N. Y. Supp. 4; *Nassau Elec. R. Co. v. Corliss*, 126 Fed. 355; *Alexandria etc. R. Co. v. Herndon*, 87 Va. 193, 12 S. E. 289. See, also, *Mitchell v. Chicago etc. Co.*, 51 Mich. 236; *Killian v. Georgia R. Co.*, 97 Ga. 727, 25 S. E. 384; *McCarty v. St. Louis etc. Ry. Co.*, 105 Mo. App. 596, 80 S. W. 7; *Washington etc. R. Co. v. Grant*, 11 App. D. C. 107; *Gallagher v. 453 W. E. St. Rey. Co.*, 156 Mass. 157, 30 N. E. 480; *Jacobson v. Transit Co.*, 106 Mo. App. 339, 80 S. W. 309, in some of which it appears that testimony of this character was introduced without objection and was treated as of importance in determining the issue of liability.

The defendant requested the court to charge as follows:

"1. If the jury find that the car upon which the plaintiff's wife, Catherine Moore, was riding on July 9, 1904, came to a full stop, and before she had fully alighted was started upon a signal to start being given by some person not authorized by the defendant to give such signal, then the verdict must be for the defendant.

"2. If the jury find that the car upon which the plaintiff's wife, Catherine Moore, was riding on July 9, 1904, came to a full stop, and before she had fully alighted therefrom was

started upon a signal to start being given by some person not authorized to give such signal; and if the jury further find that the accident which happened to the plaintiff, Catherine Moore, could not have been prevented after the giving of such unauthorized signal by the exercise of due care on the part of the conductor or motorman in charge of said car, then the verdict must be for the defendant."

We think the court erred in refusing to charge substantially as requested. There was evidence from which the jury could have found a state of facts upon which these requests might be founded, and we think the principle of law involved in these requests is sound. The charge not only does not embody the substance of these requests, but, on the contrary, says directly and positively as follows: "If the car did start from the signal or a bell, no matter who rung the bell, gentlemen, if that bell was run and the car started, if she didn't do it, and the car did start and she was thrown, the company are responsible for it." .

Although no specific exception is taken to this portion of the charge, it is manifestly in such direct contradiction of the principle of law involved in the requests above set forth, the refusal of which was excepted to, that we feel bound to take it into account in discussing them; and it shows conclusively ⁴⁵⁴ that the jury were erroneously instructed in this respect: *McDonough v. Third Ave. R. Co.*, 95 App. Div. 311, 88 N. Y. Supp. 609; *Krone v. Southwest etc. Ry. Co.*, 97 Mo. App. 609, 71 S. W. 712; *McDonnell v. New York etc. R. Co.*, 35 App. Div. 147, 54 N. Y. Supp. 747; *Gulf etc. Ry. Co. v. Phillips*, 32 Tex. Civ. App. 238, 74 S. W. 793; *North Chicago St. Ry. Co. v. Cook*, 145 Ill. 551, 33 N. E. 958.

We think that the defendant's exceptions in the matters above set forth must be sustained; we therefore need not discuss the other grounds set forth in defendant's petition for new trial.

The defendant's petition for a new trial is granted, and the case is remitted to the superior court for further proceedings.

The Duty of Street Railway Company to see that passengers have alighted from a car before again starting it is discussed in *Leavenworth Electric R. R. Co. v. Cusick*, 60 Kan. 590, 72 Am. St. Rep. 374; *Werbowsky v. Fort Wayne etc. Ry. Co.*, 86 Mich. 236, 24 Am. St. Rep. 120; *Birmingham etc. Ry. Co. v. Smith*, 90 Ala. 60, 24 Am. St. Rep. 761.

WRYNN v. DOWNEY.

[27 R. I. 454, 63 Atl. 401.]

BREACH OF MARRIAGE CONTRACT.—Evidence of Seduction is not admissible in aggravation of damages in an action for breach of promise to marry. (p. 72.)

ARGUMENT OF COUNSEL.—Restriction by Court.—The justice who presides at a jury trial must exercise a sound discretion in confining counsel to the discussion of vital issues; and unless that discretion is abused, its exercise is not cause for a new trial. (p. 75.)

Joseph J. Cunningham and Ryan & Nickerson, for the plaintiff.

Barney & Lee and Prince H. Tirrell, Jr., for the defendant.

⁴⁵⁴ DOUGLAS, C. J. This case was brought to recover damages for breach of promise of marriage, and after verdict for the plaintiff for ten thousand dollars, the defendant petitions for a new trial on the grounds that the verdict is against the law and the evidence, ⁴⁵⁵ that the damages are excessive, and that the presiding justice erred in admitting certain evidence against the objection of the defendant and in restricting the argument of defendant's counsel.

The evidence to the admission of which exception was taken was offered to enhance the damages by showing that the defendant had seduced the plaintiff after he had promised to marry her. What the plaintiff actually testified to was that at some time after the promise to marry there was sexual intercourse between the plaintiff and defendant. No circumstances are given, nor is it said even that the misconduct was suggested by the defendant. The evidence is as follows:

"Q. Whether or not any time after the promise to marry which you have related, was there sexual intercourse between you and Mr. Downey? A. Yes.

"Q. When after the promise of marriage? A. I don't just remember how long after.

"Q. What month was it in? A. I think June.

"Q. State the circumstances preceding it; what was the conversation? A. I don't just remember.

"Q. I will ask you directly, was it done under promise of marriage? A. Of course, I wouldn't have thought of such a thing if I didn't think he was going to marry me.

"Q. Did that intercourse continue, Miss Wrynn? A. Yes."

This is all the evidence on the subject, except the defendant's denial of the fact and the statement of a witness that the defendant confessed the fact to him.

If the jury had scrutinized the evidence with the care which such an accusation demands, they might have declined to believe that a woman who was virtuous before could yield to the persuasion of a lover and then forget the month in which her fall occurred and the circumstances which led up to it. One would suppose that so serious an event in her life would have marked itself in her recollection more sharply than an ordinary experience. But the evidence quoted above was admitted and accepted by the jury as proof of seduction, and the defendant's exception raised the question which is now before us: Whether or not in Rhode Island evidence of seduction may be admitted in aggravation of damages in an action for breach of promise of marriage.

⁴⁵⁶ The question came up for decision by the court in 1851, in *Perkins v. Hersey*, 1 R. I. 493. At that time the full bench of the supreme court sat in jury cases, and the charge of Chief Justice Greene is therefore the opinion of the court. In directing the jury as to the rule of damages, he says: "The fact that the plaintiff was seduced you will not consider in this connection. We have a statute which affords the plaintiff a remedy for the injury thus done her in a more appropriate form." The last statement of the charge is not clear. If it refers to the statute, Digest of 1844, page 392, section 78, punishing as a criminal any person who should "obtain carnal knowledge of a female by virtue of a feigned or pretended marriage, or by a false or feigned expressed promise of marriage," it may be said that this affords no remedy to the plaintiff. The statute, though superseded in terms, is still substantially embraced in the statute, General Laws, caption 281, section 5, enacted as "An act for the better protection of the persons of women and girls," etc., Public Laws of Rhode Island, caption 738, January, 1889, which has, however, a much broader scope than the former law. The action of tort which the father or master has for the seduction of his daughter or servant, which in the case of father and daughter would be practically available for her benefit, is not given by statute. The report of the case recites that the plaintiff had given birth to a child, and it seems most likely that the "more appropriate" statutory remedy was the process by which the

putative father is compelled to take upon him the care of his child. Whatever may have been the allusion, the doctrine is plainly declared and has been followed in this state for more than fifty years. The principle on which it is founded has been reaffirmed by this court as lately as October 13, 1891, in *Conlon v. Cassidy*, 17 R. I. 518, 23 Atl. 100, where it is said: "All the counts in the declaration except that entitled 'additional count' are to be regarded as counts for seduction, the promises of marriage being introduced merely in aggravation. To these counts the demurrer is sustained. The plaintiff cannot allege her own criminal misconduct as a ground of action."

The opinion in *Mainz v. Lederer*, 21 R. I. 370, 43 Atl. 876, attempts to explain away the decision in *Perkins v. Hersey*, 1 R. I. 493, and ⁴⁵⁷ while affirming the doctrine of *Conlon v. Cassidy*, 17 R. I. 518, 23 Atl. 100, that for mere seduction there can be no action, holds that "assuming seduction brought about solely through a promise of marriage," the fact of seduction may be considered in assessing damages. The court in this decision, therefore, presume to change the law which had always prevailed in this state. The defendant asked for a reargument, which was granted just before Chief Justice Matteson resigned, and the reargument was had, after Judge Stiness became chief justice, before all four justices of the appellate division. The result was an even division of the court, and the petition for a new trial was denied. So that, while the ruling of the trial court stood for that case, there was no authoritative decision of the question of law involved. The case at bar, then, brings the question before us anew.

Shall this court now give to a woman the right to recover damages from her seducer, who has likewise violated his promise to marry her? Can it hold that, while a woman cannot allege seduction as a cause of action and a breach of promise of marriage in aggravation of damages, she may hereafter in this state allege a breach of promise of marriage as a cause of action and seduction in aggravation of damages?

It does not seem to us to be within the province of the judiciary to alter a rule of law which has been so long in force. It is for the court, indeed, to find and declare new applications of old principles, adapting them to the diversified circumstances of the time; but for the legislature alone, under

constitutional limitations, to repeal and modify such laws, either statute or common, as it deems outworn or hurtful.

The court may foster and direct the growth and development of established rights, but may not suppress or ignore them, or create new ones. The case at bar presents no new relations or problems. Unhappily, seductions and breaches of the promise of marriage have been dealt with by the courts from time immemorial: *Y. B. 45, Edw. III. fol. 23, case 30*; *Stretch v. Parker, 1 Rolle Abr. 22*; *Holcroft v. Dickenson, Cart. 233*; *Holt v. Ward Clarencieux, 2 Strange, 937*; *Harrison v. Cage, 1 Ld. Raym. 386*.

It is true that in most of the United States the courts have ⁴⁵⁸ ignored these limitations on judicial construction and have sustained the contention of the plaintiff as to the admissibility of such evidence. But aside from the objection just set forth, an examination of the decisions does not convince us that the conclusions which they have reached are supported by sound reason.

It was shown by Breese, J., in his able dissenting opinion in *Fidler v. McKinley, 21 Ill. 308*, that all the cases up to his time—1859—were founded upon a dictum of Parsons, C. J., in *Paul v. Frazier, 3 Mass. 71, 3 Am. Dec. 95*. He mentions and criticises *Conn v. Wilson (1814), 2 Overt. (Tenn.) 233, 5 Am. Dec. 663*, *Boynton v. Kellogg (1807), 3 Mass. 189, 3 Am. Dec. 122*, *Whalen v. Layman (1828), 2 Blackf. 194, 18 Am. Dec. 157*, *Green v. Spencer (1834), 3 Mo. 318, 26 Am. Dec. 672*, and *Tubbs v. Van Kleek (1851), 12 Ill. 446*, where the chief justice dissented.

The case of *Paul v. Frazier, 3 Mass. 71, 3 Am. Dec. 95*, was an action for seduction, and the court held that it could not be maintained, saying: "She is a partaker of the crime, and cannot come into court to obtain satisfaction for a supposed injury to which she was consenting"; and then the learned judge discusses the propriety of amending the law so as to give such an action, and utters the following dictum: "As the law now stands, damages are recoverable for a breach of promise of marriage; and if seduction has been practiced under color of that promise, the jury will undoubtedly consider it as an aggravation of the damages."

What was said by Judge Breese in 1859 is substantially true at the present day. All the leading cases, with two or three exceptions referred to below, are based simply upon the au-

thority of this dictum and the cases through which it has been transmitted.

King v. Kersey (1850), 2 Ind. 402, relies on Whalen v. Layman, 2 Blackf. 194, 18 Am. Dec. 157; Wells v. Padgett (1850), 8 Barb. 323, quotes Paul v. Frazier, 3 Mass. 71, 3 Am. Dec. 95, Green v. Spencer, 3 Mo. 318, 26 Am. Dec. 672, and another case in the same volume—Hill v. Maupin (1834), 3 Mo. 323. Coil v. Wallace (1854), 24 N. J. L. 291, holds that the action of breach of promise of marriage is an exception to all rules of damages, and cites Paul v. Frazier, 3 Mass. 71, 3 Am. Dec. 95. Potts, J., dissenting, says, on this point (page 318): "I am not able to assent to the doctrine, that in an action for breach of promise of marriage, the plaintiff ⁴⁵⁹ can legally give in evidence her seduction by the defendant in aggravation of damages. She cannot have an action for seduction; she cannot recover damages directly for such an injury. This is the result of principles as well fixed and established as any in the law. She is a party to the mischief, in the eye of the law, equally guilty with her seducer; and I cannot see, with this well-established doctrine standing in the way, how she can be allowed to recover damages for the seduction under the form of an action for breach of promise." Goodall v. Thurman (1858), 38 Tenn. 209, follows Conn v. Wilson, 2 Overt. (Tenn.) 233, 5 Am. Dec. 663. Matthews v. Cribbitt (1860), 11 Ohio St. 330, contains no argument and no citation. Kniffen v. McConnell (1864), 30 N. Y. 285, approves Wells v. Padgett, 8 Barb. 323.

Sherman v. Rawson (1869), 102 Mass. 395, argues the point as follows (page 399), Colt, J.: "It may be true that damages for the seduction, as a distinct ground of action, cannot be added to the damages which the plaintiff is entitled to recover for a breach of the alleged promise to marry. It would be an indirect mode by which the plaintiff could recover damages for an act which cannot be the foundation of an action in favor of the party seduced, because the policy of the law forbids satisfaction, to a partner in the crime, for a supposed injury to which she was consenting. But it does not follow that the fact of the seduction is not to be taken into consideration at all by the jury. The action is nominally for a breach of contract, but the measure of damages is fixed by rules not precisely like those which apply to ordinary contracts where injury to the person is not involved. They are awarded

upon principles more commonly applicable in actions of tort. The plaintiff is entitled to compensation, but that term implies indemnity for all that she has suffered by the defendant's bad faith. It includes injury to her affections and wounded pride. It involves necessarily a consideration of all the circumstances of the plaintiff's actual situation at the time of the breach of the promise. If, by reason of an imprudent or criminal act in which both participated, she is brought to such a state that the suffering occasioned ⁴⁶⁰ to her feelings and affections must necessarily be increased by his abandonment, then that would be but an inadequate and poor compensation which did not take it into account. Damages, it is true, must be awarded solely for the suffering which results from the defendant's refusal to perform his promise. But under this rule, even they cannot be justly estimated without regarding the increased exposure to mortification and distress to which she has been left by a seduction and promise of marriage afterward broken. We understand this to have long been the law of this commonwealth. The remark of Parsons, C. J., in *Paul v. Frazier*, 3 Mass. 71, 3 Am. Dec. 91, in reference to the damages to be awarded in these cases, seems to go further''; citing *Weaver v. Bachert*, 2 Pa. 80, 44 Am. Dec. 159, which holds that seduction cannot be given in evidence but circumstances may; *Baldy v. Stratton*, 11 Pa. 316; *Wells v. Padgett*, 8 Barb. 323; *Tubbs v. Van Kleek*, 12 Ill. 446; *Kniffen v. McConnell*, 30 N. Y. 285.

This is the first attempt to show that the doctrine can be reconciled with the established principle that a wrongdoer cannot recover from his accomplice compensation for what he has lost by committing the offense.

The argument of the learned judge is: A woman cannot recover damages for her seduction directly or indirectly, because it is an offense on her part to consent to the seduction; but she may recover more damages when she has been seduced, because of the condition in which seduction leaves her, than she may when she has not been seduced, i. e., seduction as a fact constitutes no cause of action or basis for damages, directly or indirectly; seduction as a circumstance is the basis of increased damages.

We cannot assent to this reasoning. If a woman recovers additional damages when she has been seduced, she is recovering indemnity for the consequences of an offense against the law, in which she has been a consenting actor.

If, during a promise of marriage, a woman should be seduced by a third person, could she recover more damages against her promisor in an action for a breach of the promise on that account, as a circumstance? On the contrary, her yielding to such seduction would absolve the promisor entirely, or in some ⁴⁶¹ jurisdictions would go in mitigation of damages: *Dupont v. McAdow*, 6 Mont. 226, 9 Pac. 925.

It follows clearly, then, that if she may recover, it is only against the seducer, and really for the seduction. If she may recover such indemnity in an action of breach of promise of marriage, it is the only action of contract or tort known to the common law where it is allowable. In any case of tort, where the injury is the result of her own act and another's, her action is wholly barred by her contributory negligence. In any action of contract, she cannot voluntarily enhance the damages and recover them so aggravated by herself.

Sauer v. Schulenberg (1870), 33 Md. 288, 3 Am. Rep. 174, relies on *Paul v. Frazier*, 3 Mass. 71, 3 Am. Dec. 91; *Wells v. Padgett*, 8 Barb. 323; *Kniffen v. McConnell*, 30 N. Y. 285; *Coil v. Wallace*, 24 N. J. L. 291; *Tubbs v. Van Kleeck*, 12 Ill. 446; *Whalen v. Layman*, 2 Blackf. 194, 18 Am. Dec. 157; *Conn v. Wilson*, 2 Overt. (Tenn.) 233, 5 Am. Dec. 663.

Sheahan v. Barry (1873), 27 Mich. 217, argues that seduction is itself a breach of the promise to marry, that the law does not regard the parties as equally at fault, and that the practice to admit such testimony is sustained by the common law and the sentiment of mankind.

A subsequent case, *Bennett v. Beam* (1880), 42 Mich. 346, 36 Am. Rep. 442, 4 N. W. 8, still further develops these views, as follows (page 351): "That the act of seduction, under a promise of marriage, should go a great ways with a jury in estimating the damages, ought to be true both in law and fact. In many cases, the loss sustained from a breach of the agreement to marry may be but slight indeed; but never can this be the case where the lifelong blight which seduction entails enters into the case. Respectable society inflicts upon the unfortunate female a severe punishment for her too confiding indiscretion, and which the marriage would largely, if not wholly, have relieved her from. The fact of seduction should, therefore, go a great ways in fixing the damages, as in no other way could amends be made the plaintiff for the injury she sustained, or the defendant be properly punished for his

aggravated offense. It would seem also to be in full accord with the sense of justice implanted in the heart of every right, high-minded person, and therefore with the reason of the common law."

The argument of the Michigan court is more logical than the ⁴⁶²Massachusetts opinion, though the premises from which it proceeds are unstable. It denies, first, that the parties are in *pari delicto*, and states, secondly, that the doctrine is established by the common law. Neither of these statements is true, if predicated of the English common law as adopted by us: See opinion of Treat, C. J., in *Tubbs v. Van Kleeck*, 12 Ill. 446. The American current of decisions, as we have seen, flows from the Massachusetts dictum.

In Michigan a statute was in force permitting a woman to sue her seducer for damages in the name of her parent if she were a minor, or in the name of any relative whom she might select if she were of full age: *Sheahan v. Barry*, 27 Mich. 217. This might have been construed to declare the public policy of Michigan, and nothing but the rules of pleading would then stand in the way of decision; but when the court proceeds to invoke the deceitful authority of the human heart, he forgets that that organ is figuratively the seat of the emotions and not of the understanding. The heart deals with individual cases, not with general principles, and the common law leaves sufficient scope for the sentiments of pity or righteous indignation in the latitude of penalties within which the court fixes sentences for crime, and in the still broader discretion of a petit jury in tort cases calling for vindictive damages.

Williams v. Hollingsworth (1873), 6 Baxt. 12, contains no citation and no argument. A new trial was granted on other grounds. *Leavitt v. Cutler* (1875), 37 Wis. 46, contains no argument. *Collins v. Mack* (1877), 31 Ark. 684, is the converse of our case of *Conlon v. Cassidy*, 17 R. I. 518, 23 Atl. 100. There were apparently two counts in the declaration—one for breach of promise, one for seduction. It was held that the first would lie, and the second might be treated as an allegation in aggravation of damages. The question is not discussed. The only citation is *Sedgwick on Damages*, sixth edition, 248.

In *Hattin v. Chapman* (1879), 46 Conn. 607, there is no discussion and there are no citations.

Bennett v. Beam (1880), 42 Mich. 346, 36 Am. Rep. 442, 4 N. W. 8, we have already considered.

⁴⁶³ Kurtz v. Frank (1881), 76 Ind. 594, 40 Am. Rep. 275, cites cases to the effect that punitive damages may be allowed. The doctrine was already adopted in that state by Whalen v. Layman, 2 Blackf. 194, 18 Am. Dec. 157.

Giese v. Schultz (1881), 53 Wis. 462, 10 N. W. 598, and the same case again before the court in (1886), 65 Wis. 487, 27 N. W. 353, grants a new trial twice because damages for sickness resulting from seduction were allowed. Cole, C. J., dissents, but on what ground does not appear.

Kelley v. Highfield (1887), 15 Or. 277, 14 Pac. 744, is not in point.

McKinsey v. Squires (1889), 32 W. Va. 41, 9 S. E. 55, is a bill in equity for breach of promise of marriage and seduction, and relies on Sherman v. Rawson, 102 Mass. 395, Sauer v. Schulenberg, 33 Md. 288, 3 Am. Rep. 174, Wells v. Padgett, 8 Barb. 323, Kniffen v. McConnell, 30 N. Y. 285. The decision that the two causes of action can be joined in a bill in equity depends on a state statute.

Bird v. Thompson (1888), 96 Mo. 424, 9 S. W. 788, affirms the law as theretofore settled in Missouri.

Musselman v. Barker (1889), 26 Neb. 737, 42 N. W. 759, cites Matthews v. Cribbett, 11 Ohio St. 330; Tubbs v. Van Kleeck, 12 Ill. 446; Coil v. Wallace, 24 N. J. L. 291.

Lowden v. Morrison (1889), 36 Ill. App. 495, follows Tubbs v. Van Kleeck, 12 Ill. 446, Burnett v. Simpkins, 24 Ill. 264, and Fidler v. McKinley, 21 Ill. 308.

Daggett v. Wallace (1889), 75 Tex. 352, 16 Am. St. Rep. 908, 13 S. W. 49, cites Sherman v. Rawson, 102 Mass. 395, and Kelley v. Riley, 106 Mass. 339, 8 Am. Rep. 336.

Jennette v. Sullivan (1892), 63 Hun. 361, 18 N. Y. Supp. 266, follows the former New York decisions.

Kaufman v. Fye (1897), 99 Tenn. 145, 42 S. W. 25, follows Goodall v. Thurman, 38 Tenn. 209, and Williams v. Hollingsworth, 6 Baxt. (53 Tenn.) 12.

The remarkable unanimity among so many eminently respectable tribunals in imposing this doctrine upon the common law must be founded on some supposed natural equity, and this can be none other than the conviction, which some of the opinions quoted come very near expressing, that sexual intercourse between persons who are engaged to marry each

other is not criminal. But this is not the doctrine of the common law. Such an act could be innocent only if intended as an assumption of the marriage relation. The common law made *verba de futuro cum copula* evidence of marriage itself, not the basis of an action for breach of promise. The question in such cases ⁴⁶⁴ is one of intention purely: *Peck v. Peck*, 12 R. I. 485, 34 Am. Rep. 702. If the intention is to consummate a marriage, it is a marriage and the act is innocent; if it is not so intended by the parties, the act is criminal in both. The presumption that the intercourse is innocent, therefore, precludes an action for not doing what the presumption says has been done: See 1 Bishop on Marriage, Divorce and Separation, sec. 353, and following. And whether the act be innocent or guilty, the maxim, "*Volenti non fit injuria*," takes from both consenting parties the right to sue at common law.

Against these authorities we are constrained to adhere to the conclusions of Treat, C. J., in *Tubbs v. Van Kleeck*, 12 Ill. 446; of the court of Kentucky, in *Burks v. Shain*, 2 Bibb. 341, 5 Am. Dec. 616; of the court of Pennsylvania, in *Weaver v. Bachert*, 2 Pa. 80, 44 Am. Dec. 166, *Hay v. Graham*, 8 Watts & S. 27, and *Baldy v. Stratton*, 11 Pa. 316; of Judge Breese in *Fidler v. McKinley*, 21 Ill. 308; of Potts, J., in *Coil v. Wallace*, 24 N. J. L. 291, and upon the uniform practice of our own court since the time of Chief Justice Greene.

If the question were to be decided with reference to the justice and expediency of the present law, we should doubt the propriety of making the suggested alteration.

The criminal statutes now make a wide distinction between the seducer and his victim in the punishments they allot to each. If the female be under eighteen years of age, or if the seduction be obtained by fraud or threats, the seducer may be imprisoned for five years. The penalty may be ten years' imprisonment if the female is under sixteen—Gen. Laws, cap. 281, secs. 4, 5—but there can be no conviction upon the uncorroborated testimony of the *particeps criminis*. The common law gives to the father or master of a minor female an action for damages against the seducer in which vindictive damages are allowable; but otherwise holds both parties as free agents to an equal responsibility. It may be doubted, in the words of Chief Justice Parsons, in *Paul v. Frazier*, 8 Barb. 323, in case the lawmakers give an action to a woman to recover for her

own seduction, "whether seductions will afterward be less frequent, or whether artful women may not pretend to be seduced in order to obtain a pecuniary compensation." And may not an artful woman who has had illicit relations with a man as easily pretend to have received a promise ⁴⁶⁵ of marriage in order to recover damages for seduction? Fraud and cunning and avarice and desire are not exclusive characteristics of either sex. We may not assume that the roles of temptress and tempted, as cast in the earliest recorded human tragedy, are always inverted in the dramas of modern society.

It seems to us that social morality will not be promoted by relieving either sex of legal responsibility for voluntary action. In California, Indiana, Iowa, and Tennessee the legislatures have taken a different view, and have expressly conferred upon a seduced woman, if unmarried, a right of action for her seduction: Note to *Weaver v. Bachert*, 44 Am. Dec. 166, and cases cited. If the change in our law is thought desirable, it should be made by the General Assembly, as we have said before. What the law ought to be is for the legislature, not for the court, to decide.

The plaintiff's counsel argues that, if this evidence was not pertinent to aggravate the damages, it was admissible to prove, first, the contract of marriage; secondly, the breach of that contract. He is not without citations which support both propositions; but sound reason and the weight of authority are on the other side. For the first purpose this evidence could be deemed relevant only in a community where such misconduct was an ordinary and usual incident of betrothal. It would be an unwarranted insult to virtuous men and women to adopt such a premise. The remarks of Howk, C. J., in *Felger v. Etzell*, 75 Ind. 417, are just and conclusive. He says: "We are aware that there are many cases in which it has been held that evidence of the conduct of the parties toward each other is admissible as tending to prove the existence of a promise of marriage; but such evidence, we think, should be limited, and, so far as we are advised, it has been limited, to the open, visible, or public conduct of the parties toward each other. The illicit intercourse of parties is generally consummated in the strictest privacy and secrecy, and is known only to the parties themselves; and the evidence of the parties, or of others, in regard to such intercourse, can have no possible tendency to prove the existence of a promise

of marriage. This must be so, ⁴⁶⁶ as it seems to us, in the very nature of things, unless it can be correctly said (and we need hardly say that the proposition is unreasonable and untenable) that illicit sexual intercourse naturally, necessarily, or generally, attends upon the mere promise of marriage, and is, therefore, one of the indicia of the existence of such promise."

Such evidence is held not to support an alleged promise in *Bleiler v. Koons*, 132 Pa. 401, 19 Atl. 140; *Boyer v. Sherer*, 28 Ill. App. 545.

As is said in *Dupont v. McAdow*, 6 Mont. 226, 9 Pac. 925: "We think that the fact that a man has lived with a woman as his mistress raises a very strong presumption that he does not intend to marry her at all."

Neither is the evidence logically admissible for the second purpose. While seduction may be considered an outrage which violates the trust reposed in the stronger party, it is not a refusal to marry, although by consenting to it the weaker party may invite the repudiation of the promise. But it cannot be seriously urged that such circumstances are ever introduced by a plaintiff except with the object of increasing damages. The record plainly shows that such was the intent in this case. A meritorious case could hardly arise where the contract and the breach of it could not be proven by other evidence.

In England, by Statutes 32 and 33 Victoria, chapter 68, section 2, the testimony of a party will not support a verdict "unless his or her testimony shall be corroborated by some other material evidence in support of such promise" (2 Ency. Laws of England, 238); but it has been held in Rhode Island that no such corroboration is necessary here: *Kelley v. Brennan*, 18 R. I. 41, 25 Atl. 346.

The evidence, as we conclude, was improperly admitted, and was so calculated to prejudice the jury against the defendant as to entitle him to a new trial.

Of the other exceptions taken by the defendant during the trial, only two are relied upon in his brief and argument before this court.

He complains that his argument to the jury was unduly restricted by the court, in that he was not permitted to comment upon the fact, which appeared in evidence, that some six months ⁴⁶⁷ before the beginning of this suit a similar action

for alleged breach of promise of marriage had been brought by one Mary J. Fuller, who was at one time housekeeper in a certain hotel in which this plaintiff was at the same time assistant housekeeper. The record and the affidavit do not show what inferences counsel was attempting to draw with sufficient definiteness to enable us to pass upon the legitimacy of them. So far as we can see, the circumstances shown had very little, if any, relevancy to the issues of the case. The justice who presides at a jury trial must exercise a sound discretion in confining counsel to the discussion of vital issues, and we cannot say that such discretion was abused in the present case.

The last exception is based upon the introduction of testimony apparently showing an attempt by the defendant to compromise the plaintiff's claim. Such evidence is, of course, inadmissible. In this case the defendant's counsel say that it was so insidiously led up to that no fair opportunity to object was given. We think the record shows some ground for this complaint; but as a new trial must be granted on other grounds we need not further discuss this exception, and for the same reason we express no opinion upon the weight of the evidence.

Petition for new trial granted, and case remitted to the superior court for further proceedings.

At the Common Law it seems that a woman could not recover damages for her own seduction. This error in the law, however, has been corrected in many of the states: See the monographic notes to *Weaver v. Bachert*, 44 Am. Dec. 165; *Bradshaw v. Jones*, 76 Am. St. Rep. 666.

CASES
IN THE
SUPREME COURT
OF
SOUTH CAROLINA.

**WOODWARD v. SANTEE RIVER CYPRESS LUMBER
COMPANY.**

[73 S. C. 31, 52 S. E. 733.]

PARTITION—Inclusion of Two or More Parcels.—A complaint for the partition of two tracts of land, alleging a tenancy in common between plaintiffs and one defendant in one tract, and between plaintiffs and another defendant in another tract, and title from a common source in both tracts, states but one cause of action. (pp. 79, 80.)

Smythe, Lee & Frost, Thomas & Gibbes and M. Reynolds, for the appellant.

A. J. Green, Ragsdale & Dixon and Cooper & Fraser, for the appellee.

³¹ JONES, J. The defendants appeal from the order of Judge Dantzler overruling their separate demurrers ³² to the complaint upon the ground of misjoinder of causes of action. This renders it necessary to state substantially the allegations of the complaint, and we adopt the statement of the complaint as contained in respondent's argument, as follows. The complaint alleges:

1. The death, testate, of N. M. Bynum, probate of his will and qualification of his executor.

2. Sets out Nos. 3, 4, 8 and 10 of his will, by which it appears the estate was to be appraised and divided into nine equal shares, and upon the division being made, one-ninth should be held in trust for his daughter, Mrs. Mobley, for life, and after her death to her children then living in fee;

one-ninth should be conveyed to his son, Robert, which ninth should include a moiety of the Taylor tract, heretofore advanced him and his brother Clarence, at its appraised value; and one other ninth to Clarence, upon the same conditions as to Robert's share.

3. Describes the "Taylor tract."

4. Alleges that in pursuance of the terms of the will, in order to participate in the partition of the said estate, Robert and Clarence surrendered their deeds to the Taylor tract, and the lands thereby conveyed were thrown into "hotchpot," and appraised and divided with the residue of the estate, on the 28th of November, 1876. Sets out the return in partition, by which it appears five hundred and fifty-three acres of the residuary estate was added to the upland of the Taylor tract, and made the same in judgment of commissioners in partition fully two-ninths of the land belonging to said estate, and all the swamp land was allotted to shares Nos. 4, 5 and 6, to equalize the division.

5. That Mrs. Mobley received lot No. 4, which carried with it the undivided one-third of all the swamp land, including the swamp, that before partition had been attached to the Taylor tract, and the same became vested in her for life, with remainder to her children in fee.

6. An attempted conveyance by the executor prior to the partition of the Taylor swamp to Robert and Clarence, purporting ³³ to be made in pursuance of the partition, but in direct contravention thereof, which deed is alleged to be inoperative, in so far as plaintiff's one-third interest is concerned.

7. That the said Taylor swamp has, through successive conveyances from the executor and his grantees, with full notice of the partition and settlement and of the rights of plaintiffs thereunder, passed into the possession of defendant, Brayton, and is now held by him, and the defendant, Santee company, claims the timber rights on the said lands, and holds same with full notice and in subordination of plaintiffs' right.

8. The remainder of the swamp land of the said estate consists of the Van Buren tract, and, under the terms of the will and partition, became vested in the persons who received shares Nos. 4, 5 and 6, to wit, Mrs. Mobley, John T. and Julius A. Bynum; notwithstanding which, John T. and Julius A., the latter of whom since partition had qualified as ex-

ecutor, by deed dated 11th of January, 1882, but not recorded until the 11th of February, 1889, attempted to convey the same for a nominal consideration to Mrs. Bynum, the wife of Julius, which deed is alleged to be void and inoperative as to the one-third interest of the plaintiffs.

9. That Mrs. Bynum took the said land with full notice of the rights of the plaintiffs and their mother, and the same has, through successive conveyances from her, and with full notice of the rights and interest of the plaintiffs, passed into the possession of the defendant, Santee company, by deed of June 9, 1900.

10. Death of Mrs. Mobley and survival of plaintiffs, her children.

11. Insanity of N. F. Mobley and appointment of his guardian ad litem.

12. Corporation of Santee company.

13. That plaintiffs and defendant Brayton are tenants in common of Taylor swamp, described in paragraph 6; plaintiffs being each entitled to an undivided six-eightieths thereof, and defendant the remaining twelve-eightieths³⁴ thereof; and plaintiffs and defendant, Santee company, are tenants in common of the Van Buren swamp tract, described in paragraph 8, in the same proportion, and own no other lands in common.

14. That these lands are principally valuable for their timber, and plaintiffs charge the Santee company with cutting, removing and converting the timber to its own use.

The prayer is:

1. That Santee company account for waste, and pay one-third of the value thereof to plaintiffs.

2. That the land be partitioned between plaintiffs and defendants.

3. Injunction to prevent further waste pending suit.

The demurrer is in these words: "The defendant, the Santee River Cypress Lumber Company, demurs to the complaint herein on the ground that several causes of action have been united therein; in that (a) one cause of action affects one tract of land, the 'Taylor tract,' involving one set of parties and questions of fact and law; (b) another cause of action affects a different tract, the 'Van Buren tract,' involving another set of parties and other and different questions of fact and law. And neither of these causes of action, nor the property and parties involved therein, is necessarily or

properly connected with the other. And the rights and remedies concerning each should and must be set up and determined in separate suits."

A similar demurrer was filed by E. M. Brayton.

We think it is clear that the complaint states only one cause of action, for the partition of the swamp lands of the estate of N. F. Bynum, devised under his will, the plaintiffs claiming one-third interest therein as remaindermen under said will and alleging tenancy in common with the defendant, E. M. Brayton, entitled to a two-thirds interest, as to the "Taylor tract," and tenancy in common with defendant, Santee River Cypress Lumber Company, entitled to a two-thirds interest, as to the "Van Buren tract"; the complaint ²⁵ further alleges that the defendants trace their titles through mesne conveyances to those who held under the will of N. F. Bynum, as tenants in common with plaintiffs as remaindermen, and that they took their titles with full knowledge and notice of the rights and interests of the plaintiffs.

The case falls within the rule stated in *Garret v. Weinberg*, 43 S. C. 36, 20 S. E. 756, which held that the issue of an intestate father may bring one action for the partition of all his lands, properly joining as parties defendant the grantees of the widow's interest in said lands, severally owning separate parcels. This case is so full to the point that it is unnecessary to cite other authority.

The case of *Albergottie v. Chaplin*, 10 Rich. Eq. 428, 433, is relied on by the appellants to sustain their view, but that case is clearly distinguishable from this. In *Albergottie's* case, it was sought to compel Chaplin and Sams, in adverse possession of land, to surrender the land, that it might be partitioned among the other parties to the cause. Partition was not sought as against Chaplin and Sams, and as to them the cause of action was not partition but for the recovery of land; whereas, in the present action, partition is sought as against the defendants as tenants in common. The court said: "There is no alleged privity between the parties, nor anything to constitute the occupants 'tenants in common' with the plaintiffs; so that if the court should order an issue or an action to try titles, the result of such trial could not bring back the cause here for partition."

In this case there is alleged privity between the parties as tenants in common. Assuming the allegations of the complaint to be true, the effect of the conveyance to the defend-

ants was to make them tenants in common with plaintiffs: *Young v. Edwards*, 33 S. C. 404, 26 Am. St. Rep. 689, 11 S. E. 1066, 10 L. R. A. 55. The fact that each defendant is in possession of a separate parcel of the real property of the estate of Bynum does not affect the question, since plaintiff's right of partition applies to the ³⁶ land as a whole because of their tenancy in common therein with the grantors of defendants.

The judgment of the circuit court is affirmed.

The chief justice did not participate in this opinion because of illness.

Partition, Whether Must Include All the Lands of the Cotenancy.—

The principal case involves a question respecting which some confusion appears in the authorities and relating to the subject of whether a person interested as a cotenant in two or more parcels of property is entitled to insist that all shall be included in the same suit for partition. In truth, there are dicta tending to sustain the conclusion that where the subject matter of the cotenancy consists of but a single tract of land, a suit may be brought to partition a part only of it, especially when its area is extensive. Thus, it was strangely and apparently irrelevantly said in *Hopkins v. Adams*, 144 Cal. 19, 77 Pac. 712, that there is nothing in the law requiring the whole of a Mexican grant to be included in a partition suit brought by the claimants thereof. From this, as there is nothing in the fact that title rests on a Mexican grant exempting it from the general law of partition, the inference might well be indulged that a cotenant may maintain as many suits to partition the property as his caprice may dictate. Surely this is not the law, though it is doubtless true that a suit brought to partition a part only of the lands of a cotenancy would confer jurisdiction on the court, and hence require such of the parties in interest as were before it to object to any partition which did not determine and make due provision for the rights of all the cotenants. It is now practically settled that a cotenant may convey to a third person an interest in a specific part of the common property, whether it consists of two or more separate parcels or of a single tract only, but that such conveyance cannot operate to the prejudice of the cotenant not joining therein, and that the grantee may lose his title if the parcel so conveyed to him should not be set off to him or his grantor on partition. There is, it must be admitted, a decision to the effect that if one cotenant conveys in severalty distinct parts of the common property to different persons, the other cotenant cannot obtain partition by a single suit against such grantees: *Prentiss' Case*, 7 Ohio, pt. 2, 131, 30 Am. Dec. 203. The reverse of this, however, is true, for a cotenant may include in one suit all the lands of the

cotenancy, though grants in severalty of specific parts thereof have been made by a cotenant: *Parker v. Harrison*, 63 Miss. 225; *Grady v. Malose*, 92 Wis. 666, 66 N. W. 808; and a grantee in severalty of a cotenant cannot maintain a suit in partition embracing only the part conveyed to him: *Sutter v. City and County of San Francisco*, 36 Cal. 112; *Hazen v. Webb*, 65 Kan. 38, 93 Am. St. Rep. 276, 68 Pac. 1096; *Bigelow v. Littlefield*, 52 Me. 24, 83 Am. Dec. 484. In truth, where two or more persons become cotenants either of a single or of several distinct tracts of land, each of them is entitled to partition of all their common property, within the jurisdiction of the court, by a single proceeding, and cannot be deprived of this right by any act or conveyance of any of his cotenants, and if any of such cotenants makes any conveyance in severalty, his grantee also has a right to a partition of the whole property, for thereby his rights are more likely to be respected. Every suit in partition should bring before the court all persons having any right or equity in the property: *Havens v. Sea Shore Land Co.*, 57 N. J. Eq. 142, 41 Atl. 755. Therefore, such suit should include all the lands of the original cotenancy, and if it does not, any party, whether his interest extends through all such lands or is restricted to some specific part, may insist that the omitted land or lands be included in the suit, and that all persons be made parties whose presence is necessary to a partition with such lands included: *Wilkinson v. Stuart*, 74 Ala. 198; *Gore v. Dickinson*, 98 Ala. 363, 39 Am. St. Rep. 67, 11 South. 743; *Hazen v. Webb*, 65 Kan. 38, 93 Am. St. Rep. 276, 68 Pac. 1096; *Maguire v. Fluker*, 112 La. 76, 36 South. 231; *Barnes v. Lynch*, 151 Mass. 510, 21 Am. St. Rep. 470, 24 N. E. 783; *Beetson v. Stoops*, 91 App. Div. 185, 86 N. Y. Supp. 332; *Deshong v. Deshong*, 186 Pa. 227, 65 Am. St. Rep. 855, 40 Atl. 402; *Holmes v. Fulton*, 193 Pa. 270, 44 Atl. 426; *Sickles v. Oviatt*, 212 Pa. 219, 66 N. W. 808. It follows from this that a person whose interest is not coextensive with the cotenancy may by suit compel a partition of all the land thereof, or, at least, compel such proceeding as will result in setting off to him in severalty some portion coextensive with his interest. Thus, one of the cotenants may convey an interest in some specific part of the property, as where he conveys to a stranger the timber thereon, after which all the cotenants, other than such grantee, may join in a conveyance to a third person. In such case it is evident that the grantee must either be authorized to maintain some action or lose the benefit of his purchase. In such circumstances, it has been held that he may in equity proceed against all the cotenants and compel them to make partition of all the realty subject to the cotenancy, and thereby procure such an assignment, if equitable, of the share of his grantor as may make good the conveyance of timber executed by him: *Mee v. Benedict*, 98 Mich. 260, 39 Am. St. Rep. 543, 57 N. W. 175, 22 L. R. A. 641. In *Cheney v. Ricks*, 168 Ill. 533, 48 N. E. 75, it was held that if the complainants seeking par-

Am. St. Rep. Vol. 114—6

tition has executed separate mortgages to different parcels, each parcel should be partitioned separately and independently of the others, but this referred merely to the action of the commissioners, and was not intended to require separate suits.

STATE v. MILLER.

[73 S. C. 277, 53 S. E. 426.]

HOMICIDE—Evidence—Res Gestae.—Evidence of the conduct, actions, and general behavior of the accused immediately before the killing with which he is charged, and that he was armed and in a vicious humor, is admissible as tending to show the state of mind of the defendant shortly before the homicide. (p. 84.)

HOMICIDE—Admission as Evidence.—The admission by a person charged with a homicide, made five or ten minutes thereafter, that he had shot a man, is admissible to show that he did the killing. (p. 84.)

HOMICIDE—Reputation.—In a criminal case, an instruction that testimony that, as far as the witness knew, the reputation of the deceased was good, must be taken in connection with what the witness stated other persons had said on the subject, is proper. (p. 84.)

HOMICIDE—Malice—Instructions.—An instruction in a homicide case that malice has been defined to be a term of art importing wickedness, and excluding just cause and excuse, is not erroneous as having a tendency to impress the jury that mere wickedness is malice. (p. 85.)

HOMICIDE—Benefit of Evidence—Instructions.—In a homicide case, an instruction that under a plea of not guilty, the accused is entitled to the benefit of all the testimony in the case that may inure to his benefit, is not erroneous as depriving the accused of any benefit arising from failure or lack of proof. (p. 85.)

HOMICIDE—Self-defense.—The law of self-defense is founded in necessity, so that if it be not necessary to take human life at the time it is taken, or if it does not appear to be necessary to take such life at such time, the law of self-defense falls to the ground, but it does not make any difference, whether the danger was real or not, for if the person doing the killing actually believed at the time that he was in danger, he may be said to have acted in self-defense. (p. 85.)

C. J. Ramage, for the appellants.

R. A. Cooper, solicitor, for the appellee.

²⁷⁸ JONES, J. Sion Miller, Joe B. Miller and Russell McCormick were indicted for the murder of Richard Truesdale. Sion Miller and Russell McCormick were convicted

of manslaughter and sentenced to imprisonment in the state penitentiary at hard labor for ten years.

²⁷⁹ The homicide occurred in Saluda county, in the afternoon of June 11, 1904, at Long Bridge on the Mt. Willing Road leading from Batesburg to said bridge. The defendants that afternoon, previous to the homicide, passed by the home of W. L. Wise on said road, about three miles from Long Bridge, going in the direction of said bridge. The witness, W. L. Wise, was, over objection, permitted to testify that about fifteen or twenty minutes before defendants passed his house that afternoon he heard hollering and pistol shots up the road in the direction from which they were coming, and this ruling is the foundation of the first exception, the appellant alleging that the testimony was not sufficiently connected in point of time with the killing and not calculated to explain any phase of the homicide. The witness, Lawrence Hartley, a negro, was, over objection, permitted to testify as to the unprovoked and violent conduct of defendant, Russell McCormick, toward him on said road that afternoon, about one-quarter of a mile from Wise's house. The witness testified: "Mr. McCormick said, 'Hello, nigger.' I said, 'Good evening, Mister.' He said, 'Raise your hat to me, if you don't I will shoot your God damn brains out.' I could not raise my hat at once. He caught hold of my mule's bridle and drew a knife on me and said, 'If you don't raise your hat to me I will cut your God damn heart out'; and I raised my hat to him." This testimony was admitted on the ground that it tended to show the defendant's state of mind a short time before the homicide. This ruling is the basis of the second exception, which contends that such conduct was not connected with the homicide and had no tendency to show defendant's frame of mind toward the deceased.

The general rule is that proof of distinct and independent offenses is not admissible on the trial of a person accused of crime, but there are exceptions to or modifications of this general rule, as where such evidence reasonably tends to show the malice, intent or motive of the defendant with respect ²⁸⁰ to the crime charged, or to show the identity of the defendant and his connection with the crime charged, or where the offense is so closely connected with the crime charged as to bring it within the rule of *res gestae*: Wharton's Criminal Evidence, 8th ed., secs. 30-47. See, also, a full and elaborate note to *People v. Molineux*, 168 N. Y. 264,

61 N. E. 286, 62 L. R. A. 193. The testimony admitted tended to show that the defendants were, a short time before the homicide, approaching the place where it occurred, armed with a deadly weapon and with a mind ready for mischief. The conduct, actions and general behavior of the accused immediately before the killing is admissible to show that he was armed and in a vicious humor: 4 Elliott on Evidence, sec. 3029.

The sixth exception alleges error in permitting the witness, W. C. Duncan, to testify, over objection, on cross-examination by the solicitor, that defendants, five or ten minutes after the homicide, in a short conversation with witness, said that they had shot a darkey. The ground of objection was not made known to the circuit court, but the testimony is clearly competent to show that they committed the homicide.

The seventh exception relates to remarks of the court in connection with the testimony of J. A. Ridgell, offered by the state to prove the reputation of the deceased for peace and good order. After the witness in his testimony said, "So far as I know, it was good," the court properly remarked: "In order that there may be no misunderstanding about this matter, when you attempt to prove the good character, or the bad character, by reputation, not by what you know about it, or what the witness knows about it, but by showing what people generally say about the witness whose character is assailed, or whose character is sought to be bolstered up. Reputation is what people say and think about a man. This witness' testimony will be taken in connection with what he said about what people said about the deceased."

²⁸¹ The judge charged the jury: "Now, malice has been defined to be a term of art importing wickedness and excluding just cause or excuse. It is something that springs from wickedness, from depravity, from a depraved spirit, from a spirit at the time bent on mischief, and not then having a regard for the social obligations, or the obligations which rest upon mankind." The third exception alleges error in this charge, in that it confounds wickedness and malice, and the instruction had a tendency to make the jury believe that mere wickedness in a defendant is equivalent to malice. We see no merit in this exception. The charge was correct.

The court also charged: "Now the defendants come into court and say not guilty, and when they say not guilty they are not called upon to name any special defense beyond just

saying not guilty, but any defense that may arise from the testimony that inures to their benefit; they may set up a special plea, or may not set up any special plea. Under the plea of not guilty they are entitled to the benefit of all the testimony in the case that may inure to their benefit." In their fourth exception appellants allege that the court erred in charging the last sentence above, in that he should have charged the jury that defendants were also entitled to any benefit arising from the failure of proof or lack of testimony. This exception cannot be sustained. We see nothing in the charge excluding the matter which appellants claim should have been incorporated, and in other portions of the charge it was made manifest to the jury that it was the duty of the state to prove its case against the defendant beyond any reasonable doubt.

The fifth and remaining exception assigns error in the charge as to self-defense in not distinguishing between an absolute and an apparent necessity to strike. The charge was full and clear on that point, as shown by this extract from the charge, the first sentence being the portion to which exception is taken: "The whole ²⁸² thing of self-defense after all is summarized and embraced in one word, 'necessity.' The law of self-defense is founded in necessity, and if it be not necessary to take human life, if it appear not to be necessary to take human life at the time it was taken, the law of self-defense falls to the ground. There must be some real or some apparent necessity for taking human life; the party must be actually in imminent danger, or he must believe he was in imminent danger, before he can strike. So far as the law of self-defense is concerned, it does not make one shadow of difference whether the danger was real or not, if the party actually, honestly believed at the time he was in danger of receiving seriously bodily harm, or suffering death at the hands of the party slain." The charge as a whole was very full on the subject of self-defense, and the law was declared in accordance with the rule stated in *State v. McGreer*, 13 S. C. 464.

The exceptions are overruled, and the judgment of the circuit court is affirmed.

The Question of Res Gestae is discussed in the monographic note to *People v. Vernon*, 95 Am. Dec. 51-76. *Res gestae* are those circumstances which are the automatic and undisguised incidents of a par-

ticular litigated fact, and which in contemplation of law are a part of the act itself: *Bedmon v. Metropolitan St. Ry. Co.*, 185 Mo. 1, 105 Am. St. Rep. 558; *Leach v. Oregon Short Line R. R. Co.*, 29 Utah, 285, 110 Am. St. Rep. 708. To render declarations admissible as part of the *res gestae*, they must generally be substantially contemporaneous with the principal occurrence, but they need not be concurrent therewith: *State v. Foley*, 113 La. 52, 104 Am. St. Rep. 493, and cases cited in the cross-reference note thereto. Declarations by a person accused of homicide made a few minutes before or after the killing are admissible against him: *Scott v. State*, 46 Tex. Cr. 536, 108 Am. St. Rep. 1032, and cases cited in the cross-reference note thereto; *McAllister v. State*, 45 Tex. Cr. 258, 108 Am. St. Rep. 958; *State v. Foley*, 113 La. 52, 104 Am. St. Rep. 493; *Campbell v. State*, 133 Ala. 81, 91 Am. St. Rep. 17.

Evidence of the Good Character of a person on trial for crime is the subject of a monographic note to *People v. Bonier*, 103 Am. St. Rep. 888-909.

The Law of Self-defense is discussed in the monographic notes to *State v. Gordon*, 109 Am. St. Rep. 804-826; *State v. Sumner*, 74 Am. St. Rep. 717-740.

EX PARTE REYNOLDS.

[73 S. C. 296, 53 S. E. 490.]

PARENT AND CHILD—Parol Gifts of Children—Estoppel.—

The right of a parent to the custody of his child cannot be defeated by a mere parol gift of the child by the parent to another, but if a parent undertakes to make a parol contract absolutely bestowing the custody of the child upon another, and allows the child to acquire a new home and strong attachments and tender associations to spring up, he may be estopped from asserting his right to the custody of the child. (p. 91.)

PARENT AND CHILD—Parol Gift of Child—Evidence to Establish Estoppel.—Those who receive children from parents under a parol gift, relying upon estoppel of the parents to reclaim them, are charged with notice that the presumption is very strong that a right so precious as that of a parent to a child will not be unconditionally given away except for very cogent reasons, especially when such gift does not free from parental obligation, and it devolves upon them to prove a certain and definite agreement and estoppel by conduct by evidence clear and convincing. (pp. 91, 92.)

PARENT AND CHILD—Custody of Child—Parent's Moral Character.—To establish that a parent's bad moral character and low financial condition make him unfit to have the custody of his children, it is necessary to show clearly that provision for the ordinary comfort and contentment and the intellectual and moral development of the children cannot be expected at his hands. (p. 92.)

PARENT AND CHILD—Custody of Child—Wishes of Child.—In awarding the custody of a child, its wishes are consulted, not because it has a legal right to demand it, but because it is material for the court to understand them, that it may be the better prepared to exercise its discretion in the matter wisely. (p. 93.)

Sheppards, Grier & Park, for the petitioners.

B. T. Rice and Bellinger & Welch, for the respondents.

²⁸⁷ WOODS, J. The solemn and painful duty is imposed on the court of determining, in this application for the writ of habeas corpus, the right to the custody of the children, William Osborne Reynolds, Mary Susan Reynolds and Nannie Reynolds. Mrs. Mary Susan Reynolds, the mother of the children, died in August, 1899. The contest is between James B. Reynolds, petitioner, the father of the children, now residing in Greenwood, and Miss Lucy S. Peyton, their cousin, and Mrs. Mell Bellinger, their step-grandmother, with whom they live together in Barnwell, Miss Peyton claiming William and Nannie, and Mrs. Bellinger claiming Mary.

These claims against the father rest upon the allegations (1) that he promised his wife on her deathbed that Miss Peyton should have the rearing of the children, and in pursuance of this promise has allowed her to keep and support ²⁸⁸ them since their mother's death, and that he is now estopped from taking them back after Miss Peyton has used her means in their support and such strong affection has grown up between her and the children that a separation would be deeply distressing; and (2) that the petitioner drinks to excess, is thriftless, immoral, and without means to maintain and educate his children, and should not be allowed to take them from a home of comfort and refinement where they will be supported and sent to school, and where they wish to remain.

It is important to set out the facts of the family history which gave rise to this deplorable controversy, and reconcile as far as possible the affidavits of witnesses of high character which bear materially on the issues.

James B. Reynolds and Mary Susan Bellinger were married February 23, 1892, and thereafter Miss Peyton lived with them on land in Barnwell county, in which she had at that time, or subsequently acquired, at least a life interest. It does not satisfactorily appear to what extent Miss Peyton and Reynolds respectively contributed to the support of the family, but it seems the family lived in agreement and without controversy about matters of property until some time after the death of Mrs. Reynolds, when Miss Peyton moved to Barnwell, taking with her the children, where they remained in Miss Peyton's home with the consent of Reynolds

until a short time before this proceeding was instituted. Was this in pursuance of a promise given by Reynolds to Miss Peyton at the instance of his dying wife that she should have permanent custody and control of the children, as Miss Peyton contends, or was it merely a temporary arrangement intended to last until Reynolds could supply a suitable home for them? Mrs. Bellinger gives this statement of the promise: "Deponent was present at the death of said Mary Susan Reynolds, and at her request called her said husband, James B. Reynolds, to her bedside, and in the presence of this deponent stated to her said husband that she wished to commit her children to the care and training of Miss Lucy ²⁰⁰ Peyton, and asked him if he would consent and promise that Miss Lucy Peyton should have the raising of her children, and the said James B. Reynolds then and there stated to his dying wife, 'I promise you that she [Miss Peyton] shall have the children.' " Miss Peyton's version is: "That Mary Susan Reynolds, the mother of said children, died at the house and home of the respondent about five years ago; that just a few hours previous to her death she called the respondent and her said husband, James B. Reynolds, to her bedside, and there asked respondent to take her children and raise them, and then asked her said husband to consent and promise that he would see that the children were committed to the care and raising of this respondent; that this respondent then and there agreed to accept the care and raising of the said children, and said James B. Reynolds at the same time promised his dying wife that this respondent should have the rearing of said children, and that he would aid in maintaining and supporting them." Dr. Cannon says that the promise was that "the children should be committed to the care of Miss Lucy Peyton, and that she should have the rearing and raising of them, and the said James B. Reynolds then and there agreed to the same, and promised his dying wife that Miss Lucy Peyton should have the raising of their children, and Miss Peyton agreed to raise said children."

When it is remembered that Miss Peyton, then an elderly maiden lady, and the husband were at the time the promise was made to the dying wife of the same household, living in accord, and that it is not denied that the husband and wife had lived in affection and trust, it would not only be straining the meaning of the words used, but overlooking the environment of the parties and their relations to each other,

as well as the motives and purposes to be found in the outflow of natural affection, to suppose that Mrs. Reynolds exacted and her husband promised an absolute surrender of his children. It would not be just to the dying wife and mother to attribute to her a desire, much less the exaction of a promise, that her husband should no longer have a father's care and ^{and} responsibility for their children. The plain purpose and wish which prompted the request was that Miss Peyton should remain in the father's family and rear and care for the children—there is not a word to indicate that he was to cease to be the head of the family. A promise made under such compelling conditions should not be held to extend to and impose an obligation, legal or moral, which he who promised did not plainly and distinctly contemplate and assume. The utmost that can be said to have been in contemplation in this instance was that Miss Peyton should have the place and duties of a mother, not the rights and obligations of a father. It is true that the affidavit of Mr. H. L. O'Bannon is to the effect that petitioner, long afterward, told him "that while his wife lay upon her dying bed she made a request of him that their children be given to Miss Lucy Peyton after her death, and to this he consented and promised then, but that he did not intend to abide by that contract now, because at the time it was made he was almost crazed with grief." Mr. O'Bannon does not undertake to give the exact words of the interview, and the petitioner insists that an admission that he had given his children to Miss Peyton was far from his meaning. The impression of Mr. O'Bannon, however, might well have been received from even an exact account of the last interview between the husband and wife by one not familiar with all the circumstances. However that may be, the accounts of the last interview given by Miss Peyton, Mrs. Bellinger and Dr. Cannon, all eye-witnesses, warrant the conclusion that the petitioner did not give or promise to give his children to Miss Peyton in the sense of relinquishing to her his rights and duties as a father.

After the death of Mrs. Reynolds, in August, 1899, Miss Peyton, Reynolds, and the children continued to live together as one family until January, 1903, and there is no evidence or intimation that during all this period the petitioner did not claim and exercise the rights of a father. There is, it is true, a variance between Miss Peyton and petitioner as to the support of the family, her statement being that it came

³⁰¹ mainly from her means, while the petitioner swears she not only did not contribute to the support of the family, but, on the contrary, he contributed largely to her support. It is impossible from the affidavits to reach any satisfactory conclusion on this issue, but assuming that Miss Peyton did contribute generously to the support of the family, this would not imply the surrender of parental authority, especially when all were living as one household.

About January, 1903, Miss Peyton rented the farm on which the family was living and moved to the town of Barnwell, taking with her the children, William Osborne and Nannie. She says this change was made necessary by the drinking habits of the petitioner, and that she now supports and sends to school the two children above named, who are living with her. Mrs. Bellinger has had the care of Mary Susan for five years, but she does not set up any promise of the father to her concerning the custody of this child. The petitioner gives this account of Miss Peyton's removal to Barnwell, and the present custody of his children by Miss Peyton and Mrs. Bellinger: "That in the year 1903, Miss Lucy S. Peyton decided to move to the town of Barnwell to the home of Mrs. Mell Bellinger, the widow and second wife of Dr. Martin Bellinger, and requested of this deponent that the said children be permitted to go with her and stay with her until such time as deponent could settle up his business affairs in that county and prepare and arrange for his children a home in Greenwood, where he had decided to remove, to which proposal deponent consented; that deponent stated at the time that he would not give his children to anyone and would not give them to Miss Peyton or to Mrs. Bellinger, but would consent for them to remain away from him only for such length of time as was necessary for him to provide a suitable home for them, and he has never renounced his right as a father to their custody or control over or to them or either of them; that Mrs. Bellinger on more than one occasion tried to persuade deponent to give her his daughter Sue, which he has always refused to do." Though ³⁰² this important statement of the circumstances and conditions under which Miss Peyton was allowed to take the children was made in the affidavit attached to the original petition, it is significant that it is not denied in any of the affidavits submitted on behalf of Miss Peyton and Mrs. Bellinger. The undisputed fact that the petitioner took one of the children,

Eleanor Taft, to his home in Greenwood, and is still keeping her there without objection on the part of Miss Peyton, and the further fact that Mrs. Bellinger has in her exclusive care another child, Mary Susan, goes very far to support the petitioner's statement that they were never given to Miss Peyton unconditionally, and that she did not so receive them.

The weight of authority sustains the doctrine that the right of a parent to the custody of a child cannot be defeated by a mere parol gift of the child by the parent to another: *Fletcher v. Hickman*, 50 W. Va. 244, 88 Am. St. Rep. 862, 40 S. E. 371, 55 L. R. A. 896; 21 Am. & Eng. Ency. of Law, 1039; *Washaw v. Gimble*, 50 Ark. 351, 7 S. W. 389; *Foulke v. People*, 4 Colo. App. 519, 36 Pac. 640; *Brooke v. Logan*, 112 Ind. 183, 2 Am. St. Rep. 177, 13 N. E. 669; *Hussey v. Whiting*, 145 Ind. 580, 57 Am. St. Rep. 220, 44 N. E. 639; *Weir v. Marley*, 99 Mo. 484, 12 S. W. 798, 6 L. R. A. 672; *Hibbette v. Bains*, 78 Miss. 695, 29 South. 80, 51 L. R. A. 839; *State v. Libbey*, 44 N. H. 321, 82 Am. Dec. 223. The reason upon which this doctrine rests—that such a parol gift is against public policy—is strengthened in this state by the statute which sanctions the disposition by a parent of the custody and tuition of a child, but provides that such disposition shall be evidenced “by his or her deed executed and recorded according to law”: Code 1902, sec. 2689. Nevertheless, if a parent undertakes to make a parol contract absolutely bestowing the custody of the child upon another, and allows the child to acquire a new home, and strong attachments and tender associations to spring up, the court will not, at his instance, ruthlessly break these ties which have come into existence through his acquiescence and neglect to assert his right. In such case the parent is estopped, and the affection of those who have cared for the child and learned to love it will not be sacrificed ³⁰³ unless the interests of the child require that it should be restored to the parent: *Enders v. Enders*, 164 Pa. 266, 44 Am. St. Rep. 598, 30 Atl. 129, 27 L. R. A. 56, note; *State v. Libbey*, 44 N. H. 321, 82 Am. Dec. 223. By such a surrender, however, the parent does not escape the duty he owes the child and the state to provide for its support and education, if he to whom it is intrusted fails to do so: *Anderson v. Young*, 54 S. C. 388, 32 S. E. 448, 44 L. R. A. 277. Those who receive children from parents without the deed provided by statute, relying upon estoppel of the parents, are charged with notice

that the presumption is very strong that a right so precious as that of a parent to a child will not be unconditionally given away except for very cogent reasons, especially when such gift does not free from parental obligation, and it devolves upon them to prove a certain and definite agreement and estoppel by conduct by evidence clear and convincing: *Brooke v. Logan*, 112 Ind. 183, 2 Am. St. Rep. 177, 13 N. E. 669. As we have seen, the evidence in this case falls far short of leading to the conviction that there was a clear and definite parol agreement for unconditional surrender of the children by the parent, or that he ever acquiesced in their permanent residence with Miss Peyton and Mrs. Bellinger, or that Miss Peyton or Mrs. Bellinger were led to care for the children, and became attached to them on account of any conduct or misrepresentation of the petitioner from which they had a right to infer that they would be allowed to keep them permanently.

The next question is whether it is true, as charged, that petitioner's bad moral character and low financial condition make him unfit for the custody of his children. To establish this charge it is necessary to show clearly that provision for the ordinary comfort and contentment and the intellectual and moral development of the children is not to be expected at his hands: *Ex parte Davidge*, 72 S. C. 16, 51 S. E. 269. We do not think the evidence warrants such a conclusion. It is true, a number of residents of Barnwell of high character made affidavits to the effect that the petitioner was known to them as a thriftless man, unable to provide for the support of his family, and addicted to the excessive ³⁰⁴ use of liquor, and some of them say he pays no debts he can avoid, and has little, if any, regard for his moral obligations. On the other hand, petitioner himself swears that in Barnwell county he conducted a successful business, from which he supported his children, and that he owes no debts there; that he did not drink at all before the death of his wife, but admits that after her death he did to some extent, and on several occasions, while living alone in the country in the year 1903, he became intoxicated, but alleges he has not been addicted to the use of liquor since moving to Greenwood in December, 1903.

Many highly respectable citizens of Greenwood submit affidavits that petitioner has led there an exemplary life, is

conducting a successful business, owns property of considerable value, and is generally regarded an estimable citizen. It appears from the affidavits of the petitioner and his mother and sisters that the children will be gladly received and cared for by petitioner's mother and sisters, with whom he resides. We cannot doubt that in the past the petitioner has brought reproach upon himself and his children by his intemperate habits, and that he has been in grave fault in allowing others to provide in large degree for the support of his children, but the evidence is plenary that a reformation has taken place and that petitioner is now a fit person in character and financial condition to have the custody and rearing of his children. It would be harsh to hold that for such faults as these a parent should be forever deprived of his children, notwithstanding his subsequent reformation.

In the meantime, however, the children, William Osborne and Nannie, have become deeply attached to Miss Peyton, and Mary Susan to Mrs. Bellinger, and earnestly ask to be allowed to remain with them. William Osborne is now thirteen, Mary Susan is twelve, and Nannie is nine years of age.

Under the English rule, it seems that the wishes of a child under the age of nurture, which is fourteen years, are not to be consulted as to its custody against the claim of its ³⁰⁵ guardian by nurture, and this rule seems to receive recognition in *Ex parte Schumpert*, 6 Rich. 344, and *Ex parte Reed*, 19 S. C. 604, but it does not appear that the point was in either case necessarily involved or adjudicated. It was held, on the other hand, in *Ex parte Williams*, 11 Rich. 452, that the discretion of the court was not to be controlled by the choice of a boy of fifteen years. The rule which we think has the support of common sense as well as authority is thus stated in *Hurd on Habeas Corpus*, 532: "The welfare of the child, then, being the object to be attained, no consideration calculated to influence the decision of the question should be overlooked. Hence the wishes of the child are consulted, not because it has a legal right to demand it, but because it is material for the court to understand them, that it may be the better prepared to exercise its discretion wisely. It is not the whim or caprice of the child which the court respects, but its feelings, its attachments, its reasonable preference and its probable contentment. Consulting the wishes of the infant, we may conclude, is a mere rule of procedure founded

upon the duty of the court to exercise a wise circumspection, and not upon any legal right of the infant to decide for himself and the court the question of custody."

In this case, Miss Peyton, who claims a gift of the children, is quite advanced in years, and in the course of nature would not probably live to rear the children to maturity. To decree that the children should remain with her would result in permanent separation from their father and the sister, who is now with him, and end the opportunity of the father to influence and discipline their lives, and regain their filial love and confidence. While the kindness and generosity of Miss Peyton and Mrs. Bellinger, which has elicited the loyal affection of the children, cannot be too highly commended, the evidence is that the children would have at their father's home comfort, educational advantages and affection. It would be unnatural if they did not object to leaving those from whom they have received so much kindness, but their preference is ³⁰⁶ only one factor to be considered by the court in trying to decide for their best interests.

Upon careful consideration of all the facts, the court is satisfied the children should be restored to their father, the petitioner, and it is so adjudged.

Since the rights and duties of the parties are established, there is increased incentive to amicable adjustment. There should be on the one side cheerful recognition of the rights of the parent, and, on the other, the exercise of those rights by the father with such tenderness and consideration as to ward off all needless pain, and to express his appreciation of the care and labor bestowed upon his offspring by Miss Peyton and Mrs. Bellinger.

Contracts for the Transfer of the Parental Custody of children are discussed in the monographic note to *Fletcher v. Hickman*, 88 Am. St. Rep. 866-875. It has recently been affirmed that such contracts are against public policy and generally not enforceable: *Hernandez v. Thomas*, 50 Fla. 522, 111 Am. St. Rep. 522. See, also, *Stapleton v. Poynter*, 111 Ky. 264, 98 Am. St. Rep. 411.

The Questions Concerning the Right to the Custody of children involved in the principal case will be found discussed in *Hernandez v. Thomas*, 50 Fla. 522, 111 Am. St. Rep. 137, and cases cited in the cross-reference note thereto.

STATE v. GILLIS.

[73 S. C. 318, 53 S. E. 487.]

CRIMINAL LAW—Jeopardy—Waiver.—The accused waives the constitutional safeguard against being twice put in jeopardy, and may be tried again for murder, when he procures a new trial on his own motion, on a conviction of manslaughter under an indictment for murder. (p. 97.)

HOMICIDE—Corpus Delicti—Circumstantial Evidence.—All the elements constituting the corpus delicti on a trial for murder or manslaughter may be established by circumstantial evidence. (p. 100.)

G. M. Green, for the appellant.

L. F. Youmans, assistant attorney general, for the appellee.

319 JONES, J. The appellant was indicted and tried for the murder of Nellie Galphin, and was convicted of manslaughter. Upon his own motion a new trial was granted by the court of general sessions. Thereafter the defendant was again put upon his trial under the same indictment and entered a special plea, that having been already tried upon an indictment for murder and found guilty of manslaughter, he was thereby acquitted of murder, and could only, if at all, be tried for manslaughter. The trial court sustained the state's demurrer to the plea and ordered on the trial upon the original indictment. Upon the second trial appellant was again convicted of manslaughter and was sentenced to the penitentiary at hard labor for thirty years. By his exceptions appellant renews his contention in this court.

The authorities practically agree on the proposition that when one indicted for murder is convicted of manslaughter, and, upon his own motion, secures a new trial, he may be tried upon the same indictment for manslaughter, upon 320 the ground that he is deemed to have waived his right to plead former jeopardy as to the particular issue upon which he secured a new trial. Inasmuch, therefore, as appellant has only been convicted of manslaughter, we might dispose of this question by holding that, even if there was error in the ruling, appellant has not been prejudiced thereby. But the question sought to be raised is one of grave importance in the administration of criminal law, and we prefer to consider and decide it.

Article 1, section 17, of the constitution, provides: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life and liberty." This is a great right guaranteed by the constitution, but, like other rights, may be waived by the accused: *State v. Faile*, 43 S. C. 57, 20 S. E. 798. The real question is as to the extent to which the accused is to be held to have waived this right when he procures a new trial on conviction for manslaughter on indictment for murder. As stated above, the authorities generally hold that the waiver certainly extends so far as to permit a new trial on the same indictment for the offense of which the accused was convicted. Our investigation discloses that the greater number of authorities in other states take the view that a verdict of manslaughter is an acquittal of murder, and that a new trial granted on motion of the accused upon conviction of the lesser offense is not to be considered as a new trial for the greater offense of which he was acquitted, as the accused should not be deemed to have waived his right in so far as he was acquitted. Of the cases taking this view we cite: *State v. Hornby*, 8 Rob. 583, 41 Am. Dec. 314; *Hurt v. State*, 25 Miss. 378, 59 Am. Dec. 225; *People v. Gilmore*, 4 Cal. 376, 60 Am. Dec. 620; but see *People v. Keefer*, 65 Cal. 232, 3 Pac. 818, said to be in conflict; *State v. Jones*, 13 Tex. 168, 62 Am. Dec. 550; *State v. Martin*, 30 Wis. 216, 11 Am. Rep. 567; *Johnson v. State*, 29 Ark. 31, 21 Am. Rep. 154; *State v. Cross*, 44 W. Va. 315, 29 S. E. 527.

There are states which have statutes providing that "the granting of a new trial places the parties in the same position ³²¹ as if no trial had been had," and in such states it is held that the accused waives the constitutional safeguard against being twice put in jeopardy, and that he may be tried again for murder when he procures a new trial on conviction of manslaughter: *State v. McCord*, 8 Kan. 232, 12 Am. Rep. 469; *Veatch v. State*, 60 Ind. 291; *People v. Palmer*, 109 N. Y. 413, 4 Am. St. Rep. 477, 17 N. E. 213; *Commonwealth v. Arnold*, 83 Ky. 1, 4 Am. St. Rep. 114.

If the constitutional provision, article 1, section 17, guarantees that a conviction for manslaughter is an acquittal for murder, even though the conviction be set aside upon the accused's own motion, it is rather difficult to see how a statute providing that "the granting of a new trial places parties in the same position as if no trial had been had" could be valid to annul the constitutional right. If it be so that such

statutes are valid and effective in enlarging the effect of the accused's waiver involved in procuring a new trial, then the same effect should follow when the decisions of the judicial department establish a like rule, as in both cases the question is, the effect of a voluntary act of the accused proceeding under the rules of law.

In the case of *State v. Commissioners*, 3 Hill, 239, the court held that when a new trial is ordered at the instance of the defendants, upon a conviction on one of the counts in an indictment, the case stands as though it had never been tried, and that defendants may be tried anew on both counts. The court said: "The defendants were found guilty only on one count, and upon appeal the verdict was set aside and a new trial ordered. The verdict was set aside in favor of, and at the instance of, the defendants, who were found guilty. There is nothing in the record that could avail them by way of plea in bar to another prosecution. If the verdict of guilty had remained, it would have protected them, perhaps, from another indictment for the same offense. As long as the verdict of guilty remained on the record there was a finding; but what proceeding is there now on it? I consider all the proceedings on the indictment, since the ³²² finding of the grand jury, to be set aside, and set aside at the instance and for the benefit of the defendants. The case stands as though it never had been tried. The defendants contended that a verdict of guilty on one count led to the conclusion that they were acquitted on the other; that is, that omitting to find on one count and finding on the other is an exclusion of guilt to the extent not passed on by the jury. Such inference could not have been fairly drawn from what was apparent on the record; and the inference cannot be drawn when all the proceedings on the record are obliterated." The rule declared above was recognized and enforced in *State v. McGee*, 55 S. C. 247, 74 Am. St. Rep. 741, 33 S. E. 353, and the case was remanded for a new trial on all the counts in the indictment, notwithstanding the defendant had been convicted on the first and third counts, and in legal effect acquitted on the second, but a new trial having been granted on his motion, the effect was to remove the inference of acquittal on the second count. It is true this rule was applied as to offenses not capital, but the constitutional provision applies equally to offenses involving liberty as well as to offenses involving life as a penalty. The defendant must be held to have made his appli-

cation for a new trial in view of the rule of law above declared, and must be deemed to have understood as plainly as if a statute had so declared that a new trial meant a rehearing upon the whole indictment as if no trial had taken place thereon.

In the case of *State v. Stephenson*, 54 S. C. 234, 32 S. E. 305, in considering section 17, article 1, of the constitution, the court used this language: "According to the decisions of this state and the weight of authority elsewhere, it may be stated, as a general rule, that one is in jeopardy when a legal jury is sworn and impaneled to try him, upon a valid indictment, in a competent court, unless the jury before reaching a verdict be discharged with the prisoner's consent, or upon some ground of legal necessity, or the verdict if rendered be set aside according to law." So in *State v. McGee*, 55 S. C. 247, 74 Am. St. Rep. 741, 33 S. E. 353, the court declared: "When ³²³ a verdict is entered *which is not afterward set aside at the instance of the defendant* (italics ours) and the jury discharged from the further consideration of the case, its effect is to acquit the defendant on all the counts in the indictment, although the jury may have found him guilty on a less number than the whole of the counts; otherwise he would be subject for the same offense to be put twice in jeopardy of life or liberty a second time."

It is undoubtedly true that the legal effect of a verdict of manslaughter on an indictment of murder is to acquit of the greater offense. This implication or inference, however, rests upon the existence of the verdict of manslaughter as the result of a trial upon the indictment for murder. Remove the fact upon which the inference is based, and necessarily the inference goes with it. The trial for murder involves three principal issues: 1. Whether there was an unlawful killing; 2. Whether the defendant committed it; 3. Whether it was done with or without malice. A verdict of manslaughter involves a finding on each of these issues, and the effect of setting aside such verdict must necessarily be to set aside the finding on all of said issues and leave them open for further trial. The jury said on the third issues there was no malice, but their finding on this issue was set aside on defendant's motion. The defendant concedes that the first and second issues must be relitigated; can it be possible under any proper view of the doctrine of waiver, that the third issue must for-

ever remain settled in favor of the defendant, when to secure a new trial he must necessarily ask that it be retried!

In the convincing language of the Ohio court, in *State v. Behimer*, 20 Ohio St. 572, published in full in note, 14 Am. Rep. 752: "The effect of setting aside the verdict finding the defendant guilty was to leave at issue and undetermined the fact of the homicide; also the fact whether the defendant committed it, if one was committed. The legal presumption on this plea of not guilty was of his innocence; and the burden was on the state to prove every essential ³²⁴ fact. The only effect, therefore, that could be given to so much of the verdict as acquitted the defendant of murder in the first degree, after the rest of it had been set aside, would be to regard it as finding the qualities of an act while the fact of the existence of the act was undetermined. This would be a verdict to the effect that, if the defendant committed the homicide, he did it without 'deliberate and premeditated malice.' There can be no legal determination of the character of the malice of a defendant, in respect to a homicide which he is not found to have committed; or, rather, of which, under his plea, he is, in law, presumed to be innocent. The indictment was for a single homicide. The defendant could, therefore, only be guilty of one offense, and could be subject to but one punishment. The degree of the offense differed only in the *quo animo* with which the act causing the homicide was committed. The question of fact was whether a criminal homicide had been committed, and, if so, whether the circumstances of aggravation were such as to raise it above the grade of manslaughter. If the finding as to the main fact be set aside, the finding as to the circumstances necessarily goes with it."

The following cases hold to the same view: *Trono v. United States*, 199 U. S. 521, 26 Sup. Ct. Rep. 125, 50 L. ed. 292; *Bohanan v. State*, 18 Neb. 57, 53 Am. Rep. 791, 24 N. W. 390; *State v. Kessler*, 15 Utah, 142, 62 Am. St. Rep. 911, 49 Pac. 293; *State v. Bradley*, 67 Vt. 465, 32 Atl. 238; *Bailey v. State*, 26 Ga. 579, appears to be the same effect; but see *Waller v. State*, 104 Ga. 505, 30 S. E. 835, resting the view upon the provision in the constitution of 1865. We think that the weight of reason is on the side of the cases holding this view, and that such is the logical result of the decision of our own court.

Another question raised by the exceptions is whether manslaughter can be proved by circumstantial evidence. The corpus delicti consists of two elements; (1) the death of a human being, (2) criminal agency in producing said death. The weight of modern authorities is to the effect that all the elements constituting the corpus ³²⁵ delicti may be proved by circumstantial evidence: *State v. Martin*, 47 S. C. 71, 25 S. E. 113; see, also, note, 68 L. R. A. 75. There is no reason to doubt that the connection of the accused with the homicide may be shown by circumstantial evidence. In all cases to justify a conviction, the evidence, whether direct or circumstantial, must be of such a character as to leave no room for reasonable doubt that all the elements constituting the offense are established.

The judgment of the circuit court is affirmed.

On the Identity of Offenses in a Plea of Former Jeopardy, see the monographic note to People v. McDaniels, 92 Am. St. Rep. 89-159.

ROBERTS v. WESTERN UNION TELEGRAPH COMPANY.

[73 S. C. 520, 53 S. E. 985.]

TELEGRAPH COMPANIES—Office Hours—Damages for Mental Anguish.—If a telegram is received after office hours of the company, announcing the serious illness of a relative of the sendee, and the death of such relative occurs before succeeding office hours, the company is not liable for mental anguish caused the sendee by not being with the deceased at the time of death. (p. 101.)

TELEGRAPH COMPANIES—Negligence—Nonsuit.—If a complaint against a telegraph company alleges both negligence and willfulness in delay in delivering a telegram, and there is an entire failure of proof to support the allegation of willfulness, a nonsuit should be granted as to that cause of action, leaving the cause of action for negligence to be submitted to the jury. (p. 102.)

TELEGRAPH COMPANIES—Mere Delay in Delivering a telegram is not sufficient to send the issue to the jury on the question of willfulness, if there is evidence of an effort to deliver. (pp. 102, 103.)

NEGLIGENCE—Damages for Mental Anguish.—In actions to recover for mental anguish it is generally proper to instruct the jury that to warrant a verdict for damages, it must find not only that the plaintiff suffered mental anguish from defendant's breach of duty as a proximate cause, but that such breach of duty would have brought suffering to a reasonable human being in the situation of plaintiff. (p. 104.)

TELEGRAPH COMPANIES—Negligent Delay—Mental Anguish.—If the negligent delay of a telegraph company in delivering a message prevents a relative from attending the funeral of a deceased person, the company is liable for the mental anguish suffered by a normal person, in the absence of evidence as to individual temperament or peculiar apprehension of the sendee of the message. (p. 104.)

EVIDENCE—Admission—Harmless Error.—The admission of testimony which, though irrelevant and hearsay, can have no possible bearing on the issues, is harmless error. (p. 104.)

TELEGRAPH COMPANIES—Negligent Delay—Mental Anguish.—If it is sought to recover for delay in delivering a telegram, and the only mental anguish which plaintiff could have suffered was from her inability to attend the funeral of a relative, she cannot recover if she had no intention of attending the funeral. (p. 105.)

G. H. Ferrons, Evans & Finley and J. C. Jeffries, for the appellant.

Butler & Osborne and E. A. Trescot, for the appellee.

⁵²¹ WOODS, J. The plaintiff recovered judgment for mental anguish arising from the failure of the defendant to deliver to her promptly the following telegram:

“Toccoa, Ga., 1-1-24.

“To Mrs. Jennie Roberts, Blacksburg, S. C.

“Fannie will not live but a few hours.

“W. E. ACREE.”

⁵²² The plaintiff lived in Blacksburg, South Carolina, and the telegram referred to the illness of her sister at Toccoa, Georgia. The defendant's Sunday office hours at Blacksburg were from 8 to 10 A. M., and from 4 to 6 P. M., but the operator was also railroad agent, and being at the office as railroad agent, he received this message at 2 o'clock P. M., on Sunday, January 24, 1904. It was not actually delivered until about 8 o'clock P. M. on Monday. The suffering alleged was for deprivation of the privilege, of which plaintiff would have availed herself, of being with her sister “before and at her death and of attending her burial and funeral, and of being with her family in the bereavement and during said funeral.” The last train on which it would have been possible for plaintiff to reach her sister's bedside before her death, which occurred at 10 o'clock P. M. on Sunday, passed Blacksburg at 2:30 P. M. The defendant owed the plaintiff no duty to deliver before 4 o'clock, its regular afternoon office hour (*Bonner v. Western Union Tel. Co.*, 71 S. C. 303, 51 S. E. 117); it, therefore, was not responsible for the

plaintiff's failure to be with her sister at and before her death, and the claim as to that alleged wrong need receive no further notice.

The operator testified he sent a messenger to deliver the telegram as soon as it was received; the messenger's evidence was that he could get no answer to repeated knocks at plaintiff's front door, and the effort was made to prove she was away from home on Sunday. The plaintiff, on the other hand, testified she was at home and knew of no effort to find her. There was some evidence that the telegram was again sent to plaintiff's residence at 3 o'clock the next day and not delivered because of her absence.

The circuit judge granted a nonsuit as to the cause of action for willful or wanton wrong, but refused it as to the cause of action for negligence. The appellant's position that there was only one cause of action, though both negligence and willfulness and wantonness were alleged, cannot ⁵²³ be sustained, for it has been finally settled otherwise. When there is an entire failure of proof to support the cause of action for punitive damages, nonsuit should be granted as to that cause of action, leaving the cause of action for negligence to be submitted to the jury: *Machen v. Western Union Tel. Co.*, 72 S. C. 256, 51 S. E. 697.

There was certainly evidence to go to the jury tending to prove that the plaintiff could and would have attended the funeral services of her sister, which were held about 4 o'clock Monday afternoon, if the telegram had been promptly delivered, and the defendant's motion for nonsuit as to actual damages was properly refused. It is true she did not go when she did receive the message, but it was for the jury to say whether from its contents and the time which had elapsed she then had good reason to think she would be too late.

It is sometimes difficult to draw the line between a scintilla of evidence and no evidence on the subject of willfulness, wantonness or recklessness. It was held in *Young v. Western Union Tel. Co.*, 65 S. C. 93, 43 S. E. 448, *Machen v. Western Union Tel. Co.*, 72 S. C. 256, 51 S. E. 697, and *Willis v. Western Union Tel. Co.*, 73 S. C. 379, 53 S. E. 639, that long delay in the absence of effort to deliver is evidence to go to the jury on the question of punitive damages. But here there was undisputed evidence of some effort to deliver. It may be the effort was not sufficiently vigorous to repel the

imputation of negligence, but, on the whole, we think the circuit judge was right in holding the mere delay was not sufficient to go to the jury on the issue of willfulness, wantonness or recklessness in view of the evidence of efforts to deliver. The exceptions of both plaintiff and defendant as to the nonsuit are overruled.

The defendant complains that the circuit judge, after granting the nonsuit as to punitive damages, charged the jury: "If the jury is satisfied that the message sued upon was kept by the defendant's agent for several hours, and that he made no effort to promptly deliver the same, such facts may be considered by the jury on the question of ⁵²⁴reckless disregard of the rights of the plaintiff by the defendant." This being a mere inadvertence immediately corrected by the court, the exception requires no further notice.

The fourth, sixth and seventh exceptions involve the same legal question, which will be made clear by reading the seventh, which is as follows: "Because his honor erred in modifying defendant's first request to charge, which was as follows:

" 'I charge you that, after hearing all the facts, as men of common sense, with knowledge and experience in ordinary human sensibilities, you shall determine whether any mental anguish or suffering would result under all the circumstances to a person of ordinary reason, strength and firmness, and not what might occur to an individual of peculiar temperament or fanciful imagination.'

"His honor, in lieu of the said request, charged the following:

" 'I charge you, after hearing all the facts, as men of common sense, with knowledge and experience in ordinary human sensibilities, you should determine whether any mental anguish did result to plaintiff from the negligence of the defendant.'

"The error complained of being that in modifying said request his honor took from the jury their right to determine: (a) Whether or not under such conditions a person of ordinary reason, strength and firmness would have suffered any mental anguish whatever; (b) whether or not the plaintiff was a person of ordinary reason, strength and firmness, or (c) an individual of peculiar temperament or fanciful imagination."

The plaintiff in suits for mental anguish may testify to the fact that he suffered, after the circumstances from which the suffering might arise have been brought out, but he cannot testify as to his peculiar apprehensions, fears and conclusions, because these might be due to individual temperament. In such cases it is generally proper to instruct the ⁵²⁵ jury that to warrant a verdict for damages they must find not only that the plaintiff suffered mental anguish from defendant's breach of duty as a proximate cause, but that such breach of duty, in their judgment, would have brought suffering to a reasonable human being in the situation of plaintiff: *Willis v. Western Union Tel. Co.*, 69 S. C. 531, 104 Am. St. Rep. 828, 48 S. E. 538. While the request was in accord with this view of the law, under the facts of this case the modification complained of was not error. There was no evidence here of any conclusions or inferences or apprehensions which might have been peculiar to the plaintiff, and on account of which the jury might have awarded damages. The plaintiff stood before the court as an ordinary human being who wished to attend the funeral of her sister and who had testified she had suffered in mind, as surely every normal person would, because she had been deprived of the privilege by the negligence of the defendant. There could not be the least doubt of the mental anguish or of its nature, if the plaintiff's testimony as to her desire to attend the funeral was true, and there was therefore no question before the jury as to individual temperament or peculiar apprehension. Hence, the omission to charge on this subject was not reversible error.

It has not been suggested, and the court is unable to perceive, how a conversation over the telephone between the witness Freeman and some one in the office of the telegraph company could have any possible bearing on the issues before the court, and even if the testimony as to that conversation was irrelevant and hearsay, it was certainly harmless.

The eighth exception will have to be sustained. The circuit judge refused the following request: "If the jury believed that the plaintiff, Mrs. Roberts, had no intention of attending the funeral of her sister, had she been informed in time to have so done, then there can be no injury, and their verdict should be for the defendant." As we have seen, it would have been impossible for the plaintiff ⁵²⁶ to reach her sister before her death, even if the telegram had been promptly

delivered. Hence, the only mental anguish for which the defendant could possibly be responsible was that which grew out of the plaintiff being deprived of the privilege of attending the funeral, and if she had no intention of exercising that privilege, there could be no damage: *Hughes v. Western Union Tel. Co.*, 72 S. C. 516, 52 S. E. 107.

The judgment of this court is, that the judgment of the circuit court be reversed and a new trial ordered.

Telegraph Companies are liable in damages, according to the better rule, for mental suffering due to their negligence in the transmission or delivery of messages, irrespective of whether such suffering is accompanied by physical pain or injury: *Willis v. Western Union Tel. Co.*, 69 S. C. 531, 104 Am. St. Rep. 328; *Barnes v. Western Union Tel. Co.*, 27 Nev. 438, 103 Am. St. Rep. 776; *Green v. Telegraph Co.*, 136 N. C. 489, 103 Am. St. Rep. 955, and cases cited in the cross-reference note thereto.

CASES
IN THE
SUPREME COURT
OF

WASHINGTON.

BLAKE v. YOUNT.

[42 Wash. 101, 84 Pac. 625.]

USURY.—Compounding of Interest After It Becomes Due at the End of a Year does not amount to usury. (pp. 107, 109.)

USURY.—Whenever the Debtor by the Terms of a Contract can avoid the payment of the larger by the payment of a smaller sum at an earlier date, the contract is not usurious, but conditional, and the larger sum becomes a mere penalty. (p. 109.)

Routhe & Maxwell, H. J. Hibschan and H. N. Martin,
for the appellants.

J. T. Mulligan and H. A. P. Myers, for the respondent.

¹⁰¹ DUNBAR, J. This was an action on a promissory note, secured by a real estate mortgage. The defense is (1) that ¹⁰² the note was usurious; (2) that the court erred in not finding sufficient payment. The essential part of the note is as follows:

“\$1,000.00. Wilbur, Wash., March 25, 1899.

“For value received, one year after date, I promise to pay at Wilbur, Wash., to the order of Isaac B. Armstrong, one thousand dollars in gold coin of the United States of America of the present standard value, with interest thereon at the rate of 10 per cent per annum from date until paid. If not paid when due the interest to be added to and become a part of the principal, and the whole sum of both principal and interest to bear interest thereafter at 12 per cent per annum.”

Section 3669 of Ballinger's Code, provides: “Any rate of interest not exceeding twelve per centum per annum agreed to in writing by the parties to the contract, shall be legal,

and no person shall directly or indirectly take or receive in money, goods or thing in action, or in any other way, any greater interest, sum or value for the loan or forbearance of any money, goods or thing in action than twelve per centum per annum." And subsequent sections provide the penalty.

We do not think that the appellants' contention that this loan was usurious can be sustained. Nor is his contention sustained by the cases cited. In the case of *Brown v. Crow* (Tex. Civ. App.), 29 S. W. 653, upon which appellants strongly rely, the note in question was as follows:

"\$200.00.

Austin, Texas, September 12, 1892.

"Four months after date, for value received, I, we, or either of us promise to pay Osceola Archer, or order, in Austin City, Texas, at his law office, the sum of two hundred dollars, with interest thereon from date until paid at the rate of ten per cent per annum, interest to be paid semi-annually, and in default thereof the same shall become principal and bear the same rate of interest," etc.

Under the Texas statute, ten per cent was the maximum rate of interest allowed; and it will readily be seen that, under the conditions of the note in that case, the whole ¹⁰³ amount of interest for a year would have been twenty dollars and fifty cents instead of twenty dollars, which was the largest amount which the law would permit on the sum of two hundred dollars, and was plainly obnoxious to the statute. But in this case the interest is not to be paid until the end of the year, and when so paid would fall short of the maximum amount, twenty dollars. It is true that, after the expiration of the year, the interest would be at the rate of twelve per cent on the one thousand dollars loaned, and on the accrued interest of one hundred dollars, or the legal rate of interest on eleven hundred dollars. But the extra one hundred dollars would belong at the maturity of the note to the lender, and not to the borrower; that amount he has legally earned, and we see no reason why he should not have the benefit of it. It is within the power of the borrower to avoid paying interest on this extra one hundred dollars by paying it to its legal and equitable owner, and if, instead of paying it he appropriates it to his own use, there is no reason why he should not pay interest on it, the same as upon the original sum. It was evidently not the intention of the supreme court of Texas to hold in *Brown v. Crow* (Tex. Civ.

App.), 29 S. W. 653, that the compounding of interest created usury, for the same court, in the case of *Geisberg v. Mutual etc. Loan Assn.* (Tex. Civ. App.), 60 S. W. 478, in discussing this question of usury, said: "It certainly cannot be held that a contract is usurious simply because, under its provisions, legal interest might be demanded upon overdue interest agreed to be paid in such contract. In such case the overdue interest becomes a separate interest demand from the principal of the contract, and the interest charged upon it cannot be added to or considered a part of the interest stipulated to be paid upon the principal, so as to make the contract usurious."

Miller v. Life Ins. Co., 118 N. C. 612, 54 Am. St. Rep. 741, 24 S. E. 484, is a case where a life insurance company lent to a borrower a sum of money at the full legal rate of interest, payable monthly, its repayment being amply secured by mortgage on real estate, but required the borrower, in addition to and as a condition of the lease, to take from and reassign to ¹⁰⁴ it an endowment policy for a sum equal to the amount of the loan upon which the premiums should be paid monthly for seven years (or until his death), the payment of the premiums being also secured by the mortgage. There it was rightly held, we think, that the transaction was usurious; that it was the intent or purpose of the lender of the money to get more than the legal rate of interest for the loan; and the court properly stated that, if there be a provision, a condition, or a contingency in, or connected with, the contract, by which he may do so, the transaction is usurious. It was also stated in that case that, if the usurious character of a transaction is not manifest upon its face, but depends on facts and circumstances connected with the transaction as a part of the *res gestae*, it is a question of fact as well as of law, and should be submitted to the jury.

Watson v. Mims, 56 Tex. 451, was a case where a note was given for eight hundred dollars, with interest at the rate of twenty per cent per annum. A partial payment was afterward made, and a new note given for the principal and unpaid interest, amounting to nine hundred and sixty dollars, with interest thereon at the same rate, the law having in the meantime made a greater rate than twelve per cent usurious. It was held that the second note was not a mere renewal of the previous one, but was a new and illegal contract by reason of the excessive rate of interest charged on the previously

accrued interest. It is manifest that this decision was right, but it in no way tends to establish the fact that the note under discussion in this case is usurious. And so we think with all the other cases cited by the appellants—that none of them sustain the contention.

As showing that the note is not usurious, the respondent cites *Hager v. Blake*, 16 Neb. 12, 19 N. W. 780; *Crapo v. Hefner*, 53 Neb. 251, 73 N. W. 702; *Havemeyer v. Paul*, 45 Neb. 373, 63 N. W. 932; *Geisberg v. Mutual etc. Loan Assn.* (Tex. Civ. App.), 60 S. W. 478; *Martin v. Land Mortgage Bank*, 5 Tex. Civ. App. 167, 23 S. W. 1032; *Stewart v. Petree*, 55 N. Y. 621, 14 ¹⁰⁵ Am. Rep. 352; *Hale v. Hale*, 1 Cold. 233, 78 Am. Dec. 490; *Gilmore v. Bissell*, 124 Ill. 488, 16 N. E. 925; *Bledsoe v. Nixon*, 69 N. C. 89, 12 Am. Rep. 642. These cases also support the contention that the simple compounding of interest is not usurious, and that, wherever the debtor by the terms of the contract can avoid the payment of the larger by the payment of the smaller sum at an earlier date, the contract is not usurious, but additional, and the larger sum becomes a mere penalty. The rule is stated in 29 *American and English Encyclopedia of Law*, second edition, 507, as follows: "Stipulations to the effect that if the debt be not paid at maturity it shall draw interest thereafter at a rate greater than the statutory limit are now generally regarded as penalties to induce prompt payment, and as the debtor has it in his power to avoid paying the penalty by discharging the debt when due, such agreements are held to be free from usury."

Of course, if it appears from the face of the transaction that there is any trick or device or subterfuge by which the borrower is compelled, in order to get the money, to pay a larger amount of interest than is allowed by the statute, the note will be determined to be usurious; as, for instance, where the interest is computed in advance and added to the principal, and the maximum rate of interest charged on the principal and interest so compounded. In such case it is evident that the borrower is compelled to pay more than the maximum rate of interest prescribed by the statute, because the form of the note can in no wise change the legal character of the contract. Or if the interest is to be paid so often, and if not so paid compounded, and it is evident that the intention is to obtain more than the legal rate of interest, the result would be the same. But in this case, where the interest is not due

or payable until the end of a year, the cycle of time which is taken notice of by the statute, the borrower has the privilege of paying the interest at that time, and we see no reason for holding the note usurious. Nor are we able to discover ¹⁰⁶ from the record that the court erred in finding the amount that was paid upon the note.

The judgment is affirmed.

Mount, C. J., Root, Crow, Fullerton, Hadley and Rudkin, JJ., concur.

For Authorities upon the questions involved in the principal case, see the monographic note to *Close v. Riddle*, 91 Am. St. Rep. 588, 589. For a general discussion of the question of what transactions are usurious, see the note to *Bank of Newport v. Cook*, 46 Am. St. Rep. 178-202.

WEANDER v. CLAUSSEN BREWING ASSOCIATION.

[42 Wash. 226, 84 Pac. 735.]

LANDLORD AND TENANT—Lease, What Amounts to an Assignment of.—If a lessee of premises executes a lease thereof for the full term of his lease, this operates as an assignment of such lease, and does not create a new tenancy between such original lessee and his lessee. (p. 111.)

LANDLORD AND TENANT—Lease, Assignment of, When not Converted into a New Lease.—The fact that a tenant who leases the premises to another for the full unexpired term of the lease reserves the right of re-entry in case of default in the payment of rent, or the breach of any other of the covenants of the lease, does not prevent such leasing from operating as an assignment of the lessor's lease. (pp. 112, 113.)

LANDLORD AND TENANT—Assignment of Lease—Nonliability for Act of the Original Lessor.—Where an instrument executed by a lessee amounts to an assignment of the full leasehold term of such lessee, an action does not lie in favor of the last lessee against his lessor for an act of the original lessor. (p. 113.)

John B. Hart, for the appellant.

Brown, Leehey & Kane, for the respondent.

²²⁶ HADLEY, J. This is an action to recover damages on account of an alleged eviction from leased premises. The premises consist of a part of the Mitchell hotel building, in the ²²⁷ city of Everett. The owner leased to one Morrill, who, in turn, leased to the Claussen Brewing Association, and

the plaintiff claims that the latter leased to him. By reason of some default on the part of the original lessee, the owner terminated his lease and ousted him, and his subtenants were likewise ousted. The plaintiff then brought this suit against the Claussen Brewing Association, claiming damages against it because of the eviction. Defendant answered, admitting its lease from Morrill, the original lessee, but alleged that it assigned to the plaintiff all of its rights in said lease. The cause proceeded to trial before a jury, and at the close of the testimony in behalf of plaintiff, the defendant challenged its sufficiency, and moved that the case be withdrawn from the jury. The challenge and motion were granted, the jury was discharged, and judgment was entered dismissing the action. The plaintiff has appealed.

The real question in the case is, Did the relation of landlord and tenant exist between the parties? In order to pass upon this question it is necessary to determine what was the legal effect of the written instrument which they jointly executed. Appellant contends that it was a lease, and that it constituted him a tenant of respondent, while the latter urges that it was in law an assignment and not a lease, for the reason that it transferred all rights which respondent acquired from its lessor, including the entire term under its lease, with no reversionary interest reserved. The instrument is in the form of a lease, and contains apt words designating it as such; but it covers the entire term which respondent had acquired by its own lease. No portion of the term whatever is reserved for reversion to respondent. It is conceded that the terms and covenants of the instrument are in the exact words of the lease held by respondent, and no other or new covenants are included therein. We think, under the authorities, that the legal effect of such an instrument is that of an assignment in full of the lease by its holder; that it is not a new lease, which creates a new lessor and subtenant, ²²⁸ with the relation of landlord and tenant between the two, but the new nominal lessee becomes an assignee of the whole leasehold estate affected.

"A lessee's parting with his interest in the whole of the leasehold estate for the balance of his term, or with his interest in a part of the demised premises for the entire term, constitutes an assignment or assignment pro tanto of the lease, and the person to whom such an interest is conveyed becomes an assignee of the term with all the rights and lia-

bilities incident to such a position. It is immaterial by what kind of an instrument or conveyance the term is so disposed of. Thus, the grantee or nominal lessee becomes an assignee if the lessee executes a quitclaim deed of his rights in the leasehold estate, or executes an instrument purporting to be a lease or demise of the premises for the balance of his unexpired term or a period exceeding his term, or conveys the premises in fee simple. To constitute an assignment the lessee must, however, part with his entire interest in the whole or a part of the premises": 18 Am. & Eng. Ency. of Law, 2d ed., 656, 657.

Again, the same principle is stated as follows: "A term signifies not only the limitation of time, or period granted to the lessee for the occupation of the premises, but it includes also the estate and interest in the land that pass during such period. The words 'lease' and 'demise' are often used to signify the estate or interest which is conveyed, but they properly apply to the instrument or means of conveyance. And it is essential to a lease that some reversionary interest be left in the lessor; for if by an instrument purporting to be a demise, he parts with his whole interest in the premises, or makes a lease for a period exceeding his own term, it will, in either case, amount to an assignment of the term": 1 Taylor on Landlord and Tenant, 9th ed., sec. 16.

The principle is fully sustained by the following decided cases: *Sexton v. Chicago Storage Co.*, 129 Ill. 318, 16 Am. St. Rep. 274, 21 N. E. 920; *Craig v. Summers*, 47 Minn. 189, 49 N. W. 742, 15 L. R. A. 236; *Smiley v. Van Winkle*, 6 Cal. 605; *Lee v. Payne*, 4 Mich. 106; *Woodhull v. Rosenthal*, 61 N. Y. 382; *Bedford v. Terhune*, 30 N. Y. 453, 86 229 Am. Dec. 394; *St. Joseph etc. R. Co. v. St. Louis etc. R. Co.*, 135 Mo. 173, 36 S. W. 602, 33 L. R. A. 607; *Cook v. Jones*, 96 Ky. 283, 28 S. W. 960; *Mulligan v. Hollingsworth*, 99 Fed. 216; *McLennan v. Grant*, 8 Wash. 603, 36 Pac. 682.

Appellant argues that the instrument is a lease as between himself and respondent, although it may be an assignment as to others. We do not think so, in view of the doctrine maintained by the weight of the decided cases. Respondent parted with its entire interest. It is true, it reserved the right of re-entry at the close of the term; but that provision is without force for the reason that, at the end of the term, there would be nothing left of which it could take possession. It also reserved the right of re-entry in case of default in payment

of rent or breach of any of the covenants. The rental terms and covenants being, however, precisely the same as its own in the lease with its lessor, the authorities maintain that the legal effect of the instrument is not changed from that of an assignment to that of a lease, even though the right of re-entry for condition broken be reserved. While there is some conflict upon this point, yet we think the weight of authority decidedly supports the rule as stated. In *Craig v. Summers*, 47 Minn. 189, 49 N. W. 742, 15 L. R. A. 236, it was said: "So the right of re-entry is not an estate or interest in land, nor does it imply a reservation of a reversion. It is a mere chose in action. When enforced, the grantor is in through the breach of the condition, and not by the reverter."

The instrument being an assignment of a full leasehold term by respondent to appellant, an action does not lie in favor of the assignee and against the assignor for an act of the original lessor: *Blair v. Rankin*, 11 Mo. 440; *Waldo v. Hall*, 14 Mass. 486; *M'Clenahan v. Gwynn*, 3 Munf. (Ky.) 556; *Knickerbacker v. Killmore*, 9 Johns. 106.

"There is no instance produced, nor can we find any, of an action by an assignee against an assignor upon a covenant in law for an eviction in consequence of an act done by the original lessors": *Waldo v. Hall*, 14 Mass. 486.

²³⁰ We think the court did not err in its application of the law, and the judgment is affirmed.

Mount, C. J., Fullerton, Rudkin, Crow, Root and Dunbar, JJ., concur.

On the Assignment of Leases and the respective rights and liabilities of the lessor, assignor, and assignee thereafter, see the note to *Washington etc. Co. v. Johnson*, 10 Am. St. Rep. 557-565. If all of a lessee's estate is transferred, the instrument of transfer operates as an assignment of the lease, notwithstanding words of demise are used instead of words of assignment; and if a lessee assigns his whole estate without reserving to himself any reversion therein, a privity of estate is at once created between the assignee and the original lessor, so that the latter has a right of action against the assignee on a covenant running with the land: *Sexton v. Chicago Storage Co.*, 129 Ill. 318, 16 Am. St. Rep. 274. As to whether there is any privity between the original lessor and a subtenant, see *Williams v. Michigan Cent. R. R. Co.*, 133 Mich. 448, 103 Am. St. Rep. 458.

Am. St. Rep., Vol. 114—8

STATE v. SMITH.

[42 Wash. 237, 84 Pac. 851.]

CONSTITUTIONAL LAW—**Licensing of Plumbing.**—A statute providing for the licensing of all plumbers who carry on the business of plumbing, creating a board of plumbing examiners, fixing their compensation, and imposing a penalty on all persons engaged in plumbing unless licensed, cannot be sustained as a health regulation, and is therefore unconstitutional as depriving persons of their liberty to pursue their chosen calling. (p. 121.)

E. H. Flueck, for the relator.

Kenneth Mackintosh and John B. Hart, for the respondent.

²⁴⁰ **RUDKIN, J.** The appellant was convicted before one of the justices of the peace of King county of the crime of engaging in the business of plumbing as a journeyman plumber, in violation of section 12 of the act of March 4, 1905, Laws of 1905, page 126, entitled, "An act to regulate plumbing in cities having a population of ten thousand inhabitants or over, providing for the licensing of persons to carry on the business and work of plumbing, creating a board of plumbing examiners, fixing the compensation of plumbing examiners, providing a penalty for the violation hereof and repealing all acts in conflict herewith," without first having obtained a license so to do, as prescribed by the preceding section of said act, and was sentenced to pay a fine of fifteen dollars, and costs of prosecution. He was committed to the custody of respondent, as sheriff of King county, in execution of this sentence, and applied to this court for a writ of habeas corpus, on the ground that the restraint and imprisonment were illegal: (1) Because said act violates section 1 of article 14 of the amendments to the constitution of the United States; (2) because said act violates sections 3 and 12, of article 1 of the constitution of the state of Washington; and (3) because said act is an unlawful delegation of legislative power. ²⁴¹ The case is now before us on the application and return to the show cause order heretofore granted.

The power of the legislature to make all needful rules and regulations for the health, comfort and well-being of society cannot be questioned, but there are certain limits beyond which the legislature cannot go, without trenching upon liberty and property rights which are safeguarded by the state

and federal constitutions. As said by the court in *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636: "The limit of the power cannot be accurately defined, and the courts have not been able or willing definitely to circumscribe it. But the power, however broad and extensive, is not above the constitution. . . . Generally, it is for the legislature to determine what laws and regulations are needed to protect the public health and secure the public comfort and safety, and while its measures are calculated, intended, convenient and appropriate to accomplish these ends, the exercise of its discretion is not subject to review by the courts. But they must have some relation to these ends. Under the mere guise of police regulations, personal rights and private property cannot be arbitrarily invaded."

And in *Re Aubrey*, 36 Wash. 308, 104 Am. St. Rep. 952, 78 Pac. 900, this court said: "It may be stated, as a general principle of law, that it is the province of the legislature to determine whether the conditions exist which warrant the exercise of this power; but the question, What are the subjects of its exercise? is clearly a judicial question. One may be deprived of his liberty, and his constitutional rights thereto may be violated, without the actual imprisonment or restraint of his person. 'Liberty,' in its broad sense, as understood in this country, means the right, not only of freedom from actual servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work when he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation. All laws, therefore, which impair or trammel these rights—which limit him in his choice of a trade or profession—are infringements upon his fundamental rights of liberty, which are under constitutional protection."

²⁴² Acts of similar import but relating to different professions, trades and occupations have often been before this court. Thus, in *State v. Carey*, 4 Wash. 424, 30 Pac. 729, an act regulating the practice of medicine and surgery was sustained. In *State v. Board of Dental Examiners*, 31 Wash. 492, 72 Pac. 110, and in *Re Thompson*, 36 Wash. 377, 78 Pac. 899, a similar act regulating the practice of dentistry was upheld. In *State v. Sharpless*, 31 Wash. 191, 96 Am. St. Rep. 832, 71 Pac. 737, involving the validity of the act regulating the business of barbering, a similar ruling was made. But in *Re Aubrey*, 36 Wash. 308, 104 Am. St. Rep.

952, 78 Pac. 900, an act regulating the business of horse-shoeing was declared unconstitutional, and without the police power of the state. Some of the acts considered in the above cases were manifestly needful and proper for the protection of the public health; others were on the border line.

Acts similar to the one now before us have been before the courts of last resort in a number of states. In *Singer v. State*, 72 Md. 464, 19 Atl. 1044, 8 L. R. A. 551, the court of appeals of Maryland held that an act regulating the business of plumbing was a valid police regulation. In *State v. Gardner*, 58 Ohio St. 599, 65 Am. St. Rep. 785, 51 N. E. 136, 41 L. R. A. 689, the supreme court of Ohio held that the business of plumbing was a proper subject for police regulation, but the Ohio act was declared unconstitutional because it discriminated between individuals, and firms and corporations. In *State v. Benzenberg*, 101 Wis. 172, 76 N. W. 345, the supreme court of Wisconsin made a similar ruling. In *State v. Justus*, 90 Minn. 474, 97 N. W. 124, the supreme court of Minnesota held that the business of plumbing was a proper subject for police regulation, but the Minnesota act was declared unconstitutional because its classification was arbitrary and unreasonable. In *People v. Warden of City Prison*, 144 N. Y. 529, 39 N. E. 686, 27 L. R. A. 718, a bare majority of the court of appeals upheld the validity of the plumbing act of that state. The only difference between the New York ²⁴³ act and our own lies in the fact that the former applied to employing of master plumbers only, while the latter includes journeymen plumbers as well. No importance was attached to this omission or difference, however, in either the majority or dissenting opinion. Indeed, the objection could only go to the efficacy of the law, and not to its validity; for if the subject can be regulated in its entirety, it can be regulated in part. The majority opinion concedes "that the act skirts pretty closely that border line beyond which legislation ceases to be within the powers conferred by the people of the state, through the constitution, upon its legislative body." In his dissenting opinion, concurred in by two of the other justices, Mr. Justice Peckham said: "It is said this is proper and right in order that the public may have some assurance that the master or employing plumber is not alone capable of following his trade as such, but that he has sufficient knowledge of the laws of health as applicable to plumbing to enable him scientifically to follow that trade as

a master plumber. It is to be observed that the examination does not necessarily call for any such knowledge. The act can be complied with, so far as this examination is concerned, if the applicant has but the most ordinary knowledge of the laws of his trade and the proper way to follow it practically. It is true the board may demand much more than that, and much more than was ever necessary to practically pursue the trade. If such additional knowledge were exacted, it would be in fact adding to the known and ordinary qualifications necessary to carry on the well-recognized trade of a plumber, those other and entirely different and much superior qualifications necessary in one who intended to conduct the professional business of a sanitary expert with regard to systems and general plans of plumbing. The legislature has no power to impose such a condition upon one desiring to exercise such a trade. It has, as I believe, no power to prescribe that an individual who desires to follow the trade of a plumber shall be possessed of qualifications which do not naturally pertain to such a calling, and which are only possessed by persons qualified for the pursuit of a very different occupation, involving learning and skill of an uncommon order. The legislature might probably provide for a sanitary²⁴⁴ inspection of plumbing work, and thus secure a kind of work, as to its system and sufficiency, which might fairly be said to tend toward the protection of the health of the general public. But the trade of the practical plumber is not one of the learned professions, nor does such a tradesman hold himself out in any manner as an expert in the science of 'sanitation,' nor is any such knowledge expected of him, and this act, when practically enforced, may or may not exact it of him. This board has the very greatest and an entirely arbitrary discretion as to what qualifications it will exact from the applicant. It may make an examination which none but an expert in sanitary knowledge could pass, or it may make the examination entirely perfunctory. Judging from the other features of the act, it will depend upon considerations which are foreign to any question of health as to what kind of examination will be made.

"If the broader and more severe examination is held, or the greater qualification is insisted on, the imposition of such a condition in the case of a workman upon his natural right to work at his ordinary trade renders the act under which such a condition can be imposed unconstitutional. Whether

in all cases the condition would be insisted on is immaterial. It is the power to insist upon it under the law which makes the law itself void.

"And yet, if the more severe examination is not made, and the superior qualification exacted, the act is absolutely worthless as a health measure. If it is intended as an act simply to secure the ordinary capacity necessary for the prosecution of the trade of a plumber, it is useless and vexatious, and not a health regulation in any form. If it exact more, it is an improper addition to the qualifications of a simple tradesman. This act permits the greater exaction to be made.

"It seems to me very absurd to treat this statute as one which in any possible manner affects, or which was really intended to affect, the public health. And when it is seen that the work of the master plumber may be performed by journeymen who have been subjected to no official examination, and whose work need not be examined by anyone, not even by the master plumber himself, the radical failure of the act to really protect the public health is quite apparent. Sewer gas is dangerous, but exactly how to treat the matter of plumbing in order to run the least danger therefrom is a ²⁴⁵ subject for professional learning and skill, except as to the narrow part of the tradesman-plumber, which is to see to it that his pipes do not leak, and that they do not permit the escape of gas. This part is mechanical and easily understood, and is the part which the tradesman performs, and the system, the proper arrangement thereof, and such kindred questions, are for the determination of a more scientific and a more learned body of men.

"The examination provided for by this act, if conducted for the sole purpose of discovering the qualifications of an applicant in regard to those matters which pertain and are germane to the real and practical trade of a plumber, will not have the slightest tendency to discover whether he has also the requisite knowledge to enable him to act as a sanitary expert.

"Taking the act as a whole, it would seem quite apparent that its purpose is to enable the employing plumbers to create a sort of guild or body among themselves, into which none is to be permitted to enter excepting as he may pass an examination, the requisites of which are not stated, and where his success or failure is to be determined by a board of which some of their own number are members. In order to be at

liberty to exercise his trade as a master plumber, he must pass this examination and become a member of this favored body. It is difficult for me to see the least resemblance to a health regulation in all this.

"I think the act is vicious in its purpose, and that it tends directly to the creation and fostering of a monopoly.

"It seems to me most unfortunate that this court should, by a strained construction of the act as a health law, give its sanction to this kind of pernicious legislation. We shut our eyes to the evident purpose of the statute, and by means of maxims well enough in their way, but sadly out of place here, impute a purpose to the legislature which it plainly did not have, and which, if it did have, it has failed to carry out, even conceding that the purpose could be legitimately effected by other means. This measure detracts from the liberty of the citizen acting as a tradesman in his efforts to support himself and his family by the honest practice of a useful trade, and I think no court ought to sanction such legislation unless it tends much more plainly than does this act toward the preservation of the health and comfort of the public."

²⁴⁶ We have quoted at length from this dissent because a federal question is involved, and because the views of the learned justice are in accord with our own, and in our opinion are shared by a majority of the supreme court of the United States of which he is now a member. In *People v. Lochner*, 177 N. Y. 145, 101 Am. St. Rep. 773, 69 N. E. 373, an act forbidding the employment of bakers in biscuit, bread or cake bakeries, or in confectionery establishments for more than sixty hours in any one week, came before the court for consideration. A bare majority of the court again sustained the act, the two justices, who concurred in the above dissent of Mr. Justice Peckham, dissenting. The case came before the supreme court of the United States on writ of error, and the act was declared unconstitutional and the judgment reversed, Mr. Justice Peckham delivering the opinion of the court. In the course of his opinion the learned justice said: "There must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty. It is unfortunately true that labor, even in any department, may possibly carry with it the seeds of unhealthiness. But are we all, on that account, at the mercy of legislative majorities? A printer, a tinsmith, a locksmith, a carpenter, a cabinet-maker, a dry goods clerk,

a bank's, a lawyer's, or a physician's clerk, or a clerk in almost any kind of business, would all come under the power of the legislature, on this assumption. No trade, no occupation, no mode of earning one's living, could escape this all-pervading power, and the acts of the legislature in limiting the hours of labor in all employments would be valid, although such limitation might seriously cripple the ability of the laborer to support himself and his family."

Again: "It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are in reality passed from other motives. We are justified in saying so when, from the character of the law and the subject upon which it legislates, it ²⁴⁷ is apparent that the public health or welfare bears but the most remote relation to the law. The purpose of a statute must be determined from the natural and legal effect of the language employed; and whether it is or is not repugnant to the constitution of the United States must be determined from the natural effect of such statutes when put into operation, and not from their proclaimed purpose. . . . The court looks beyond the mere letter of the law in such cases": *Lochner v. New York*, 198 U. S. 45, 25 Sup. Ct. Rep. 539, 49 L. ed. 937.

In his concurring opinion in *Butchers' Union etc. Co. v. Crescent City Livestock etc. Co.*, 111 U. S. 746, 4 Sup. Ct. Rep. 652, 28 L. ed. 585, Mr. Justice Bradley said: "The right to follow any of the common occupations of life is an inalienable right; it was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence, which commenced with the fundamental proposition that 'all men are created equal, that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness.' This right is a large ingredient in the civil liberty of the citizen."

Again: "I hold that the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States."

And again: "But if it does not abridge the privileges and immunities of a citizen of the United States to prohibit him from pursuing his chosen calling, and giving to others the exclusive right of pursuing it—it certainly does deprive him (to a certain extent) of his liberty; for it takes from him the

freedom of adopting and following the pursuit which he prefers; which, as already intimated, is a material part of the liberty of the citizen."

It is true these remarks were made in regard to questions of monopoly—questions not entirely foreign to this case—but they well describe the rights which are covered by the word "liberty" as contained in the fourteenth amendment.

²⁴⁸ We cannot close our eyes to the fact that legislation of this kind is on the increase. Like begets like, and every legislative session brings forth some new act in the interest of some new trade or occupation. The doctor, the lawyer, the druggist, the dentist, the barber, the horseshoer, and the plumber have already received favorable consideration at the hands of our legislature, and the end is not yet, for the nurse and the undertaker are knocking at the door. It will not do to say that any occupation which may remotely affect the public health is subject to this kind of regulation and control. Our health, our comfort, and our well-being are materially affected by all of our surroundings—by the houses we live in, the clothes we wear, and the food we eat. The safety of the traveling public depends in no small degree on the skill and capacity of the section crews that build and repair our railroads; yet are we on this account to add the architect, the carpenter, the tailor, the shoemaker, those who produce and prepare our food, and all the rest, to the ever-growing list? If so, it will be but a short time before a man cannot engage in honest toil to earn his daily bread without first purchasing a license or permit from some board or commission. The public health is entitled to consideration at the hands of the legislative department of the government, but it must be remembered that liberty does not occupy a secondary place in our fundamental law. Under some of the acts to which we have referred members of the board of health form part of the examining board, but our act has not even this saving grace. By its terms two master plumbers and one journeyman plumber are constituted the guardians of the public health and welfare. We are not permitted to inquire into the motive of the legislature, and yet, why should a court blindly declare that the public health is involved, when all the rest of mankind know full well that the control of the plumbing business by the board and its licensees is the sole end in view. We are satisfied that the act has no such relation to the public health as will sustain it as a police or sani-

tary ²⁴⁹ measure, and that its interference with the liberty of the citizen brings it in direct conflict with the constitution of the United States.

The prisoner is entitled to his discharge, and it is so ordered.

Mount, C. J., Dunbar, Fullerton, Hadley and Crow, JJ., concur.

ROOT, J., Concurring. To the foregoing may be added this thought: The liberty and natural rights of a citizen—such as his privilege to engage in a lawful vocation for a livelihood—can be denied him by the legislature only where such deprivation is necessary to accomplish a given result essential to the welfare of the public. If that result can be attained in a practicable manner without interference with such liberty and rights, there is an absence of that necessity which is an essential and prerequisite to the validity of such a statute.

In the case at bar, the only justification urged in behalf of the statute is that good plumbing is necessary to the health of people in cities having over ten thousand inhabitants. Avowedly, it is sought to insure good plumbing by means of this statute. It is self-evident that the same or a better result can be obtained by means of statutes or ordinances requiring good plumbing, and insuring it by means of adequate inspection. Such a statute or ordinance would not interfere with the liberty or natural rights of any person, and would safeguard the health of the public as fully as, or more so than, the statute now in question. It therefore follows that the liberty and natural rights of the individual are infringed by this statute unnecessarily and, consequently, unconstitutionally.

The Legislature cannot prevent an association of persons in a partnership from carrying on the plumbing business because some of the partners, who have nothing to do with the plumbing work or its supervision, are not registered as plumbers: Schnaier v. Navarre Hotel etc. Co., 182 N. Y. 83, 108 Am. St. Rep. 790. And a statute requiring an examination by, and a license from, a state dental board as a prerequisite to owning, running or managing a dental office, is unconstitutional: State v. Brown, 37 Wash. 97, 107 Am. St. Rep. 798.

BANK v. DOHERTY.

[42 Wash. 317, 84 Pac. 872.]

CONFLICT OF LAWS.—Though the Law of the Place of the Contract Controls the interpretation and validity of a note, the law of the forum governs as to the remedy for its enforcement. (p. 127.)

USURY, Laws Respecting, When Affect the Remedy Only and not the Substance of the Contract.—Though the usury law of a state affects only the remedy and not the substance of contracts, this rule does not apply to valid contracts made without the state, and which are governed by the laws of another state as to their character, construction and validity. (pp. 127, 128.)

USURY—Notes Secured by Mortgage on Lands Situate in Another State.—If a note and mortgage are executed in a state between citizens and residents, and are not usurious by the laws of such state, the mortgage may be enforced against real property described therein and situate in another state by whose laws the note would have been usurious had it been executed therein. (p. 128.)

APPEAL AND ERROR.—An Exception on the Ground that Evidence is Insufficient to support a finding, and that the same is contrary to the evidence, is sufficient where the finding relates to the amount allowed as interest on a promissory note, to raise the question that such interest should, under the laws of another state, where the note was executed, have been computed at a different rate. (p. 128.)

INTEREST, Rate of After Maturity.—If a note is payable three years after its date, with interest at the rate of two per cent per month, and a statute of the state provides that unless there is no express contract in writing fixing a different rate, interest is payable on all moneys at the rate of eight per cent per annum after they become due on any instrument in writing, interest after the maturity of such note cannot be allowed at the rate specified therein, but only at the rate designated in such statute. (pp. 129, 130.)

CONFLICT OF LAWS—Interest After Maturity.—If the statutes of the state provide the rate of interest allowable on contracts where no other rate is specified therein, such statute controls in a proceeding in another state to foreclose a mortgage given on lands therein to secure the payment of one of such contracts. (pp. 129, 130.)

MORTGAGES, Conflict Between—Priority.—One who advances money, to be secured by a mortgage on property, with notice that a pre-existing mortgage thereon has not been regularly satisfied, takes his security subject to such prior mortgage. (p. 130.)

APPEAL AND ERROR—Reversal, Order for Restitution Which may be Made Thereon.—If, on appeal from a judgment foreclosing a mortgage, it appears that the judgment was for a sum in excess of that due, and that a sale has been made thereunder pending an appeal, and a deficiency judgment has been entered, the appellate court may provide that the respondent satisfy the deficiency judgment and pay into court such an additional sum as will, when added to the amount of the deficiency judgment, equal the excess for which the recovery was permitted by the lower court, and that

the sale may stand, but if the respondent does not comply with such order, then that the judgment appealed from be vacated and a new judgment be entered in harmony with the opinion expressed by the court and a new sale be made thereunder. (pp. 130, 131.)

Melville C. Brown, John W. Roberts and Maurice D. Leehey, for the appellants.

James B. Murphy, Harold Preston, and Graves, Palmer, Brown & Murphy, for the respondent.

323 MOUNT, C. J. This is an action to foreclose certain real estate mortgages. On January 3, 1900, the respondent, Benjamin Bank, a resident of Butte, Montana, loaned to Mary T. Doherty, a resident of the same place, \$2,500 on her promissory note, as follows:

"2,500.00 Butte, Montana, January 3, 1900.

"For value received, three years after date, I promise to pay to B. Bank, or order, the sum of \$2,500 at his office in Butte, Montana, with interest at the rate of two per cent per month, payable monthly. The privilege hereby granted to the maker of this note to pay any amount not exceeding \$200 per month thereon. Interest to be reduced according to such payments. Payment to be made on interest day.

"(Signed) MARY T. DOHERTY."

At the same time and place, in order to secure the said note, the maker executed two mortgages, a chattel mortgage on certain personal property in Butte, and a real estate mortgage on certain real estate in Seattle, this state. The property included in the chattel mortgage was afterward sold, and the proceeds of the sale amounted to \$96. A short time after the note and mortgages were made, the said Mary T. Doherty died, testate, in Montana. Her will was thereafter admitted to probate in King county, in this state, and letters testamentary with the will annexed issued to appellant

324 Maurice D. Leehey. Her minor son, the appellant Earle Doherty, a resident of California, was her sole devisee. On March 9, 1901, the respondent brought an action in the superior court of King county to foreclose his real estate mortgage, and at that time filed a *lis pendens* in the office of the county auditor of King county. Subsequently a judgment of foreclosure was entered, and an appeal was taken therefrom to this court. We reversed the judgment, for the reason that the debt was not then due: *Bank v. Doherty*, 29 Wash

233, 92 Am. St. Rep. 903, 69 Pac. 732. The appellants in that action, Earle Doherty and Mr. Leehey, administrator, were awarded costs therein against Mr. Bank, for the sum of \$101.45.

The original note and mortgage had been introduced in evidence by the plaintiffs in that case, as exhibits, and were transmitted here with the record, where they were held by the clerk of this court. After a remittitur in that case had gone down, the parties stipulated in writing that the exhibits might be returned to the clerk of the superior court, to be held by him subject to the demand of the party who introduced the same in evidence. After demand had been made upon Mr. Bank to pay the judgment for costs, as above stated, and he had neglected to do so, an execution was issued at the request of the appellants in that case, and the sheriff levied upon the original note and mortgage, and took the same from the possession of the clerk. The note and mortgage were advertised for sale and, on December 1, 1902, were sold at sheriff's sale to C. L. Byron, defendant in this action, for \$110.20, being the amount of the judgment and accrued costs. The sale was subsequently confirmed, and the note and mortgage were delivered to Mr. Byron. Neither Mr. Bank nor his attorneys had any actual notice of the seizure and sale of the note and mortgage. The note had been indorsed in blank by the payee some time before it was introduced in evidence in the first foreclosure action. After the sale to Mr. Byron, the words "Pay to C. L. Byron or ³²⁵ order" were written on the note above the respondent's signature.

On December 16, 1902, the appellant Leehey, as administrator of the estate, petitioned the probate court for leave to place another mortgage upon the property described in respondent's mortgage, for the purpose of procuring money with which to pay the respondent's mortgage, then held by C. L. Byron under the said sheriff's sale. On January 13, 1903, the respondent, Mr. Bank, and his attorneys, upon learning that the note and mortgage had been sold, filed a motion to set aside the sale in the original foreclosure action out of which the execution issued. After many continuances of the hearing, and some amendments to the motion, the motion was finally heard, and on April 10, 1903, the superior court of King county made an order setting aside the

sale. This order was subsequently affirmed, on appeal, by this court: *Bank v. Doherty*, 37 Wash. 32, 79 Pac. 486.

In the meantime, on February 20, 1903, an order was entered in probate, authorizing the administrator to mortgage the property for the purpose of paying off respondent's note and mortgage while it was held by Mr. Byron. Soon after the sale of the note and mortgage to Mr. Byron, Mr. Leehey, the administrator of the estate of Mary Doherty, deceased, went to Butte, Montana, and there informed J. S. Dutton and Adolph Pincus, two creditors of the estate, that the note and mortgage executed to Mr. Bank were then held by Mr. Byron, and could be satisfied for \$2,200; that the mortgaged property was worth at least \$3,000; and requested Mr. Dutton and Mr. Pincus to advance \$2,200 for the purpose of taking up respondent's note and mortgage, and promising that he, as administrator, would obtain leave of the probate court to execute a new mortgage on the property to secure them for the \$2,200, and that by means of such mortgage he would permit them to acquire the title to the property and thus make themselves whole on the estate. Mr. Pincus and Mr. Dutton agreed to this, and while the motion to vacate ~~the~~ the sale of the note and mortgage to Mr. Byron was pending, appellant Leehey, as administrator, executed a mortgage to Mr. Dutton for the sum of \$2,200, and Mr. Byron thereupon acknowledged satisfaction of the respondent's note and mortgage, and delivered the same to Mr. Dutton, who thereupon sent to Mr. Leehey a draft for the amount agreed upon, \$1,100 being contributed by Mr. Dutton and \$1,100 by Mr. Pincus. Mr. Leehey thereupon recorded the mortgage to Mr. Dutton.

After the sale of respondent's note and mortgage was set aside by the court, and after the same became due, respondent brought this action to foreclose his mortgage, and made all persons claiming any interest in the property parties to the foreclosure proceeding. The appellant Dutton filed a cross-complaint, setting up his mortgage, and praying that the same be also foreclosed, and that he be decreed to be a prior mortgagee. At the trial, the court found the facts in favor of the respondent Bank, and that the appellant Dutton took his mortgage with notice and knowledge of respondent's mortgage, and was therefore a subsequent mortgagee. The judgment of the lower court was in favor of the respondent Bank, for the full amount of the note, with interest at two per

cent per month from its date to the date of the judgment, and his mortgage was decreed a first lien upon the property for the amount thereof. Appellant Dutton was also given judgment for the amount of the note and mortgage standing in his name, but the court found that he took his mortgage with notice of the respondent's mortgage, and the lien was therefore declared subsequent to respondent's mortgage. The administrator Leehey and the legatee Doherty appeal from the judgment, claiming (1) that the note given to respondent Bank is usurious; (2) that it does not bear interest after maturity at the rate of two per cent per month; and (3) that respondent is not the owner thereof. Mr. Dutton appeals separately, claiming that the court erred in finding that his mortgage was subsequent to respondent's mortgage.

³²⁷ It is apparently conceded that both the note and mortgage sued on by the respondent Bank are Montana contracts. If not conceded, the record conclusively shows that both the maker and the payee of the note and mortgage were bona fide residents of Butte, Montana. The note was executed there and was payable there. The mortgage was also executed and delivered at the same time and place as the note. But it described property in King county in this state, and was sent here for record. It is proved, and not disputed, that the rate of interest provided for in the note and mortgage was valid in the state of Montana, where the contract was made and where it was to be performed. Under these facts there can be no escape from the conclusion that the contract was a Montana contract and was not usurious there. But appellants argue that, while the law of the place of the contract governs as to the interpretation and validity of the note, the law of the forum governs as to remedies for its enforcement. This position is no doubt correct. We said in *La Selle v. Woolery*, 14 Wash. 70, 53 Am. St. Rep. 855, 44 Pac. 115: "The settled rule is that the law of the place where the contract is made must govern in determining the character, construction and validity of such contract; while the law of the place where suit is instituted upon the contract governs as to 'the nature, extent and form of the remedy.' "

Appellants further contend that the usury law of this state affects only the remedy, not the substance of such contracts, and we are cited to Ballinger's Code, section 3671 (*Pierce's Code, sec. 5706*), in support thereof. This is true when applied to contracts executed or to be performed within the state, but it

sale. This order was subsequently affirmed, on appeal, by this court: *Bank v. Doherty*, 37 Wash. 32, 79 Pac. 486.

In the meantime, on February 20, 1903, an order was entered in probate, authorizing the administrator to mortgage the property for the purpose of paying off respondent's note and mortgage while it was held by Mr. Byron. Soon after the sale of the note and mortgage to Mr. Byron, Mr. Leehey, the administrator of the estate of Mary Doherty, deceased, went to Butte, Montana, and there informed J. S. Dutton and Adolph Pincus, two creditors of the estate, that the note and mortgage executed to Mr. Bank were then held by Mr. Byron, and could be satisfied for \$2,200; that the mortgaged property was worth at least \$3,000; and requested Mr. Dutton and Mr. Pincus to advance \$2,200 for the purpose of taking up respondent's note and mortgage, and promising that he, as administrator, would obtain leave of the probate court to execute a new mortgage on the property to secure them for the \$2,200, and that by means of such mortgage he would permit them to acquire the title to the property and thus make themselves whole on the estate. Mr. Pincus and Mr. Dutton agreed to this, and while the motion to vacate ³²⁶ the sale of the note and mortgage to Mr. Byron was pending, appellant Leehey, as administrator, executed a mortgage to Mr. Dutton for the sum of \$2,200, and Mr. Byron thereupon acknowledged satisfaction of the respondent's note and mortgage, and delivered the same to Mr. Dutton, who thereupon sent to Mr. Leehey a draft for the amount agreed upon, \$1,100 being contributed by Mr. Dutton and \$1,100 by Mr. Pincus. Mr. Leehey thereupon recorded the mortgage to Mr. Dutton.

After the sale of respondent's note and mortgage was set aside by the court, and after the same became due, respondent brought this action to foreclose his mortgage, and made all persons claiming any interest in the property parties to the foreclosure proceeding. The appellant Dutton filed a cross-complaint, setting up his mortgage, and praying that the same be also foreclosed, and that he be decreed to be a prior mortgagee. At the trial, the court found the facts in favor of the respondent Bank, and that the appellant Dutton took his mortgage with notice and knowledge of respondent's mortgage, and was therefore a subsequent mortgagee. The judgment of the lower court was in favor of the respondent Bank, for the full amount of the note, with interest at two per

cent per month from its date to the date of the judgment, and his mortgage was decreed a first lien upon the property for the amount thereof. Appellant Dutton was also given judgment for the amount of the note and mortgage standing in his name, but the court found that he took his mortgage with notice of the respondent's mortgage, and the lien was therefore declared subsequent to respondent's mortgage. The administrator Leehey and the legatee Doherty appeal from the judgment, claiming (1) that the note given to respondent Bank is usurious; (2) that it does not bear interest after maturity at the rate of two per cent per month; and (3) that respondent is not the owner thereof. Mr. Dutton appeals separately, claiming that the court erred in finding that his mortgage was subsequent to respondent's mortgage.

³²⁷ It is apparently conceded that both the note and mortgage sued on by the respondent Bank are Montana contracts. If not conceded, the record conclusively shows that both the maker and the payee of the note and mortgage were bona fide residents of Butte, Montana. The note was executed there and was payable there. The mortgage was also executed and delivered at the same time and place as the note. But it described property in King county in this state, and was sent here for record. It is proved, and not disputed, that the rate of interest provided for in the note and mortgage was valid in the state of Montana, where the contract was made and where it was to be performed. Under these facts there can be no escape from the conclusion that the contract was a Montana contract and was not usurious there. But appellants argue that, while the law of the place of the contract governs as to the interpretation and validity of the note, the law of the forum governs as to remedies for its enforcement. This position is no doubt correct. We said in *La Selle v. Woolery*, 14 Wash. 70, 53 Am. St. Rep. 855, 44 Pac. 115: "The settled rule is that the law of the place where the contract is made must govern in determining the character, construction and validity of such contract; while the law of the place where suit is instituted upon the contract governs as to 'the nature, extent and form of the remedy.' "

Appellants further contend that the usury law of this state affects only the remedy, not the substance of such contracts, and we are cited to Ballinger's Code, section 3671 (*Pierce's Code, sec. 5706*), in support thereof. This is true when applied to contracts executed or to be performed within the state, but it

has no application to valid contracts made without the state, and which are governed by the law of another state as to their character, construction and validity. The contract in this case being a valid and binding contract in the state of Montana, the mere fact that its payment was secured by a mortgage on property in this state does not change its character or render it subject to the usury laws of this state. The ³²⁸ mortgage is but the means of securing to the payee what the maker has agreed to pay at the place named in the note: *De Wolf v. Johnson*, 10 Wheat. 367, 6 L. ed. 343; *Call v. Palmer*, 116 U. S. 98, 6 Sup. Ct. Rep. 301, 29 L. ed. 559; *Coghlan v. South Carolina R. Co.*, 142 U. S. 101, 12 Sup. Ct. Rep. 150, 35 L. ed. 951. The remedy for the foreclosure of the mortgage, being the practice of the courts, is governed, of course, by the laws of this state: *La Selle v. Woolery*, 14 Wash. 70, 53 Am. St. Rep. 855, 44 Pac. 115. The amount due upon the note is determined by the substance of the note itself, and not by any remedy to enforce it. When the lower court found that the contract was a Montana contract, valid in that state, the terms of the contract determined the amount due, and will be enforced accordingly.

It will be observed by examining the note hereinbefore set out that the maker promised to pay \$2,500 three years after date, with interest at the rate of two per cent per month. No provision is made for any rate of interest after maturity. The statutes of Montana, as shown and admitted by the pleadings, provides that "unless there is an express contract in writing fixing a different rate, interest is payable on all moneys at the rate of eight per cent per annum after they become due on any instrument of writing," etc.: Mont. Civ. Code, amended 1899, sec. 2585. The trial court in this case computed interest, from the date of the note to the date of the decree, at two per cent per month, making a total, after deducting the credit of \$96, of \$5,596.66, and found that amount to be due. An exception was taken to this finding, as follows: "Because the evidence is insufficient to support said finding, and the same is contrary to the evidence," and for other specified reasons. Respondent contends that this exception is not sufficient to raise the question now presented as to the amount of interest due. We think it is sufficient, under the provisions of Ballinger's Code, section 5055.

Appellants rely upon the decision of this court in *Palmer v. Laberee*, 23 Wash. 409, 63 Pac. 216. That was a case

³²⁹ where the question arose as to the amount of interest which should be allowed upon a judgment reviving a prior judgment, and this court there held that interest should be allowed at the legal rate where the judgment revived did not recite the amount of interest it should draw. It will be seen that the exact point involved in this case was not before the court in that case, but in discussing the question then before us, reasoning by analogy, we said: "It will be seen from *Brewster v. Wakefield*, 22 How. 118, 16 L. ed. 301, and *Ludwick v. Huntzinger*, 5 Watts & S. 51, that where a note is entirely silent as to interest after it is due, the creditor is entitled to interest by operation of law; and that until the note became payable the agreement of the parties regulated the allowance and the rate of interest, but after that the law interposed not only to allow, but to regulate, the rate of interest that should be allowed the creditor for and on account of the illegal detention of the debt."

This statement of the rule is directly in point in the case now before us.

Counsel for respondent contends that, where there is no evidence to show a contrary intention, the law will presume that it was the intention of the parties that the money should bear the rate specified in the note from its date until such time as a judgment might be entered thereon, and that this is in accord with the great weight of authority in this country, and many cases are cited to support this contention. It is unnecessary to review these authorities because, where there is a statute upon the subject, the statute must control. As we have seen above, the note in question was made in Montana by bona fide residents of that state. It was payable there, and the parties to it must have contracted with reference to the law of that state as it existed at the time. The statute in force at the time, as quoted above, provided that interest is payable on all moneys at the rate of eight per cent per annum after they become due, on any instrument in writing, unless there is an express contract in writing fixing a different rate. This statute seems clear and conclusive of ³³⁰ the question. It refers especially to moneys after they become due, and fixes the rate of interest at eight per cent per annum unless the writing fixes a different rate. No decisions of the courts of Montana have been called to our attention construing this section, and we have been unable to find any. We must, therefore, give it the plain meaning

which it was evidently intended to have. If the parties had intended the note in question to draw interest at the rate of two per cent per month after maturity, it would have been an easy matter to have placed such intention beyond doubt by simply adding the words "until paid" after the words "two per cent per month." They did not do so, and we must, therefore, conclude that the contract contained all of the agreement, and that the parties intended to let the law fix the rate of interest after maturity, if the note should not be paid when it became due. The lower court was therefore in error in computing interest at two per cent per month after maturity.

The last point made by appellants Doherty and Leehey is that the respondent is not the owner of the note, because it was sold at execution sale. This question was settled by us in the case of *Bank v. Doherty*, 37 Wash. 32, 79 Pac. 486.

The appellant Dutton contends that the court erred in finding his mortgage subsequent to the respondent's mortgage. This question depends upon the facts. There is some conflict in the evidence as to whether Mr. Dutton had actual notice of the condition of the sale of respondent's note and mortgage; but the circumstances surrounding the whole transaction lead us to believe that he had actual notice and knowledge of the whole transaction. He was not a party to it, and probably knew nothing about the proceedings until after the sale had taken place. But before he advanced his money and took his mortgage, we are satisfied that both Mr. Dutton and Mr. Pincus knew all about the sale and the purpose of it. We are further of the opinion that Mr. Dutton was bound by the constructive notice afforded by the *lis pendens* filed at ³³¹ the time the original foreclosure action was begun. But actual notice that respondent's mortgage had not been regularly satisfied was sufficient.

The conclusion we have reached upon the question of interest necessitates a modification of the judgment entered at the trial. The court rendered judgment for \$5,596.16 and \$250 attorney's fees and costs, in favor of respondent Bank. The amount of the judgment should have been \$4,662.33, and for \$250 attorney's fees and for costs. The judgment was, therefore, \$934.83 in excess of what it should have been. No supersedeas bond was given on the appeal, and it now appears from the supplemental record on file in this court that the mortgaged property was sold under the decree and

bid in by respondent for \$5,500, and that the sale was confirmed on October 28, 1905, leaving a deficiency judgment in favor of respondent for \$448.90. In view of these facts, it is ordered that the respondent satisfy the deficiency judgment and pay to the clerk of the court the sum of \$445.93, within thirty days after the remittitur is sent down, which last-named sum shall be credited upon the judgment in favor of appellant Dutton. If respondent shall not comply with this order as stated above, it is ordered that the judgment appealed from be vacated, and that a new judgment be entered in harmony with the views herein expressed, and a new sale of the mortgaged property had thereunder. Appellants shall recover costs of this appeal against respondent.

Crow, Fullerton, Hadley and Dunbar, JJ., concur.

Conflict of Law in the matter of usury is discussed in the monographic notes to *Bank of Newport v. Cook*, 46 Am. St. Rep. 201; *McGarry v. Nicklin*, 55 Am. St. Rep. 50. This question is discussed where the loan is secured by a mortgage on real estate, in *United States Sav. etc. Co. v. Beckley*, 137 Ala. 119, 97 Am. St. Rep. 19, and cases cited in the cross-reference note thereto.

JONES v. NORTH PACIFIC FISH AND OIL COMPANY.

[42 Wash. 332, 84 Pac. 1122.]

CHATTEL MORTGAGE—Removal of Property to Another State or Country with the Consent of the Mortgagee.—The rule that a mortgage duly executed and recorded in one state is given effect in another by virtue of comity between the states applies only where the removal is made without the consent of the mortgagee. Consent by the mortgagee that the property be taken from the state is a waiver of his mortgage as against every person except the mortgagor. (p. 133.)

CHATTEL MORTGAGE—Possession of Property, When Does not Aid the Mortgagee.—The possession of the mortgaged property acquired by the mortgagee through the unauthorized acts of officers of the mortgagor amounts to a trespass, and not to a lawful seizure, and cannot give the mortgagee any preference over other creditors, where his mortgage has become nonenforceable by the removal of the property with his consent from the state or territory in which it was situated, and wherein the mortgage was executed and recorded. (p. 134.)

APPEAL AND ERROR.—The Propriety of an Order Appointing a Receiver will be reviewed only on an appeal from that order, and not on an appeal from the final judgment. (p. 134.)

Sweeney & Steiner, for the appellant.

Ira Bronson and D. B. Trefethen, for the respondents.

³³² FULLERTON, J. The defendant, the North Pacific Fish and Oil Company, is a corporation organized and existing under and by virtue of the laws of this state, having its principal place of business in the city of Seattle. During the fishing season of 1904 it engaged in the business of catching and curing fish, at Grace Harbor, in the territory of Alaska. On its catch for that season, together with certain of its other ³³³ personal property at that place, it gave a chattel mortgage to the appellant, M. B. Bosworth, to secure a promissory note it was owing him, amounting to the sum of one thousand and seventy-five dollars. The mortgage was duly recorded according to the laws of Alaska governing the recording of such instruments. The respondents Jones, Hanson, Farner and Boyd, were employes of the defendant corporation, and assisted in catching and curing the fish which the appellant's mortgage covered. In the early part of November, 1904, the fish were shipped to the city of Seattle by the defendant corporation, with the knowledge and consent of the appellant. Shortly after the arrival of the fish in Seattle, the appellant obtained possession of the bill of lading from an office of the company at that place, and started to repack the fish for shipment to Japan; but shortly afterward gave a bill of sale of the same to the defendant Kelly-Clark company; this sale, however, seems not to have been consummated.

About this time the respondents above named filed a laborers' lien upon the fish to secure the payment of certain wages due them from the defendant corporation, which they had earned while in the employ of the corporation in Alaska in catching and curing the fish. On filing the lien, they began this action to foreclose the same, and applied for and, after notice and hearing, obtained the appointment of a receiver to take charge of the property pending the determination of the action. The receiver took the property into his possession, and thereafter sold it under an order of court, and at the time of final judgment, held the proceeds of the sale in lieu of the property.

The appellant defended the action, claiming a superior lien thereon by virtue of his chattel mortgage and his possession under the bill of lading. After a trial the court held

that neither the appellant nor the respondents had a lien upon the fish, but held that the corporation was insolvent and that both parties were entitled to share in its property, ²³⁴ and it apportioned the same between them according to the amounts of their respective demands.

The sum received by the receiver from the sale of the fish was sufficient to satisfy the appellant's demand, and he contends that it was error on the part of the court not to direct that his demand be paid in full before any part of the fund was distributed to the respondents. The appellant bases his right to be satisfied out of the fund on two grounds: (1) That he had a first lien upon the property by virtue of his mortgage; and (2) that the property had been turned over to him in satisfaction of his debt, and was lawfully in his possession when taken from him by the receiver under the order of the court.

In support of his first contention the appellant cites and relies upon that class of cases which maintain the doctrine that a chattel mortgage, duly executed and recorded at the then situs of the property, imparts notice to all persons who buy or otherwise obtain possession of the property in another state to which it has been removed by the mortgagor without the consent of the mortgagee. Without inquiring whether, owing to our somewhat peculiar recording acts, this rule is applicable to mortgaged property brought within this state from another jurisdiction, we think it inapplicable to the facts shown by this record, even were the rule accorded its fullest extent. A mortgage duly executed and recorded in one state is given effect in another by virtue of the rule of comity that exists between the states, and applies only in cases where the removal is made without the knowledge or consent of the mortgagee. Consent by the mortgagee that the property may be taken from the situs of the mortgage is a waiver of the mortgage as against every person except the mortgagor; hence, a mortgagee who consents to the removal of mortgaged property from the situs of the mortgage cannot be heard to insist, as against strangers thereto, that it has effect outside of its situs. So here, inasmuch as the appellant consented to the removal of the property from the territory ²³⁵ of Alaska to this state, he waived his mortgage, as against the respondents, who seized the property as creditors of the mortgagor.

The claim that the property had been turned over to him in satisfaction of his debt, and that he was lawfully in possession of the same at the time it was taken possession of by the receiver, is also without foundation. The trial court found, and we think the evidence justifies the finding, that the officers of the corporation who turned the bill of lading over to the appellant had no authority to act for the corporation; and it does not appear that the corporation ratified, or attempted to ratify, the act. This being true, the acts of these officers were not the acts of the corporation, and the appellant was a trespasser when he sought to take possession of the property. One creditor cannot obtain a preference right over another by wrongfully taking the property of the common debtor into his possession. A seizure of property, to give preference rights, must be a lawful seizure, one made under the authority of law; and a seizure which amounts to trespass is not a lawful seizure.

The appellant complains that the court was without authority to appoint a receiver, but we think it beyond question that the court had jurisdiction to make the appointment. Questions as to the propriety of the order of appointment can only be raised by an appeal from the order itself; they will not be reviewed on appeal from the final judgment.

On the whole, we think the judgment was as favorable to the appellant as the facts and law of the case warranted. It will therefore stand affirmed.

Mount, C. J., Hadley, Crow and Dunbar, JJ., concur.

The Removal to Another State of Mortgaged Chattels by the mortgagor subjects them to attachment, it has been held, by his creditors in the state to which they are removed, although the mortgage was duly recorded in the state where it was given, and the goods were removed without the knowledge or consent of the mortgagee: *Corbett v. Littlefield*, 84 Mich. 30, 22 Am. St. Rep. 681. For other decisions on this question, see *Aultman etc. Mach. Co. v. Kennedy*, 114 Iowa, 444, 89 Am. St. Rep. 373; *Snyder v. Yates*, 112 Tenn. 309, 105 Am. St. Rep. 941.

HILLMAN v. HILLMAN.

[42 Wash. 595, 85 Pac. 61.]

DIVORCE—Attorneys for Wife, When have No Right to Intervene to Prevent the Dismissal of the Action.—Though a statute of the state provides that the court, in an action brought by a wife for divorce, may require the husband to pay the reasonable expenses of the wife in the prosecution or defense of the action, when such judgment is granted or refused, or give judgment therefor, she may enter into a stipulation for the dismissal of the action without the consent of her attorneys, and the court cannot allow them to intervene in the action and thereupon enter a judgment in their favor for their fees and for the costs advanced by them. (p. 136.)

Frederick R. Burch, for the appellants.

Blaine, Tucker & Hyland and William Hickman Moore, for the respondents.

595 FULLERTON, J. The appellants Bessie Olive Hillman and Clarence D. Hillman are husband and wife, and the appellant Homer L. Hillman is the brother and business partner of Clarence D. Hillman. The respondents Steele & Brown are attorneys at law. On March 21, 1904, the appellant Bessie Olive Hillman began an action for divorce, and for a partition of the community property, against her husband, joining her husband's brother as a party defendant because of the business relations existing between him and her husband. The respondents Steele and Brown appeared as attorneys for Mrs. Hillman. A preliminary restraining order was applied for and issued, and an application made for temporary alimony and suit money, including attorney's fees. Pending this latter application, the Hillmans condoned their differences, 596 and a stipulation was entered into for a dismissal of the action. This stipulation was signed by Mrs. Hillman, but not by her attorneys, and when presented to the court was opposed by them, on the ground that they had an interest in the action to the extent of their attorneys' fees, and that the parties were without power to dismiss the action without their consent. The court took this view of the case, allowed the attorneys to file a petition in intervention for their fees and costs they had advanced, and ordered a hearing thereon, at the conclusion of which it entered a judgment against the appellants, Bessie Olive Hillman and Clarence D. Hillman, in favor of the attorneys, for one thou-

sand dollars as attorney's fees, and nine dollars they had advanced as costs, together with the costs of the proceedings.

The warrant for this judgment is thought to be found in section 5722 of the code (Ballinger's), which provides that the court in an action for divorce brought by the wife may "require the husband to pay all reasonable expenses of the wife in the prosecution or defense of the action, when such divorce is granted or refused, and give judgment therefor." But this section contemplates a judgment in favor of the wife, one running in her name, and is not authority for the intervention in the suit by the wife's attorneys, and the entry of a judgment against the husband and wife in their favor. The measure and mode of compensation of attorneys and counselors are, under our statute, a matter for private agreement between client and attorney (Ballinger's Code, sec. 5165), and controversies between them over such fees have no place in actions where the relation of attorney and client exists. Claims for attorneys' fees, where adjusted by actions, must be in actions brought for their adjustment, as claims of all other kinds are adjusted. True, the code in all cases makes an allowance for attorneys' fees called costs, and in certain classes of cases makes allowances for attorneys' fees as such. But these do not belong to the attorney by mere operation of law, nor ⁵⁹⁷ is he entitled to judgment for them; they are awarded to the prevailing party, and judgment for them is entered in the name of such party.

There are cases which maintain the doctrine contended for by the respondents, but we think they are not founded in the better reason. It is the policy of the law to encourage husband and wife to compromise and settle between themselves their domestic troubles, and to discourage actions for divorce. Actions for divorce, therefore, which both parties desire dismissed, should not be kept alive merely to settle the claims of counsel for attorneys' fees. Cases supporting the conclusion we have reached are the following: *Reynolds v. Reynolds*, 67 Cal. 176, 7 Pac. 480; *Sims v. Davis*, 48 Neb. 720, 67 N. W. 765; *Stover v. Stover*, 7 Idaho, 185, 61 Pac. 462; *Thompson v. Thompson*, 40 Tenn. (3 Head) 527; *McCulloch v. Murphy*, 45 Ill. 256.

The judgment appealed from is reversed and the cause remanded, with instructions to dismiss the action.

Mount, CJ., Hadley, Dunbar, Rudkin and Crow, JJ., concur.

A Plaintiff may Dismiss His Action at pleasure, as a general rule, without the intervention of his attorney: See Tompkins v. Railroad, 110 Tenn. 157, 100 Am. St. Rep. 795; Cameron v. Boeger, 200 Ill. 84, 93 Am. St. Rep. 165, and monographic note.

WESTERN TIMBER COMPANY v. KALAMA RIVER LUMBER COMPANY.

[42 Wash. 620, 85 Pac. 338.]

FRAUDS, STATUTE OF—Memorandum, Resolution of a Corporation may Constitute.—The resolution of a corporation adopted at a meeting of its board of directors containing a full description of property intended to be sold and also a statement of the terms of the sale, and purporting to authorize it to be made, a copy of which resolution, signed by the president and secretary of the selling corporation, is delivered to the purchaser, constitutes a full compliance with the requirements of the statute of frauds as being a memorandum in writing, signed by the parties to be charged. (p. 142.)

SPECIFIC PERFORMANCE in Favor of a Complainant Who has not Signed the Memorandum or Contract.—If the memorandum required by the statute of frauds has been signed by the defendant, but not by the complainants, and the contract is, therefore, to that extent unilateral, the latter, by promptly filing a bill in equity demanding specific performance, become liable to pay the purchase price and are entitled to the relief sought. (p. 142.)

CORPORATION, Acceptance of Terms of Sale by, When Should be Inferred.—If an oral contract for the sale of real property has been made by all the officers and chief stockholders of the purchasing and selling corporations, and thereafter the latter, at a meeting of its board of directors, adopts a resolution authorizing the sale, and the purchasing corporation does various acts for the purpose of complying with the terms of the sale, after which the selling corporation, being offered a higher price, rescinds its resolution, the trial court should find that the purchasing corporation accepted the terms of the sale and is entitled to specific performance of the contract. (p. 145.)

CORPORATION, Officer, Want of Authority of, Effect of Subsequent Ratification.—Where the principal stockholder of a corporation arranges and agrees upon the terms of the purchase of real estate by it, but is not an officer of, nor previously authorized to act for, it, the subsequent execution by the officers and stockholders of such corporation of promissory notes for the purchase price, and the readiness of the corporation to deliver such notes and make the requisite cash payments, and otherwise perform the contract of purchase, constitute a ratification of the acts of such stockholder and an acceptance by his corporation of the contract of purchase. (p. 145.)

FRAUDS, STATUTE OF, Acceptance of Contract, When not Prevented by Asking for Further Resolutions.—If a corporation at a meeting of its board of directors adopts a resolution authorizing the sale of its real property, the fact that the purchaser out of abundance of caution, desires the adoption of other resolutions, and that further steps be taken toward the completion or transfer of the title, does not show a refusal on its part to accept the contract of sale as authorized by such resolution. (p. 146.)

Coovert & Stapleton, for the appellant.

J. F. Booth, for the respondent.

⁶²² CROW, J. This action was instituted by the appellant, Western Timber Company, a Washington corporation, plaintiff below, against the respondent, Kalama River Lumber Company, an Oregon corporation, defendant below, to enforce the specific performance of a contract to sell and convey a large tract of timber land in Cowlitz county, Washington. Some time in the fall of 1904, one Henry Turrish, the principal stockholder of appellant, who, acting as its manager, controlled its business policy, although not an officer or director, had an interview at Duluth, Minnesota, with Mark Hessey, president of the respondent corporation, relative to the sale of said lands by respondent. Said Turrish then offered to purchase said lands for the appellant corporation for the sum of \$50,000, one-half cash, the remainder to be ⁶²³ payable in one and two years, with five per cent interest, secured by notes indorsed by certain stockholders of the appellant company. In pursuance of this offer, an abstract of title was furnished by respondent and approved by appellant.

On October 21, 1904, the said Mark Hessey, as president of respondent company, called a meeting of its board of directors at Iron River, Wisconsin. At this meeting only three directors were present. The board consisted of five directors, to wit: Mark Hessey, Winfield E. Tripp, their respective wives, and one M. T. O'Connell. These five directors owned all of the capital stock of the respondent company, the wives of Hessey and Tripp holding stock which belonged to their husbands, in order that they might qualify as directors. The directors present at the meeting of October 21, 1904, were Mark Hessey, Winfield E. Tripp and M. T. O'Connell. At this meeting the following resolution was unanimously adopted and entered upon the minute-book of the corporation:

"Resolved, That the timber lands in township 7, north of range 4 east, and township 7, north of range 3 east, of the Willamette meridian, now owned by the Kalama River Lumber Company, be sold and conveyed to the Western Timber Company for the sum of \$50,000; \$25,000 to be paid at the sealing and delivering of a warranty deed to the Western Timber Company, and \$12,500 to be paid with notes due on or before one year from date, with interest at 5 per cent per annum, and \$12,500 to be paid with notes due on or before two years from date, with interest at 5 per cent per annum. It is further

"Resolved, That the cash and notes received for said timber lands shall be divided between the stockholders of the said Kalama River Lumber Company, according to the stock held by the said stockholders, upon the surrendering to the said company their stock, duly assigned and transferred to said company."

After the adoption of said resolution Mr. Hessey, as president of respondent company, on October 22, 1904, delivered a signed copy thereof to Mr. Turrish, as the representative of the appellant corporation; and also handed to Mr. Turrish ⁶²⁴ the minute-book and certain papers of the respondent corporation, which were in turn referred by Mr. Turrish to the attorneys of the appellant corporation, who afterward prepared a written opinion thereon, calling attention to certain alleged irregularities in the resolution and proceedings. It is not necessary to state these objections in detail, the principal one being based upon the fact that the board of directors had not met within the state of Oregon. Appellant's attorneys suggested that certain steps be taken by respondent to perfect said proceedings and to pass the title. Mr. Turrish handed their written opinion containing said suggestion to Mr. Hessey, who, accompanied by Mr. Tripp, immediately called upon said attorneys and procured from them forms and drafts of the resolutions and proceedings which they had recommended. Mr. Hessey and Mr. Tripp, taking these documents, left the attorneys' office with the expressed intention of complying with their suggestions and completing the transfer. In the meantime Mr. Turrish provided funds for the cash payment, and had the notes for the unpaid purchase money properly executed and indorsed in accordance with the suggestion of Mr. Hessey. A subsequent meeting of the di-

rectors of the respondent corporation was called for October 27, 1904, at which time said directors, instead of taking the steps recommended by the appellant's attorneys, adopted the following resolution:

"Resolved, That the resolution adopted at a special meeting of the board of directors of the Kalama River Lumber Co., on the 21st day of October, 1904, agreeing to sell all the timber lands of said company in Cowlitz county, Washington, to the Western Timber Company, be and is hereby rescinded. Also the resolution dividing the cash and notes between the stockholders of said Kalama River Lumber Company adopted on the 21st day of October, 1904, be and is hereby rescinded."

Subsequent to the time Messrs. Hessey and Tripp had conferred with appellant's attorneys, and prior to the meeting of October 27th, the respondent corporation received by wire ⁶²⁵ from Portland, Oregon, an offer of \$70,000 for the land. Notice was afterward given to the appellant, that the respondent's directors had adopted the rescinding resolution of October 27th, refusing to complete the sale, and thereupon this action was immediately commenced.

On the trial, findings of fact were made, from which it in substance appears that the respondent owns the lands in Cowlitz county; that Henry Turrish is the principal stockholder of the appellant, living at Duluth, Minnesota, and at the solicitation of Mark Hessey, president of respondent corporation, offered to buy said lands for the sum of \$50,000, one-half cash, the balance in one and two years, at five per cent interest; that Mark Hessey, president of respondent, called said meeting of the board of directors at Iron River, Wisconsin, on October 21, 1904, at which meeting, three directors being present, the resolution first above set forth was unanimously adopted; that said resolution, the minutes of said meeting, and other papers of the respondent corporation, were thereafter handed by said Mark Hessey, president of respondent, to said Henry Turrish, and by said Henry Turrish were handed to appellant's attorneys, Washburn, Bailey & Mitchell; that on October 22, 1904, the attorneys made a written report or opinion thereon, containing certain objections to the form of the proceedings; that said written opinion was by Mr. Turrish handed to Mr. Hessey, and thereafter Mr. Hessey and Mr. Tripp, another director of respondent, called upon said attorneys for such stockholders' resolutions, direct-

ors' resolutions, proxies, etc., as said attorneys desired to be executed; that said Hessey and Tripp left said attorneys' office with said resolutions and directions, with the intent and purpose of calling a meeting to adopt the same; and that said parties called a special meeting of the board of directors, which was held in Iron River, Wisconsin, on October 27, 1904, all five directors being present, at which time the second resolution above set forth was adopted.

⁶²⁸ The appellant took no exceptions to these findings. It, however, requested the court to make the following additional findings, which were refused: That upon receiving such resolution of October 21, 1904, Mr. Turrish, on behalf of the appellant, then and there assented to all of its conditions, and proceeded to comply therewith by procuring the notes covering the deferred payments, and that at no time thereafter did appellant alter or modify the same or refuse to carry out the terms thereof; that at the trial appellant offered to pay into court, at such time as the court should direct, said sum of \$25,000, for respondent, and to deliver the notes of appellant company for \$25,000, payable one-half on or before one year, and one-half on or before two years from October 22, 1904. To the court's refusal to make these findings, appellant has excepted. Conclusions of law being made in favor of respondent, judgment was entered thereon, dismissing the action, and this appeal has been taken.

The appellant insists that the trial court erred (1) in its conclusions of law; (2) in its refusal to make the additional findings requested by appellant; (3) in its refusal to make the conclusions of law requested by appellant, and (4) in entering judgment for respondent and refusing to enter judgment for appellant.

The respondent corporation was formed for the purpose, among other things, of buying and selling timber lands in the state of Washington. The directors were therefore acting within the scope of their authority when they agreed to sell said lands. It appears from the evidence that all of the capital stock of the respondent corporation was owned by its five directors, and as it was anticipated that, in compliance with the suggestions of appellant's attorneys, all of said directors would be present at the second meeting of October 27, 1904, said attorneys waived any objection to the fact that the meeting of said board of directors would be held in the state of Wisconsin and not in the state of Oregon, their view

being that all stockholders present would be estopped from ⁶²⁷ denying the validity of the sale or transfer. The appellant contends that the first resolution of October 21, 1904, authorizing the sale of said real estate, which contains all the essential elements of a valid written memorandum as to terms, and which was signed by the president and secretary of the respondent corporation constituted a full compliance with the requirement of the statute of frauds, as being a memorandum in writing signed by the party to be charged, and as such memorandum had been made and so signed, the respondent's contract to convey can be specifically enforced. We think the resolution was a sufficient written memorandum to constitute a compliance with the requirements of the statute: *Browne on Statute of Frauds*, 5th ed., sec. 346; *Texas etc. R. Co. v. Gentry*, 69 Tex. 625, 8 S. W. 98; *Argus Co. v. Mayor*, 55 N. Y. 495, 14 Am. Rep. 296; *Tufts v. Plymouth Gold Min. Co.*, 14 Allen, 407; *Central Land Co. v. Johnston*, 95 Va. 223, 28 S. E. 175; *Grimes v. Hamilton County*, 37 Iowa, 290.

It is contended by the respondent that, even though it be conceded that a contract had been entered into between it and the appellant, and although it had signed a written memorandum thereof, still such contract cannot be specifically enforced in equity, for the reason that it is not mutual but unilateral, and that the respondent should not be held to a specific performance, for the reason that the appellant, not having signed any written memorandum thereof, could not be held liable in an action for the purchase price. In answer to this suggestion, appellant contends that, by promptly filing a bill in equity and demanding specific performance, it placed itself in a position to have a decree rendered in favor of respondent, forcing it to pay the purchase price. As the adoption of the resolution of October 21, 1904, by respondent was a sufficient compliance with the requirements of the statute of frauds, we think the contention of the appellant that the contract can be specifically enforced must be sustained. The weight of authority seems to be that the statute of frauds is ⁶²⁸ satisfied if the memorandum be signed by the party defendant in an action for specific performance. The party not signing is not bound unless, as is held by some authorities, he has accepted the same as a valid, subsisting contract. Want of mutuality arising from the failure of one party to sign cannot be successfully pleaded as a defense by the other party who did sign, as the act of filing a bill for a specific

performance binds the former, makes him liable, and renders the contract mutual: See *Woodruff v. Woodruff*, 44 N. J. Eq. 349, 16 Atl. 4, 1 L. R. A. 380; *South etc. R. Co. v. Highland Ave. etc. R. Co.*, 98 Ala. 400, 39 Am. St. Rep. 74, 13 South. 682; *Fry on Specific Performance*, secs. 448-459; *Waterman on Specific Performance*, sec. 201; *Pomeroy on Specific Performance*, sec. 170.

"Equity will not direct a performance of the terms of the agreement of one party when, at the time of such order, the other party is at liberty to reject the obligations of such agreement; yet, as in a case where an agreement which the statute of frauds requires to be in writing has been signed by one of the parties only, or when the contract, by its terms, gives to one party a right to the performance which he does not confer upon the other, upon the filing of a bill for enforcement in equity by the party who was before unbound, he thereby puts himself under the obligation of the contract. The contract then ceases to be unilateral; for by his own act the unbound party makes the contract mutual, and the other party is enabled to enforce it": 2 *Warvelle on Vendors*, p. 748.

In *Perry v. Paschal*, 103 Ga. 134, 29 S. E. 703, the supreme court of Georgia says: "If a contract for the sale of land, required by the statute of frauds to be in writing, is evidenced by a writing signed by one party only, but sufficient to charge the party signing, such party would be bound to perform the contract. While in such a contract there is want of mutuality of obligation, still if the party in whose favor the writing is executed, though not bound because it is not signed by him, sees proper to waive his right to insist upon the invalidity of the contract, and as evidence of such waiver files a proceeding in a court ⁶²⁹ of equity to enforce it, thus affirming in writing his willingness to be bound by the stipulations in the contract, he will by such proceeding, though previously not bound, put himself under the obligation of the contract. The contract then ceases to be unilateral; for by the act of the party who was in no way originally bound by the writing the contract becomes mutual, and the other party is thereby enabled to enforce it against him."

In *Engler v. Garrett*, 100 Md. 387, 59 Atl. 648, the court of appeals of Maryland says: "Was the contract mutual? This is not disputed in the pleading or in the evidence. It is said that it is not signed by the plaintiff, but this is not necessary, even under the statute of frauds, which only re-

quires the signature of the party to be charged. "There may be a mutual contract to which both parties have given their assent, though the evidence of such assent may exist in a different form as to the two parties. As to one, it may be verbal, while the other's is expressed by his signature in writing": Waterman on Specific Performance, sec. 201. The testimony as to the plaintiff's acceptance of the contract is ample, and, besides this, if there had been doubt on this question, it disappeared when he filed his bill to enforce it." See, also, Browne on Statute of Frauds, 5th ed., sec. 366; Brown v. Munger, 42 Minn. 482, 44 N. W. 519; Central Land Co. v. Johnson, 95 Va. 223, 28 S. E. 175; Cummins v. Beavers, 103 Va. 230, 106 Am. St. Rep. 881, 48 S. E. 891; Miller v. Cameron, 45 N. J. Eq. 95, 15 Atl. 842, 1 L. R. A. 554.

It is contended by the respondent that the resolution adopted by its directors on October 21, 1904, did not constitute a contract upon its part; that it did not result from a previous oral agreement, but that it was merely an offer to convey upon terms named, which offer was never accepted by the appellant, and that by reason of such nonacceptance, no contract was in fact made. On the other hand, it is contended by appellant that the resolution of October 21, 1904, was the result of a previous oral agreement entered into by Mr. Turrish on behalf of the appellant corporation, and Mr. ⁶³⁰ Hessey on behalf of the respondent corporation, and which was to be submitted by Mr. Hessey to the respondent for its approval; and that the resolution constituted a valid written memorandum of a contract which appellant never refused to perform. The trial court, when requested by the appellant to find that it assented to all the terms of the contract, and proceeded to comply therewith, refused to do so. It failed to find that the contract was either accepted or rejected by appellant.

Upon the evidence we think the court should have found that the contract was accepted by the appellant prior to the adoption of the rescinding resolution; that it was at all times ready, willing and able to completely perform the same, and we now make such finding. It is true, there is a conflict of evidence upon this issue. Witnesses for the appellant testified that the contract was accepted, and that appellant was at all times ready, able and willing to complete the purchase, while witnesses for the respondent testified to the contrary. We, however, regard the testimony of the witnesses for appel-

lant as the more convincing on this question, it being strongly corroborated by all the surrounding circumstances. Mr. Hessey and Mr. Tripp certainly did not call upon appellant's attorneys for any other purpose than that of procuring copies of any resolutions said attorneys might desire the respondent to adopt in completing the transfer. They accepted said resolutions and left said attorneys with an apparent intent to have them adopted. In fact, the trial court found that such intent existed. From a careful examination of the entire record, we find no intention or desire upon the part of respondent to refuse a completion of the contract, until it received the offer of \$70,000 for the land, when, hoping to obtain a higher price than that to be paid by appellant, it first conceived the idea of rescinding its former resolutions of October 21st and refusing to adopt the additional resolutions suggested by appellant's attorneys. It is undisputed that the appellant had the money ready to make the cash ^{cash} payment, and had procured the execution of the notes in exact accordance with the request of respondent.

It is further contended by respondent that, as Mr. Turrish was not an officer or director of the appellant corporation, he was without authority to contract in its behalf. It appears that the acts of Mr. Turrish were ratified by the appellant corporation, in that it executed and its officers and stockholders indorsed the promissory notes for the deferred payments of purchase money. It has at all times been ready to make the cash payment, deliver said notes, and perform the contract on its part. The record fails to show that respondent ever made any demand of performance, nor does it show any refusal by appellant. Appellant has again ratified the acts of Mr. Turrish by its prompt procedure in bringing and prosecuting this action. Mr. Turrish is shown to have been the principal stockholder of the appellant corporation, to have acted as its manager, and to have at all times controlled its business policy. The claim of want of authority upon his part seems to have been an afterthought, conceived by respondent for the purpose of escaping liability in this action. We think it is in no position to make any such contention.

Respondent contends that the contract was not accepted by appellant, because it asked the adoption of further resolutions by respondent. The mere fact that appellant, out of an abundance of caution, desired further steps to be taken looking toward the completion of the transfer of the title,

does not show any refusal upon its part to accept the offer of respondent. On the contrary, it indicates an opposite intention. Had respondent tendered the appellant an unacknowledged deed for the land, it would be just as reasonable to contend that a request for a corrected deed would constitute a refusal by appellant to accept the contract or complete its performance. Our view is that the appellant's acts clearly indicated a fixed intention to accept and perform the contract, rather than any inclination to refuse acceptance.

From a careful examination of the entire record and the ⁶³² authorities, we conclude (1) that the resolution of October 21, 1904, was a sufficient compliance with the requirements of the statute of frauds; (2) that the appellant at no time refused to accept or perform the contract; (3) that the offer of respondent was accepted by appellant prior to the adoption of the rescinding resolution, and (4) that the contract is one that can be specifically enforced against the respondent. This being true, the trial court erred in dismissing the action. It is ordered that the judgment of the honorable superior court be reversed, and the cause remanded with instructions to enter a decree for specific performance in accordance with the prayer of the complaint.

Mount, C. J., Dunbar, Hadley, Rudkin and Root, JJ., concur.

A Writing to Satisfy the Statute of Frauds must be signed by the party to be charged, but it need be signed by him only. This rule applies to contracts for the sale of land: *Hall v. Meisenheimer*, 137 N. C. 183, 107 Am. St. Rep. 474; *Charlton v. Columbia Real Estate Co.*, 67 N. J. Eq. 629, 110 Am. St. Rep. 495. Thus, a contract signed by the vendor alone, if accepted by the vendee, cannot be avoided by the former: *Vance v. Newman*, 72 Ark. 359, 105 Am. St. Rep. 42, and see the cases cited in the cross-reference note thereto.

CASES
IN THE
SUPREME COURT
OF
COLORADO.

PLATT v. BRANNAN.

[34 Colo. 125, 81 Pac. 755.]

WILLS—Rule of Construction.—In construing wills, the cardinal and fundamental rule is to ascertain the intent of the testator, and if it is not contrary to some positive rule of law or against public policy, to give it effect. This intention is to be derived from the language of the will itself. Words not technical are interpreted in their ordinary and popular signification, and when occurring more than once, are presumed to be used in the same sense, unless the context shows a contrary intention. (p. 148.)

WILLS—Rule of Construction.—The first taker in a will is presumed to be the favorite of the testator, and the tendency is to adopt such a construction as will give an estate of inheritance to the first donee. (p. 149.)

WILLS—Rule of Construction.—If an estate in fee is devised in one clause of a will in clear and decisive terms, it cannot be cut down or taken away by raising a mere doubt in some subsequent clause or by some other inference therefrom. (p. 149.)

WILLS—Construction.—Under a will by which a testatrix devises to her husband all of her interest in a certain lot of land, "also all my right" in two certain other lots, "to have the said interests in the said described parcels of land" for life, with a gift over to others, the husband takes only a life interest in all of the land. (pp. 150, 151.)

The following is the clause of the will in dispute:

"I give and devise to my husband. Samuel Platt, all of my right and interest of. in and to that certain lot or parcel of land known and described as lot numbered eighteen (18) in block numbered one (1) in Titus Addition to the City of Denver, in Arapahoe County. Colo. in which property I own an undivided one-half as tenant in common with my said husband.

"Also all of my right and interest of. in and to lots numbered one hundred and four (104) and the west one-half

($\frac{1}{2}$) of lot numbered one hundred and five (105). Vernon Place, in the City of Independence, Jackson County, Missouri. in which property I own an undivided one-half as tenant in common with my said husband. together with the improvements and appurtenances. to have and to hold the said interests in the said described parcels of land to the said Samuel Platt together with the rents, incomes and profits thereof, and the sole use and benefit thereof, during the term of his natural life, And upon his death to my six children," naming them.

C. Roach and N. Q. Tanquary, for the appellant.

W. W. Garwood and M. F. Lathrop, for the appellees.

¹²⁸ CAMPBELL, J. The sole question for determination is: Was the devise of the Denver lot to Samuel Platt in fee, or for his life only? If he received the fee, the defendant is entitled to recover; if only a life estate, the plaintiffs own the property.

In construing wills, the cardinal and fundamental rule is to ascertain the intent of the testator, and if the same is not contrary to some positive rule of law or against public policy, to give it effect. This intention is to be derived from the language of the will itself. When this is plain and unambiguous, the intent is easily determined; but when there is uncertainty of language, whether arising from misuse of technical terms or general inaccuracy of expression, there is more or less difficulty, to overcome which resort is had to well-recognized rules of construction, more or less technical in their nature. Words not technical are interpreted in their ordinary and popular signification, but not always so, and when occurring more than once, are presumed to be used in the same sense unless the context shows a contrary intention. Precedents are of some assistance, but too much reliance is not to be placed upon them, for rarely, if ever, are two wills precisely alike in language or in general structure.

In support of the contention that her husband, Samuel Platt, took the fee in lot 18, defendant invokes certain established general rules. We may, with plaintiffs, concede their soundness, but, with them, deny their applicability to this particular instrument. It has frequently been said that the first taker in a will is presumed to be the favorite of the testator, and it has also been decided that the tendency of all

courts is to adopt such a construction ¹²⁹ as will give an estate of inheritance to the first donee. Where two clauses of a will are absolutely repugnant, the rule has been applied which sacrifices the former in favor of the latter; but, as defendant says, this rule is not to govern except where every reasonable attempt to give to the whole will such a construction as will render every part effectual results in failure. Where, also, an estate in fee is devised in one clause of a will in clear and decisive terms, it cannot be taken away or cut down by raising a mere doubt in some subsequent clause or by some mere inference therefrom. To give such effect, the words of the subsequent clause must be as clear and decisive as are the words of the clause giving the estate in fee.

Notwithstanding the insistence of the defendant, we are of opinion that these rules of construction are either not applicable or not controlling here, as appears from a consideration of the points which she makes in argument. As preliminary to the discussion, it should be observed that this will is divided into five separate items consecutively numbered. The first item makes gifts to some of the children of the testatrix by a former marriage; the second to others of such children; while the third has already been copied. The fourth item provides for an executor, and the fifth is a revocation of former wills and the witnessing clause. Defendant says that item 3 consists of three separate and distinct sentences and three separate and independent devises, between which there is no grammatical or other connection or common purpose, but each is complete in itself. To sustain this contention she says that the fact that in the sixth line a period follows "husband" is proof that the sentence thus ending is complete. She says this is strengthened by the fact that "Also," immediately following, begins with a capital letter, and is ¹³⁰ here used in the sense of "in addition to" or "besides," and introduces a new subject and precedes independent devises.

We cannot agree with this construction. Unquestionably, if what we call the first part of the first sentence ending with "husband" stood alone, the fee would pass, for the language employed would be sufficient to transfer it; and if any accurate or systematic method of punctuation had been employed, color would be lent to defendant's argument based upon the position of this period. But not only here but in

other items of the will recognized rules of punctuation are disregarded by the scrivener, and many common words, unquestionably in the middle of a sentence, begin with capital letters. No rational system, either of punctuation or the use of capitals, has been adopted by the scrivener; hence the system or rather entire lack of method which in these particulars the will exhibits furnishes no reliable aid in arriving at the intention.

The primary meaning of "also," as given in Webster's Dictionary, is "in like manner." Secondary meanings are "in addition to," "besides," "too." The sense in which it is used depends largely upon the context. Most frequently in wills it is used in the sense of "in like manner" or "in the same manner," and unquestionably such is its meaning here. "Also" does not mark the beginning of a new sentence. It will be observed that there is but one set of operative words. "I give and devise" occur but once, and then at the beginning of the item. They are not repeated after "Also." The portion of the item following that word must, therefore, be carried back to the operative words that the devise may become effective. Unless we do so there are no operative words applicable to the Missouri lots so far as concerns Samuel Platt. And if we do not recur to ¹²¹ them the Missouri lots, which are one of the objects of the devise, have no verb or predicate, and that verb has no subject. According to defendant's argument, we would have what she calls a complete and independent sentence with no subject or predicate. There can be no complete sentence without them. It is clear that the first sentence is not complete until the word "deceased" in the twenty-third line is reached. It is equally apparent that there was intended but one general devise, composed of several separate tracts of land, and not several separate devises.

It is also to be noted that the testatrix speaks of "said interests in the said described parcels of land." This language might apply to three lots theretofore mentioned, or to only two of them; but as the Missouri lots are contiguous, and in the second sentence of the item authority is granted to the testator "to sell the said interest in Vernon Place lots," the testatrix, we are persuaded, regarded lot 18 as one interest or parcel and the Vernon place lots as the other. Taking, then, the item in its entirety, as we should, we are

convinced that the testatrix intended to give Samuel Platt a half interest in all the parcels therein described only for his natural life, and that he did not take a fee.

We are cited to and have found some cases which are clearly authority for our construction. In *Hauser v. Craft*, 134 N. C. 319, 46 S. E. 756, the following provisions of a will were construed: "Item 3. I give unto my granddaughter Katherine Scott a tract of land called the Elder tract, being 166 acres, which adjoins Janus Fletcher." Then follow two complete sentences, each one beginning with the word "Also," in which a capital A is used, by which certain personal property was given, after which was the following: "also two acres of meadow land . . . which is to be hers during her natural life ¹³² only." The court, in a luminous opinion by Walker, justice, held that Katherine Hauser took only a life estate in the Elder tract of land. The point was made there that, because of the punctuation and the use of capital letters and the employment of "also," the intention of the testator was to limit the life interest which the granddaughter took solely to the two acres of meadow land, and not to the Elder tract; but the court held that the punctuation was so irregular and inaccurate that not much, if any, weight could be given to it, and that the general structure of the will clearly indicated that this clause was intended as one devise or bequest composed of different objects. There certainly was more reason for restricting the limitation solely to the meadow land in the *Hauser* case than there is here for applying it only to the Vernon Place lots. But if the decision there was right, as we think it was, a fortiori is our conclusion here warranted.

In *Hysmith v. Patton*, 72 Ark. 296, 80 S. W. 151, cited by defendant, the first sentence of the item gave to the devisee certain land, and the language employed was sufficient to pass a fee. The word "Also," with a capital A, began a new sentence as follows: "Also all of my personal property I may have at my death, and to hold the same in her own right during her natural life or widowhood, consisting of horses, cattle, hogs, etc." The court held that the limitation applied only to the personal property, and not to the real estate. This decision was clearly right, because the property which the widow was to hold during her natural life was specified as "consisting of horses, cattle, hogs, etc."

Clearly, therefore, it was a limitation not applicable to real estate.

In *Safe Deposit Co. v. Stitch*, 61 Kan. 474, 59 Pac. 1082, was construed a will of an illiterate man written by an illiterate scrivener. The testator gave to his sister ¹³³ several different tracts of real estate, and added this sentence: "I also will and bequeath to my sister [certain personal property] to have and hold during her natural life." The court held that the words of limitation applied only to the personal property described in the gift contained in the clause immediately preceding them, and not to the real estate. This was put upon the ground, as stated in *Jarman on Wills*, fifth edition, 708, rule 22, that from the entire construction of the will it appeared that there were several independent devises not grammatically connected or expressing a common purpose. It was held that each devise must be construed separately and without reference to the others, and therefore the limitation clause applied only to the last of the several separate gifts. There was no other language in any clause of that will which threw any light upon the intention of the testator, and in this respect the will was different and the case is easily distinguishable from the one at bar.

Loring v. Hayes, 86 Me. 351, 29 Atl. 1093, is cited by defendant in support of her construction, but a critical examination discloses that it is really authority for the position assumed by the plaintiffs. This case, too, furnishes a striking illustration that to all general rules there are exceptions. The court there decided that the word "also," which occurs four times in one item, is used three times in the sense of "in like manner," and once with the meaning "in addition" or "besides."

In *Connecticut etc. Deposit Co. v. Chase*, 75 Conn. 683, 55 Atl. 171, the ninth clause of a will provided that the testator's house in Hartford should be sold as the executor deemed expedient, and from the avails thereof five hundred dollars was given for the perpetual care of certain lots in a cemetery. The sentence making this gift was complete in itself. It was immediately followed by ¹³⁴ several separate and distinct sentences, each one of which gave the right of burial in this lot. Then there followed a provision in the same item, but as a separate sentence, that from the avails of the sale of the same house a gift of five hundred dollars was made for a

certain purpose. Then follows this sentence: "I also give as a further memorial for my parents [naming them] five hundred dollars to the Baptist Church of Cromwell, the interest of which is to be used for the benefit of the church." Following this, and in a distinct sentence, was a further provision that if there was any residue out of the proceeds of the sale of the same house certain dispositions were made of it. The court held that the legacy to the Baptist church was payable only out of the proceeds of the sale of the Hartford house, though there was no such restriction in the clause which created the gift. This decision was based upon the fact that its position in clause 9, in immediate juxtaposition before and after with the legacies only so payable, taken in connection with the use of the word "also," sufficiently indicated that such was the intention of the testator. That certainly was going much further than we are required to do in this case to hold the limitation of the third item applicable to all the tracts of real estate described therein.

Without prolonging the opinion, the following, among other cases that might be cited, are clearly in support of our conclusion that Samuel Platt took only a life estate, and not a fee, in all the real estate described in item 3; that this item consists of two, and not three, sentences; that there are not separate and independent devises, but only one consisting of different objects given to the same person: *Morgan v. Morgan*, 41 N. J. Eq. 235, 3 Atl. 63; *Eberhardt v. Perolin*, 49 N. J. Eq. 570, 25 Atl. 510; *Du Pont v. Du Bos*, 52 S. C. 244, 29 S. E. 655; *Berry's Lessee v. Berry*, 1 Har. & J. *417; *Noble v. Ayers*, ¹³⁵ 61 Ohio St. 491, 56 N. E. 199 (which is quite in point here); *Page on Wills*, sec. 474; *Allison v. Bates*, 6 B. Mon. (Ky.) 78; 1 *Jarman on Wills*, 5th ed., *499; 2 *Am. & Eng. Ency. of Law*, 2d ed., 177; 2 *Cyc. Law & Pr.* 136; *Child v. Elsworth*, 51 Eng. Ch. Rep. *678; *Green v. Hewitt*, 97 Ill. 113, 37 *Am. Rep.* 102 (quite similar to the case at bar); 30 *Am. & Eng. Ency. of Law*, 2d ed., 691, and notes.

The judgment should be affirmed, and it is so ordered.

Chief Justice Gabbert and Mr. Justice Steele concur.

In Construing a Will the intention of the testator should control: *Binn v. Gillett*, 208 Ill. 473, 100 *Am. St. Rep.* 234. Technical rules must yield to the obvious intent and purpose of the testator: *Gannon v. Albright*, 183 Mo. 238, 105 *Am. St. Rep.* 471.

When the Words of a Will at the outset clearly indicate a disposition to give the entire estate absolutely to the first donee, the estate, it has been held, will not be cut down to a less estate by subsequent or ambiguous words inferential in their intent: *Gannon v. Albright*, 183 Mo. 238, 105 Am. St. Rep. 471. However, a devise of a fee may be restricted by subsequent words in the will and reduced to a life estate. Thus, if the first sentence in one section of a will, standing alone, vests a fee simple in the husband of the testatrix, although there are no words of inheritance in the devise, but the second sentence provides that after his death the property shall revert to her heirs upon their paying his heirs the value of the improvements thereon, he takes an estate for life only: *Hill v. Giannelli*, 221 Ill. 286, 112 Am. St. Rep. 182.

CLARK v. BALL.

[34 Colo. 223, 82 Pac. 529.]

INNKEEPERS—Liability.—The first requisite of the extraordinary liability imposed upon an innkeeper is that the relation of innkeeper and guest should have existed at the time the loss or injury occurred, or shortly preceding it. After the relation ceases the guest has a reasonable time within which to remove his property from the inn, and thereafter the innkeeper is liable only as a bailee, gratuitous or otherwise, in the absence of an express contract to the contrary. A complaint against an innkeeper for a loss must allege the existence of the relation of innkeeper and guest at the time of the loss, or within a reasonable time preceding. (p. 156.)

INNKEEPERS—Partnership—Liability for Money Deposited. If persons are conducting a hotel as partners, the receipt of a deposit of money by one of them from a guest is within the scope of his authority as a member of the partnership, and imposes a liability upon the members thereof to return such money upon demand, regardless of whether the relation of innkeeper and guest exists at the time of such demand. (pp. 156, 157.)

INNKEEPERS—Partnership—Authority.—Any act of a member of a partnership within the scope of his authority is binding upon all of the members of the firm, and one member of a firm of hotel keepers is authorized to receive from a guest of the hotel a deposit of money, valuables, or other property, for safekeeping. (p. 157.)

INNKEEPERS—Partnership—Liability.—If a person deposits money with one of the members of a partnership running a hotel, while such person is a guest thereof, he can recover against the firm for the loss of such money by the partner with whom it was deposited, regardless of the relation of innkeeper and guest at the time of the loss. (p. 157.)

W. Mellen, J. I. Palmer and G. D. Bardwell, for the appellant.

J. W. Davidson, for the appellee.

²²⁴ MAXWELL, J. Appellee, as plaintiff below, prosecuted this action against James Fogarty and John Clark, defendants, a copartnership in the hotel business, to recover the sum of six hundred and fifty dollars, alleged to have been deposited by plaintiff, as a guest of the hotel, with Fogarty, one of the members of the copartnership.

Briefly stated, the material averments of the complaint are: That the defendants, on the twenty-fifth day of December, 1900, were copartners and doing business as such in the town of Moffat in conducting a hotel; that on said date the plaintiff was a guest of the hotel conducted by the defendants; that as a guest of the hotel, plaintiff, on the twenty-fifth day of December, 1900, deposited with Fogarty, one of the members of said copartnership, the sum of six hundred and fifty dollars for safekeeping; that the money was deposited with Fogarty upon the representation that he was a partner in the hotel business, and that the copartnership would be responsible for the safe return of the money upon the request of plaintiff; that on December 30th plaintiff demanded ²²⁵ the money, but the defendants refused, and still refuse, to pay the same.

The answer was in effect a general denial.

There was evidence tending to prove that the defendants were copartners in the hotel business; that December 25th plaintiff became a guest of the hotel conducted by defendants; that on that date, and while a guest of the hotel, she deposited with Fogarty six hundred and fifty dollars for safekeeping; that on the next day, or the 26th of December, plaintiff became an employé of the hotel, and as such employé remained at the hotel until after January 1, 1901; that two or three days after the plaintiff deposited the money with Fogarty she asked him for it, when he informed her that it was upstairs in his trunk and gave her five dollars, which seemed to satisfy her needs at that time; that on or about January 1, 1901, Fogarty absconded.

A trial to a jury resulted in a verdict of six hundred and forty-five dollars in favor of appellee against the defendants, upon which verdict a judgment was rendered for the amount thereof, from which judgment Clark appealed to the court of appeals.

The jury in arriving at its verdict must have found that a copartnership existed between Fogarty and Clark in the hotel business; that appellee was a guest of the hotel at the

time she deposited the money with Fogarty; that she deposited the money with Fogarty as a member of the copartnership, and not in his individual capacity, and that the money had not been returned to her.

There being evidence in support of these findings, under the well-settled rule of this court the verdict of the jury is conclusive upon those points.

It is contended by appellant that the complaint is fatally defective, in that it does not allege that appellee was a guest of the hotel at the time of the loss of the money, and that the judgment should be ²²⁶ reversed for the reason that the evidence shows conclusively that at the time the money was lost she was not a guest.

These contentions will be considered and disposed of together.

It is true that the complaint does not allege, and the evidence does not show, that appellee was a guest of the hotel at the time Fogarty absconded, or at any other time after December 25th, the date when the money was deposited with Fogarty for safekeeping.

The law is that the first requisite of the extraordinary liability imposed upon an innkeeper is that the relation of innkeeper and guest should have existed between the parties at the time the loss or injury occurred, or shortly preceding such loss or injury; that after the relation ceases the guest has a reasonable time within which to remove his property from the hotel, and thereafter the innkeeper is liable only as a bailee gratuitous, or otherwise, in the absence of an express contract to the contrary; that the complaint should allege the existence of the relation of innkeeper and guest at the time of the loss or within a reasonable time preceding: *Murray v. Marshall*, 9 Colo. 482, 59 Am. Rep. 152, 13 Pac. 589; *Towson v. Havre-de-Grace Bank*, 6 Har. & J. 47, 14 Am. Dec. 254; 16 Am. & Eng. Ency. of Law, 530.

However, the above principles of law are not decisive of the liability of appellant Clark under the facts of this case.

Fogarty and Clark were copartners in the hotel business. The receipt of the deposit by Fogarty from a guest of the hotel was within the scope of his authority as a member of the firm, and his act in that behalf imposed a liability upon the firm and the members thereof to return the deposit upon demand, regardless of the existence or nonexistence of the rela-

tion of innkeeper and guest at the time the demand was made. In other words, under the facts of ²²⁷ this case, the liability of appellant Clark is determined by the law of partnership and not by the law governing innkeepers.

No citation of authorities is necessary in support of the principle that any act of a member of a copartnership within the scope of his authority is binding upon all the partners as a firm. Nor is it necessary to cite authorities to the proposition that one member of a firm of hotel or innkeepers, by the very nature of the business in which the firm is engaged, is authorized to receive from a guest of the hotel a deposit of money, valuables or other property for safekeeping.

Our conclusion is, recognizing the law of the liability of innkeepers as above stated, under the peculiar facts of this case, it was unnecessary to allege or prove that the plaintiff was a guest of the hotel at the time of the loss of her money by the embezzlement of Fogarty.

There is nothing in the contention of appellant to the effect that the character of the deposit was changed from a partnership transaction to a personal or individual transaction with Fogarty, by anything said or done by appellee, two or three days after she made the deposit with Fogarty and received from him five dollars.

Appellant tendered an instruction to the effect that if the jury found that a copartnership existed between the defendants, that such copartnership was a nontrading copartnership, and that the general rule that one copartner in a general partnership is bound by the acts of his copartner, when acting within the scope of partnership business, should not prevail in this case.

This instruction was refused, and error is assigned thereon and argued here.

There was no error in refusing this instruction under the facts as developed at the trial. The instruction ²²⁸ given fully and fairly stated the law to the jury.

There being no error in the record, the judgment must be affirmed.

Chief Justice Gabbert and Mr. Justice Gunter concur.

The Liability of Innkeepers for an injury to or the loss of property belonging to their guests is discussed in the monographic notes to *Johnson v. Chadburn Finance Co.*, 99 Am. St. Rep. 577-602; *Tulare Hotel Co. v. Holohan*, 105 Am. St. Rep. 932-940. These discussions

include a consideration of the question when the liability attaches and when it terminates. A clerk at a hotel is the authorized agent of the proprietor, and hence all acts of the clerk toward and in his conduct with guests bind the proprietor, in so far as they are within the duties of innkeepers: *Baehr v. Downey*, 133 Mich. 163, 103 Am. St. Rep. 444.

CITY OF DENVER v. SPENCER.

[34 Colo. 270, 82 Pac. 590.]

MUNICIPAL CORPORATIONS—Park Commissioners.—If city parks are the private and exclusive property of the city, and park commissioners appointed by authority of a special charter have exclusive management and control of such parks, they are municipal, and not public or state, officers. (p. 158.)

MUNICIPAL CORPORATIONS—Park Commissioners—Record of Proceedings—Evidence.—If a board of municipal park commissioners is not required by statute to reduce its proceedings, or acts transacted at its meetings, to writing in order to make them binding, parol evidence of such proceedings or acts is competent and admissible. (p. 160.)

MUNICIPAL CORPORATIONS—Liability for Negligence of Park Commissioners.—A city is liable for the negligent act, if any, of its park commissioners in constructing an amusement or entertainment stand in one of its parks. (p. 161.)

MUNICIPAL CORPORATIONS—Parks—Amusement Stands—Negligence—Presumption.—No presumption of negligence arises from the mere happening of an accident caused by the falling of an amusement stand in a city park. (pp. 161, 162.)

Action for damages for personal injury sustained by the falling of an amusement stand, alleged to have been negligently constructed by the park commissioners of the defendant city, in its public park. Judgment for plaintiff. Defendant appealed.

H. M. Orahood, H. L. Ritter and N. B. Bachtell, for the appellant.

J. H. Leiper and R. M. Snavely, for the appellee.

272 CAMPBELL, J. 1. The city says that, although the park commission has the control and management of its public parks, yet, as they were appointed under the authority of the General Assembly, they are not strictly municipal, but public or state officers, and therefore the city is not liable for their negligent acts within the scope of their authority.

This position is not tenable, and the very authorities cited in its support are against it. The special charter was granted

to the city by the General Assembly, but the duties imposed upon the park commission are exclusively for its benefit, and in no sense for the state or any of its political subdivisions. The parks are the private and exclusive property of the city, in which the state, as distinguished from the municipality, has no property interest whatever. To this proposition no authorities need be cited.

2. The stand or structure was erected in the City Park by and under the direction of the park ²⁷³ commission, so plaintiff says; without any legal authority emanating from the board, as the city asserts. The evidence is that the secretary of the park commission, if that board took any action with reference to erecting the stand, made no record of it. The city's construction of the charter and its contention with respect to this point is that the city can be bound by the action of the park commission only at a regular or special meeting, and that the only evidence of its action thereat is the record which is required to be kept, and, when the records are silent, none of its proceedings in a collateral action can be shown by parol proof.

To this proposition probably the strongest case cited is *Morrison v. City of Lawrence*, 98 Mass. 219. There the court said that parol evidence was inadmissible to prove the acts or proceedings of the city council, or that the record of such proceedings, as kept by the clerk, was erroneous or defective. This conclusion, as we understand the opinion, was based upon the proposition that the acts sought to be established by parol proof were lawful only because authority therefor was conferred by statute, and as this authority was strictly limited and the method prescribed exclusive, no obligation could be incurred by or liability imposed upon the city except in pursuance of a vote of two-thirds of the members of each branch of the city council present and voting by yea and nay vote. And as there was an express provision of the same act requiring the city council to keep a record of the whole proceedings, the only evidence of municipal action was the record. Other cases cited to the same proposition are: *Third School Dist. v. Atherton*, 53 Mass. 105; *Boston Turnpike Co. v. Town of Pomfret*, 20 Conn. 590; *Gilbert v. City of New Haven*, 40 Conn. 102; *City of Lowell v. Wheelock*, 11 Cush. (Mass.) 391; *City of Louisville v. McKegney*, 7 Bush (Ky.), 651.

²⁷⁴ Some of these cases under the local statutes tend to support the city's contention. Others might be distinguished.

No provision of the Denver charter to which our attention is called either expressly or by implication declares that nothing but a recorded vote or written document shall bind the city or be received as evidence. There is a direction that the secretary of the commission shall keep a record of all of its proceedings, but there is no provision that its acts shall be void unless such record is kept, or that the record thereof is the sole and exclusive evidence. Judge Dillon, in the first volume of the fourth edition of his valuable work on Municipal Corporations, at section 300, refers to the distinction sometimes drawn between evidence to contradict facts stated on the record and evidence to show facts omitted to be stated. He says that parol evidence of the latter kind is receivable unless the law expressly and imperatively requires all matters to appear of record and makes the record the only evidence. The leading case in support of this view is *Bank of United States v. Dandridge*, 12 Wheat. 64, 6 L. ed. 552, where, in an elaborate opinion by Mr. Justice Story, the doctrine of the text is laid down. The same principle by the same court was extended to public boards in the case of *United States v. Fillebrown*, 7 Pet. 28, 8 L. ed. 596, where it was held that, since the board of commissioners of the navy hospital fund was not required by law to reduce its proceedings to writing in order to make them binding, oral evidence of such proceedings was competent. The same doctrine is announced in *Langsdale v. Bonton*, 12 Ind. 467, *Indianapolis v. Imberry*, 17 Ind. 175, *City of Delphi v. Evans*, 36 Ind. 90, 10 Am. Rep. 12, and *City of Troy v. Atchison etc. R. R. Co.*, 13 Kan. 70.

We find nothing in *City of Denver v. Burnett*, 9 Colo. App. 531, 49 Pac. 378, opposed to Judge Dillon's view. *Tracy v. People*, 6 Colo. 151, *Brophy v. Hyatt*, 10 Colo. 275 223, and other similar cases by our own court were based upon a statute held to be mandatory that required, on the passage or adoption of an ordinance, that the yeas and nays should be called and recorded, and unless the record itself as kept by the clerk showed that the yeas and nays were called, the ordinance was invalid. That statute is distinguishable from the charter provisions under consideration. The statute construed contemplated that the vote must be taken in a certain way and record thereof made, and that the record shall be the only evidence. The charter provisions involved here contain no such requirements. The secretary of the park commis-

sion having failed to make any record whatever of the proceedings of the board which authorized the erection of the stand, we are of opinion that parol proof was admissible to show that such action was had.

We do not think this conclusion is opposed to anything decided in *Morris v. St. Louis Nat. Bank*, 17 Colo. 231, 29 Pac. 802, or *Rustin v. Merchants' etc. Tunnel Co.*, 23 Colo. 351, 47 Pac. 300. In the *Rustin* case the court did observe that, as a general rule, facts which should be of record cannot be proved by parol, and cited the former case. These were cases construing certain provisions of our revenue law in relation to tax sales. It was held that the written or record evidence referred to was by the statute intended to be exclusive. Here the charter provisions were not so intended.

3. But the city insists that the proof admitted by the trial court is insufficient to show that any action was taken by the commission at a regular or special meeting, or that a majority of the board took such action, or that the same met with the approval of the mayor. Without discussing this evidence in detail, we remark that we are satisfied, after carefully reading it, that, at a regular meeting of the ²⁷⁶ board, a majority of the members voted to erect this stand, and its determination to appropriate a certain sum therefor received the approval of the mayor; and the stand was erected in the City Park under the authority thus given. Indeed, there is no conflict as to this point, and the evidence is legally sufficient.

4. That the city is liable for the negligent act, if any, of the park commission in constructing the stand, is fully sustained in principle by our previous decisions (*City of Denver v. Rhodes*, 9 Colo. 554, 13 Pac. 729; *City of Denver v. Dunsmore*, 7 Colo. 328, 3 Pac. 705; *City of Denver v. Capelli*, 4 Colo. 25, 34 Am. Rep. 62), and is in accord with the great weight of authority in this country: *Barnes v. District of Columbia*, 91 U. S. 540, 23 L. ed. 440.

5. Having thus determined the city's liability, in case the negligence alleged is established, we must reverse the judgment for prejudicial error of the court in instructing the jury that the mere happening of the accident was presumptive evidence of the negligence charged. In some courts this doctrine is restricted to cases of personal injury by a common carrier to a passenger, while in others it has been, with qualification, extended to cases like the one at bar. This court and

our court of appeals are committed to the rule that no presumption of negligence arises from the mere happening of an accident in cases like the one before us: *City of Greeley v. Foster*, 32 Colo. 292, 75 Pac. 351.

Even where the contrary rule exists, it is doubtful if the instruction given by the trial court would be upheld in all of the states. Perhaps it finds strongest support in *Mullen v. St. John*, 57 N. Y. 567, 15 Am. Rep. 530. But the rule there applied has frequently been considered by the learned court of appeals of that state, and more than once the intimation, if not the positive ruling, been made that the mere happening of an accident, except when common carriers are charged²⁷⁷ with negligent acts affecting passengers, is not prima facie evidence of negligence without reference to the attending circumstances. Thus in *Cosulich v. Standard Oil Co.*, 122 N. Y. 118, 19 Am. St. Rep. 475, 25 N. E. 259, the court, referring to the *Mullen* case (57 N. Y. 567, 15 Am. Rep. 530), said that "there was far more than the mere happening of the accident which was held to give rise to it [inference of negligence] in that case." And in *Reiss v. New York S. Co.*, 128 N. Y. 103, 28 N. E. 24, the court said that the mere fact that the bonnet on the service valve in a pipe was blown off and steam escaped does not furnish sufficient evidence of negligence to cast liability on a defendant charged therewith.

In *Griffen v. Manice*, 166 N. Y. 188, 82 Am. St. Rep. 63, 59 N. E. 25, 52 L. R. A. 922, an instruction similar to the one given by the trial court in this case was sustained, but only because there was evidence in the case of attendant circumstances which, in connection with the mere accident, made a prima facie case of negligence. Apparently the court would not have sustained the instruction had there not been proof of attendant circumstances which, in connection with the happening of the accident, tended to establish negligence. But whatever the rule may be elsewhere, the instruction given in this case is fatal under the *Foster* case (32 Colo. 292, 75 Pac. 351). The refusal to give an instruction tendered by the defendant which contained the direction that the negligence charged cannot be presumed from the mere happening of the accident, without other evidence, accentuated the error. Such an instruction has often received approval in this jurisdiction.

6. In the event of a new trial it is appropriate to say that the plaintiff, if so advised, may have leave to amend her com-

plaint so as to state more clearly the grounds of negligence relied on and to include the specification that negligence consisted, in part at least, in choosing an improper place for the structure. ²⁷⁸ We make this observation because the point is made by the city that the negligence, if any, was not in failing properly to brace the structure, but in selecting the site for its foundation.

For error in giving and refusing the instructions referred to, the judgment must be reversed and the cause remanded for a new trial.

Chief Justice Gabbert and Mr. Justice Steele concur.

On the Liability of a City for the dangerous condition of its parks and boulevards, see Burridge v. Detroit, 117 Mich. 557, 72 Am. St. Rep. 582; McDonald v. St. Paul, 82 Minn. 308, 83 Am. St. Rep. 428; Thornton v. Maine State Agr. Soc., 97 Me. 108, 94 Am. St. Rep. 488.

The Presumption of Negligence from the happening of an accident is discussed at length in the recent note to Traction Co. v. Holzenkamp, 113 Am. St. Rep. 980.

PEOPLE v. HORAN.

[34 Colo. 336, 86 Pac. 263.]

CONTEMPT—Disregard of Judgment Pending Appeal.—If a claimant to an office brings suit by quo warranto to oust the incumbent, and upon judgment being rendered against him in the trial court takes an appeal to the supreme court, and, pending such appeal, takes possession of such office and proceeds to act as such officer, he is guilty of contempt of the supreme court. (p. 165.)

H. J. Hersey, G. Stidger and Elliott & Bardwell, for the plaintiff.

J. H. Reddin and J. R. Allphin, for the defendant.

³²⁶ MAXWELL, J. By three petitions and affidavits filed herein it has been made to appear to the court that on or about July 20, September 1 and September 22, 1905, Rollins, claiming to be the coroner of the city and county of Denver, held three separate coroner's inquests in said city and county, and then and there discharged and performed all the acts and duties of coroner in holding such inquests, and by other acts set forth in the affidavits claims to be the coroner of the city and county of Denver.

In answer to a rule to show cause why he should not be adjudged guilty of contempt of this court and punished accordingly served upon Rollins July 27, 1905, he has filed answers to the several petitions and affidavits above mentioned, in which he admits the acts charged, asserts that the allegations of the affidavits are wholly insufficient to justify the making of any order upon him to show cause why he should ³³⁷ not be guilty of contempt, earnestly disclaims any intent or purpose to do any act or thing in contempt of this court or its orders, and attempts to justify his action upon the theory that notwithstanding the judgment of the court below he is the coroner of the city and county of Denver by virtue, he alleges, of the decisions of this court in what are known as the county officers cases cited in the opinion in the main case.

For every wrong committed, the injured party has two remedies, which may be denominated a personal and a legal remedy: he may seek redress of the party who inflicted the wrong, and thus obtain a remedy for the wrong committed, or he may pursue his legal remedy, and by and through the intervention of the courts secure redress. Having adopted the latter remedy, he submits himself and his cause to the jurisdiction and determination of the courts, and impliedly binds himself to abide their decisions.

Having adopted his legal remedy, by implication he abandons his right to take the law into his own hands to enforce or attempt to enforce his personal remedy, and so long as his cause be pending in court he should not act contrary to the judgment of the court nor attempt to settle his controversy with his adversary by taking possession of the subject matter of the controversy.

This rule should govern the conduct of both parties to a litigation and should prevail until the final determination of the matter in the appellate court, if the case should be there prosecuted, and is especially applicable to the party who institutes the proceedings in court or prosecutes in the appellate court.

As said by the present chief justice in *People v. District Court*, 29 Colo. 182, 68 Pac. 242: "Courts settle only living ³³⁸ issues or determine questions actually in dispute."

If, after having perfected an appeal and submitted himself and cause to the appellate court, appellant takes the matter into his own hands and proceeds to act contrary to the judgment of the court below by taking possession of the

matter in controversy which has been adjudged against him, there is no living issue or question actually in dispute for the appellate court to pass upon. To do so and continue to prosecute in the appellate court is a disrespect of the appellate court which convicts the plaintiff in error of at least a technical contempt of court and merits punishment.

No authorities directly in point have been cited and diligent search has discovered none.

In *People v. District Court*, 29 Colo. 182, 68 Pac. 242, it was said: "It may be that no authority can be found which can be said to be directly in point, because none have been cited wherein the facts are the same as those now under consideration. This can doubtless be explained upon the hypothesis that no litigant has ever had the temerity to assume the position that he had the right to take steps such as the relators have taken in the circumstances of this case."

The foregoing language is pertinent to the case in hand, as also the following: "The prime object in having judicial tribunals is to provide a method whereby all citizens, whoever they may be or whatever their standing, may have their disputes settled in an orderly and peaceful manner. Parties cannot take the law into their own hands and settle their rights according to their own notion of what is right and wrong. Courts are instituted for the purpose of settling controversies which disputants are unable to amicably arrange between themselves, and all must recognize this fact."

³³⁹ In some respects *Hamill v. Bank of Clear Creek Co.*, 21 Colo. 173, 40 Pac. 447, is in point. There the matter in controversy was land; the judgment of the lower court was in favor of the bank; a writ of error from this court was made a supersedeas; the bank filed a motion to vacate the order granting the supersedeas. The court said:

"After this motion was submitted for determination, and while this court was engaged in its consideration, the respondent, disregarding the proceeding which it had instituted to relieve itself from the effect of the court's previous order, virtually took the law into its own hands and took possession of the property in controversy.

"Had the respondent at or before the time it thus took possession and before it was cited to show cause why it should not be punished for contempt been in a position to confess error and thus have the case remitted to the lower court, or to dismiss its motion to vacate the supersedeas, probably the

conduct complained of might not be considered so censurable or flagrant; but for it, while prosecuting in court a remedy which, if granted, would enable it to get possession of the property under the protection of the judgment, deliberately to take possession while the court was considering its application for relief, without withdrawing its motion, is nothing less than a trifling with the court whose jurisdiction had been invoked. To suffer this to be done and permit a party to a suit to reap the benefits of such conduct or retain the advantages thus gained would be to confess the inability of courts to protect parties litigant while the litigation is pending; would be to allow the time of the court to be consumed by useless wranglings; would be to enable a suitor to experiment with the court, and when anticipating an adverse ruling set at naught and disregard such proceedings begun by him and take the law into his own hands and at the same ³⁴⁰ time impose upon the court the duty of continuing its examination of his case while he is in the enjoyment of the very thing the possession of which he has asked the court to give him."

Upon the filing of the petitions and affidavits in this matter on the twenty-fifth day of July, A. D. 1905, the chief justice granted an order upon Rollins to show cause why he should not be punished for contempt by reason of the acts complained of. This order was served upon Rollins personally July 27, 1905. This order was equivalent to holding that there was probable contempt in the conduct of Rollins, and was notice to him of that fact.

Notwithstanding the foregoing order and in disregard thereof September 1, 1905, Rollins again held an inquest, and on September 22, 1905, a like act was performed by him.

On the 21st of September, 1905, oral arguments in this court were had upon the several matters involved herein, at which arguments Rollins was present and must have heard the statement made by his counsel at that time to the effect that if he (counsel for Rollins) had been in the jurisdiction of this court at the time the several acts complained of were committed, that in all probability such acts would not have been committed.

This statement by counsel for Rollins was certainly notice to him that in the mind of his counsel there existed serious doubts at least of the propriety of the action complained of

which he (counsel) would have undertaken to prevent had he been consulted in the matter.

It is true that he alleges in his answers that the board of county commissioners of the city and county of Denver and the district attorney advised him that ³⁴¹ he was the coroner, and, as he alleged, induced him to perform the acts complained of.

This, in our judgment, is no excuse or justification whatever. He had submitted the determination of this question to this court and should have abided the judgment rendered by the court below until the final determination of the question could have been had in this court.

Whatever may be said as to the conduct of Rollins in holding the first inquest, it cannot be doubted that under the facts as above stated in holding the second and third inquests, he was guilty of a flagrant contempt of this court and should be punished therefor.

The judgment of this court is that for the acts committed the said Robert P. Rollins be adjudged guilty of contempt of this court; that he pay the costs of these contempt proceedings; that he do not recover his costs in this court in this cause, and that he be fined the sum of fifty dollars.

Decision en banc.

On Contempt of Court in violating judicial orders or decrees, see the recent cases of *Franklin Union v. People*, 220 Ill. 355, 110 Am. St. Rep. 248; *People v. Barrett*, 203 Ill. 99, 96 Am. St. Rep. 296; *State v. Frealock*, 52 W. Va. 232, 94 Am. St. Rep. 932.

WARD v. GOODRICH.

[34 Colo. 369, 82 Pac. 701.]

CONTRACTS—Consideration.—A promise to do a thing which the promisor is legally bound to do is not generally a sufficient consideration to support a reciprocal undertaking by the promisee, but such promise may be enforced against the promisor, although its enforcement compels the performance of that which is already a legal obligation. (p. 170.)

HUSBAND AND WIFE—Contracts for Support of Child.—A contract between husband and wife by which he is to pay her a certain sum per week for the support of their minor child is not without consideration, by reason that a divorce suit is pending between the parties when the agreement is made, and that, as the custody of the child is involved in such suit, the court has discretionary

conduct complained of might not be considered so censurable or flagrant; but for it, while prosecuting in court a remedy which, if granted, would enable it to get possession of the property under the protection of the judgment, deliberately to take possession while the court was considering its application for relief, without withdrawing its motion, is nothing less than a trifling with the court whose jurisdiction had been invoked. To suffer this to be done and permit a party to a suit to reap the benefits of such conduct or retain the advantages thus gained would be to confess the inability of courts to protect parties litigant while the litigation is pending; would be to allow the time of the court to be consumed by useless wranglings; would be to enable a suitor to experiment with the court, and when anticipating an adverse ruling set at naught and disregard such proceedings begun by him and take the law into his own hands and at the same ³⁴⁰ time impose upon the court the duty of continuing its examination of his case while he is in the enjoyment of the very thing the possession of which he has asked the court to give him."

Upon the filing of the petitions and affidavits in this matter on the twenty-fifth day of July, A. D. 1905, the chief justice granted an order upon Rollins to show cause why he should not be punished for contempt by reason of the acts complained of. This order was served upon Rollins personally July 27, 1905. This order was equivalent to holding that there was probable contempt in the conduct of Rollins, and was notice to him of that fact.

Notwithstanding the foregoing order and in disregard thereof September 1, 1905, Rollins again held an inquest, and on September 22, 1905, a like act was performed by him.

On the 21st of September, 1905, oral arguments in this court were had upon the several matters involved herein, at which arguments Rollins was present and must have heard the statement made by his counsel at that time to the effect that if he (counsel for Rollins) had been in the jurisdiction of this court at the time the several acts complained of were committed, that in all probability such acts would not have been committed.

This statement by counsel for Rollins was certainly notice to him that in the mind of his counsel there existed serious doubts at least of the propriety of the action complained of

which he (counsel) would have undertaken to prevent had he been consulted in the matter.

It is true that he alleges in his answers that the board of county commissioners of the city and county of Denver and the district attorney advised him that ³⁴¹ he was the coroner, and, as he alleged, induced him to perform the acts complained of.

This, in our judgment, is no excuse or justification whatever. He had submitted the determination of this question to this court and should have abided the judgment rendered by the court below until the final determination of the question could have been had in this court.

Whatever may be said as to the conduct of Rollins in holding the first inquest, it cannot be doubted that under the facts as above stated in holding the second and third inquests, he was guilty of a flagrant contempt of this court and should be punished therefor.

The judgment of this court is that for the acts committed the said Robert P. Rollins be adjudged guilty of contempt of this court; that he pay the costs of these contempt proceedings; that he do not recover his costs in this court in this cause, and that he be fined the sum of fifty dollars.

Decision en banc.

On Contempt of Court in violating judicial orders or decrees, see the recent cases of *Franklin Union v. People*, 220 Ill. 355, 110 Am. St. Rep. 248; *People v. Barrett*, 203 Ill. 99, 96 Am. St. Rep. 296; *State v. Frealock*, 52 W. Va. 232, 94 Am. St. Rep. 932.

WARD v. GOODRICH.

[34 Colo. 369, 82 Pac. 701.]

CONTRACTS—Consideration.—A promise to do a thing which the promisor is legally bound to do is not generally a sufficient consideration to support a reciprocal undertaking by the promisee, but such promise may be enforced against the promisor, although its enforcement compels the performance of that which is already a legal obligation. (p. 170.)

HUSBAND AND WIFE—Contracts for Support of Child.—A contract between husband and wife by which he is to pay her a certain sum per week for the support of their minor child is not without consideration, by reason that a divorce suit is pending between the parties when the agreement is made, and that, as the custody of the child is involved in such suit, the court has discretionary

authority as to the disposition of the custody of such child. (p. 170.)

HUSBAND AND WIFE—Contracts for the Support of Child—Divorce—Public Policy.—A contract between husband and wife, made pending a suit for divorce, by which he agrees to pay her a certain sum per week for the support of their minor child, is not contrary to public policy, when the contract does not, and is not intended to, facilitate the granting of the divorce. (p. 170.)

HUSBAND AND WIFE—Contract for Support of Child—Consideration—Divorce.—A contract between husband and wife, made pending a suit for divorce, by which he agrees to pay her a certain sum per week for the support of their minor child, in consideration that she discharge him from an order of court directing him to pay a certain sum weekly for the support of herself and such child during the pendency of the action, and from all claims for alimony, is supported by a sufficient consideration, and may be enforced after the termination of the suit for divorce. (p. 171.)

H. W. Spangler, for the appellant.

Laws & Freeman, for the appellee.

³⁷⁰ GODDARD, J. The facts pertinent to a decision of this case are in brief as follows: On January 10, A. D. 1893, Calvin T. Ward, the appellant, commenced an action for divorce in the county court of Arapahoe county against Ella D. Ward (now Ella D. Goodrich), appellee, upon the ground of extreme cruelty. The appellee filed an answer containing counter charges, and asked for alimony, counsel fees and an allowance for the support of Sidney Athol Ward, the child of the parties, then two years of age. While this action was pending, and on the seventeenth day of June, A. D. 1893, the appellee commenced an action against appellant in the district court for the support and maintenance of herself and child. In this action ³⁷¹ she obtained a writ of ne exeat against appellant, and also obtained an order requiring him to pay her eight dollars weekly for the support of herself and child pending the suit.

On the 19th of September, 1893, the parties entered into a written agreement reciting the foregoing facts, and providing, inter alia, that appellant should pay to the appellee the sum of two hundred dollars in cash, and also pay and allow her the sum of two dollars and fifty cents per week, payable monthly, for the support of the child until further order of the court, or until he should arrive at the age of fifteen years; and in consideration of such payments the appellant should be released and discharged from all of said orders for alimony and support of the child, and the writ of ne exeat should be

vacated and discharged, and from all claims and demands that the appellee might have upon him by reason of their marriage, and from all claims for permanent or other alimony, and for the support of the child, other than that specified in the agreement; and it was further expressly provided that this agreement should in no way abridge, modify, or suspend any rights which said parties might have to a divorce in either of said courts, or affect the proceedings in said county court action for divorce, or any right or defense which the appellee might have against the appellant in that action.

In pursuance of this agreement, all orders against appellant above mentioned were vacated, and afterward, and on the fourteenth day of October, A. D. 1893, a decree of divorce was granted in favor of the appellant and the custody of the child awarded to him. Upon the signing of the agreement appellant paid appellee the two hundred dollars cash, and permitted the child to remain in appellee's custody, and continued the payment of the monthly installments for the support of the child, as provided in said agreement, ³⁷² until February 1, A. D. 1896. Since that time he has failed, neglected and refused to pay said allowance. On September 8, 1898, appellee brought this action in the county court to recover the sum of four hundred and sixty-five dollars, the amount of such installments then due under the terms of the agreement. On June 5, 1900, judgment was rendered in the county court in favor of the appellee for four hundred and sixty-five dollars and costs. From this judgment appellant prosecuted an appeal to the district court. On March 13, 1901, the case was tried to the court. The only evidence introduced was this contract and the testimony of Mrs. Goodrich to the effect that the child was living and had been in her care since she and appellant separated, and had been properly fed and clothed during the time, and had attended school regularly since he was six years old, and that his associates were of the best people in a Christian neighborhood.

Judgment was rendered in favor of plaintiff for five hundred and eight dollars and costs. From this judgment appellant prosecutes this appeal.

It was urged in the court below in support of a motion for judgment on the pleadings, and is insisted on here by counsel for appellant, that the contract sued on is void for want of proper consideration. The argument is, that since the only

consideration on the part of the appellant is his promise to support his infant child—in other words, to do that which he was legally bound to do—it was not a sufficient consideration to support a promise, and therefore appellant's promise cannot be enforced. Counsel labors under a misapprehension as to the application of the rule he invokes. While it is settled that the promising to do, or the doing of, that which the promisor is already legally bound to do does not, as a rule, constitute a consideration for a reciprocal promise, or support a reciprocal undertaking given by the ³⁷³ promisee, it by no means follows that such promise may not be enforced against such promisor by the promisee, although its enforcement compels the performance of that which was already a legal obligation. We are unable to appreciate the further contention of counsel that there was a want of consideration sufficient to support the contract, for the reason that at the time it was entered into the question as to the custody of the child was a matter under the custody and subject to the discretion of the court in the divorce suit. It may be conceded that the trial court had the authority and power to make such disposition of the child as it saw fit. It might have annulled or approved the agreement. It did neither; but by awarding the custody of the child to appellant imposed upon him the legal, in addition to his contractual, obligation to pay for his support and maintenance.

It is also claimed that the agreement is void and against public policy. There is nothing in its terms that renders it obnoxious to this objection. The fact that it was entered into while the action for divorce was pending does not affect its validity, unless it can be said that it was its purpose or effect in some way to facilitate the granting of the divorce. That such was not its purpose is shown by the agreement itself, which expressly provides: "That this contract shall in no way abridge, modify or suspend any rights which the parties may have to a divorce or action for divorce, . . . or affect the proceedings in said county court action for divorce brought by said Calvin T. Ward against the said Ella D. Ward, and any right of defense which the said Ella D. Ward may have in said action against the said Calvin T. Ward."

From the decree set out in appellant's answer it appears that the case was regularly tried to a jury ³⁷⁴ upon the issues joined by the complaint, answer, cross-complaint and rep-

lication, and upon the evidence, and that the court found that the findings of the jury were sustained by the evidence and were sufficient in law to entitle appellant to the relief prayed for. Nor does appellant claim that the agreement in any way facilitated that result, or that he obtained any undue advantage by reason of its existence.

This action does not involve the right to the custody of the child, as counsel for appellant seems to argue, but only the question as to whether, having placed the child in appellee's care, his promise to pay the stipulated price for its support can be enforced.

We think the court below was correct in holding that he is so liable, and the judgment is therefore affirmed.

Chief Justice Gabbert and Mr. Justice Bailey concur.

An Agreement intended or calculated to facilitate the procurement of a divorce is generally regarded as void: Barngrover v. Pettigrew, 123 Iowa, 533, 111 Am. St. Rep. 206.

Where a Husband and Wife are living apart, and she has sufficient grounds for a divorce, and has prepared a petition therefor, her forgiving him and resuming marital relations is sufficient consideration for his agreement to convey property to their children: Moayou v. Moayou, 114 Ky. 855, 102 Am. St. Rep. 303.

DENVER PUBLIC WAREHOUSE COMPANY v. HOLLOWAY.

[34 Colo. 432, 83 Pac. 131.]

LIBEL—Privileged Communications.—A communication between officers of a corporation made in good faith concerning the conduct of one of its servants is privileged. (p. 174.)

LIBEL—Privileged Communications.—The question whether the occasion of a communication is such as to make it privileged is for the court to determine. (p. 175.)

LIBEL—Privileged Communications—Burden of Proof.—If the paper published is a privileged communication, the burden of proof is upon plaintiff to show express malice in its publication. (p. 175.)

LIBEL—Privileged Communications—Burden of Proof.—In an action for libel, if the occasion of the writing or publication is privileged, the burden to show that defendant has lost his privilege is cast upon the plaintiff. (pp. 177, 178.)

LIBEL—Privileged Communications—Presumption—Probable Cause.—If a writing is shown to have been written upon a privileged occasion, the presumption arises that it was written in good faith and upon probable cause. (p. 178.)

LIBEL—Privileged Communications—Loss of Privilege.—The privilege of a communication from one officer of a corporation to another, concerning the conduct of one of its servants, is not lost by the fact that the officer receiving it discloses its contents to another of the corporation's servants as a reason why the servant about whom it is written should be discharged. (p. 180.)

T. H. Hood, for the appellants.

H. G. Benson and D. C. Webber, for the appellee.

433 STEELE, J. Judson H. Holloway brought his action in the district court of the second judicial district against the Denver Public Warehouse Company, John L. Jerome and D. R. Benedict, based upon the following letter:

“Denver, Colo., Dec. 4, 1901.

“Mr. D. R. Benedict, Manager Denver Public Warehouse Co., City.

“Dear Sir: I have given a good deal of thought to the report you made yesterday of the disappearance of forty-one bags of sugar on consignment to the warehouse. I am not satisfied with the statement that no explanation can be given for this loss. Your foreman is on duty through business hours. It would be impossible for the forty-one bags of sugar to disappear without his knowledge. When merchandise of this sort is put in his charge we have got to depend upon finding the goods there or receipts for same. I don't consider that it was possible for this sugar to have been taken out of the warehouse during the night.

“Please discharge Mr. Holloway immediately from his position as foreman and tell him that it is my intention to prosecute him for the theft of the sugar unless he can give some reasonable explanation.

“Yours truly,

“JOHN L. JEROME.”

The amended complaint alleges that the Denver Public Warehouse Company is a corporation; that at the time of the sending of the letter John L. Jerome was the treasurer and D. R. Benedict was the manager of the business of the said company. It is further alleged that the defendants, for the purpose of impeaching plaintiff's good name and subjecting **434** him to disgrace and to bring him into disrepute among his neighbors and acquaintances, did falsely, wickedly and maliciously write and publish the aforesaid letter; that the said defendants did maliciously and willfully publish said

letter and the contents thereof by reading the same to various people and permitting other persons to read the same, for the purpose of injuring this plaintiff in his reputation. Plaintiff therefore prays for damages in the sum of ten thousand dollars. A demurrer to this amended complaint upon the ground that it did not state facts sufficient to constitute a cause of action was filed and the demurrer was overruled. In the answer the defendants admit writing and sending the letter as alleged in the complaint, and alleged that it was written by said Jerome to said Benedict in the course of their said employment by and for the warehouse company; that said defendant John L. Jerome, in good faith and without ill-will or evil intention of any sort toward the plaintiff, and in no other manner whatsoever, on December 4, 1901, wrote and sent to said defendant, D. R. Benedict, the said letter, believing the statements therein to be true; and that said D. R. Benedict, in good faith and without ill-will or evil intention of any sort toward the plaintiff, and in no other manner whatsoever, received and submitted to plaintiff said letter in regard to the discharge of said plaintiff from his position as foreman.

The replication denies the matters set forth in the answer. The trial resulted in a verdict in favor of the plaintiff and against the defendants jointly for the sum of five thousand dollars, from which judgment the defendants have appealed.

We shall not undertake to consider all of the assignments of error, for the reason that we are of opinion that the court in his instructions to the jury ⁴³⁵ has committed error which requires the reversal of the judgment.

Instruction No. 3 given by the court is as follows: "The court instructs the jury that the suspicion or belief in the mind of the publisher that the article published is true constitutes no justification of the charge. The publisher, in order to justify, must not only prove that there was such belief and suspicion, but he must prove that the identical charge made was true. It is the policy of the law to protect the innocent from reports that may be spread over the world by means of writing contaminating, vile and malignant falsehoods which may make an impression which would take much time and trouble to erase and which it might be difficult, if not impossible, ever completely to remove."

Instruction No. 4: "The court instructs the jury that where a false article is libelous upon its face the law implies

malice, and evidence of malice is not required outside of the publication; and in this case, if the publication is false, the plaintiff is not bound to offer other evidence than that of the publication in proof of malice; for in such case the law implies malice in the author and publisher, and each subsequent publisher, whether in fact malice existed or not."

Instruction No. 12: "The court instructs the jury that a publication the obvious tendency of which, taken as a whole, is to fasten suspicion of guilt of a felony upon the plaintiff, is actionable, although the publication contains no direct charge; and in this case, if the jury believe from the evidence that the testimony of this letter in question, taken as a whole, is to falsely and maliciously fasten the suspicion of guilt of a felony upon the plaintiff, even though you may believe that it contains no such direct charge, your verdict will be for the plaintiff, ⁴³⁸ unless defendants shall have proved by a preponderance of the evidence that the charge made is true, or that the publications of the letter were each privileged publications and without malice in fact."

Instruction No. 20: "The jury are instructed that the stockholders, officers and directors of a corporation have the right or privilege to communicate to each other or to the corporation of which they are members whatever they know or have reason to believe, and do in fact believe, in respect to the management of the corporation or the conduct of any one of its employes or servants. These are what in law are called 'privileged communications.' And when words are thus spoken or written in such privileged communications, the party concerning whom they are spoken or written cannot recover for such words so spoken or written unless he shows that said communications were made with malice or without probable cause toward him, or unless the same are published to some third person other than such officers and directors."

It appears to us that the court has proceeded upon a wrong theory, and has excluded from the consideration of the jury the question of the right of the officers of this corporation to communicate with each other upon the subject of the conduct of one of the employes. In *Wagner v. Scott*, 164 Mo. 289, 63 S. W. 1107, the court, quoting from *Newell on Slander and Libel*, says: "'A privileged communication is an exception to the rule that every defamatory publication implies malice. A qualified privilege is extended to a communication made in good faith upon any subject matter in which the party com-

municating has an interest, or in reference to which he has a duty, either legal, moral or social, if made to a person having a corresponding interest or duty, and the burden of proving the existence of malice is cast upon ⁴³⁷ the person claiming to have been defamed. . . . The theory of privilege in connection with the law of defamation involves a variety of conditions of some nicety, and also a doctrine not always of easy application to a set of facts, and such being the case in any trial, whether civil or criminal, while the questions of libel or no libel, malice or no malice, are matters of fact for the jury, the question of privilege or no privilege is entirely one of law for the judge; that is to say, it is exclusively for the judge to determine whether the occasion on which the alleged defamatory statement was made was such as to render the communication a privileged one. The jury, however, will be the proper tribunal to determine the question of express malice where evidence of ill-will is forthcoming; but if, taken in connection with admitted facts, the words complained of are such as must have been used honestly and in good faith by the defendant, the judge may withdraw the cause from a jury and direct a verdict for the defendant.' "

And, in quoting from *Gassett v. Gilbert*, 6 Gray, 94, further says: "The question whether in a particular case a publication is to be deemed privileged, that is, whether the situation of the party making it and the circumstances attending it were such as to rebut the legal inference of malice, is a question of law to be determined by the court in the first instance.' But [the court proceeds] in deciding this question, the conditions on which it is held to be privileged must necessarily be assumed; that is, it must be taken for granted that the publication was believed, by the party who made it, to be true, and that it was made bona fide; because, if these elements are found to be wanting, then the jury would be authorized to infer malice. The sole duty of the court, therefore, in such cases is to determine ⁴³⁸ whether the occasion, in the absence of actual malice, would justify the publication. If so, then it is incumbent on the plaintiff to prove the existence of malice in order to sustain his action; and this must be shown to the satisfaction of the jury, whose exclusive province it is to pass upon the question. But it is not necessary to prove it by extrinsic evidence. It may be inferred from the relation of the parties, the circumstances attending the publication, and even from the terms of the publication itself. The defendants can-

not be justified if they have included in their notice any statements or language of a defamatory nature not warranted by the occasion which called forth the publication. The privilege must be limited to the exigency; and if the defendants, by the terms of the notice published by them, exceeded the just limits which were necessary and proper to accomplish the legitimate purpose of protecting the corporation and the public from the unauthorized acts of the plaintiff, it will be evidence of malice proper to be weighed by the jury. So, too, the question of good faith on the part of the defendants, and their honest belief in the truth of the statements put forth by them, are matters of fact which are to be determined exclusively by the jury. Although it is not necessary for the defendants to prove the truth of the statements contained in the notice in order to justify the publication, yet proof of their falsity is admissible on the part of the plaintiff to show that the defendants did not act on an honest belief in their truth."

In the case of *Klinck v. Colby*, 46 N. Y. 427, 7 Am. Rep. 360, Mr. Justice Folger, in delivering the opinion of the court, said: "But when the paper published is a privileged communication, an additional burden of proof is put upon the plaintiff, and he must show the existence of express malice in the publication of ⁴³⁹ it. Hence, as a general proposition, it may be said that the question of whether a publication is a privileged communication is one for the jury. That is to say, the court may determine whether the subject matter to which the alleged libel relates, the interest in it of the defendant or his relations to it, are such as to furnish the excuse. But the question of good faith, belief in the truth of the statement, and the existence of actual malice, remains; although the court should hold that *prima facie* the communication was privileged."

And at page 433, the court defines privileged communication in these words: "The proper meaning of a privileged communication is said to be this, that the occasion on which it was made rebuts the inference arising *prima facie* from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact, and that the defendant was actuated by motives of personal spite or ill-will, independent of the circumstances in which the communication was made."

It seems to us that this communication was privileged; that is, that the occasion which called for the letter and the subject matter of the letter made it a privileged communication.

In *Conroy v. Pittsburgh Times*, 139 Pa. St. 334, 23 Am. St. Rep. 188, 21 Atl. 154, 11 L. R. A. 725, it is held that: "The general rule is that nothing but proof of its truth is a defense of a libel. That it was privileged, because published on a proper occasion, from a proper motive, and upon probable cause, is the excepted case, and he who relies on an exception must prove all the facts necessary to bring himself within it. . . . So, where the alleged libel charges an indictable offense, the presumption of innocence ought and must stand as prima facie evidence of falsity and want of probable cause, and therefore of malice, even in cases of a claim of privilege."

⁴⁴⁰ But this case does not have the support of the weight of authority. It seems to us that when the occasion is shown to have been privileged, the burden of showing that the defendant has lost his privilege is cast upon the plaintiff. The presumption which attaches to a writing written on a privileged occasion is that it was written in good faith and upon probable cause. As said by Justice O'Brien in *Hemmens v. Nelson*, 138 N. Y. 517, 34 N. E. 342, 20 L. R. A. 440: "The question is not whether the charge is true or false, nor whether the defendant had sufficient cause to believe that the plaintiff sent the letter, or acted hastily, or in a mistake, but the question is, the occasion being privileged, whether there is evidence for the jury that he knew or believed it to be false. The plaintiff (defendant) may have arrived at conclusions without sufficient evidence, but the privilege protects him from liability on that ground until the plaintiff has overcome the presumption of good faith by proof of a malicious purpose to defame her character, under cover of the privilege."

"This kind of malice," says Justice O'Brien in the case cited, "which overcomes and destroys the privilege, is, of course quite distinct from that which the law, in the first instance, imputes with respect to every defamatory charge, irrespective of motive. It has been defined to be an 'indirect and wicked motive which induces the defendant to defame the plaintiff': *Odgers on Libel and Slander*, 267."

The authorities other than those cited herein holding that when the occasion is privileged the burden is cast upon the

plaintiff to show malice are Noonan v. Orton, 32 Wis. 106; McDavitt v. Boyer, 169 Ill. 475, 48 N. E. 317; citing 2 Greenleaf on Evidence, 15th ed., sec. 418; Bradley v. Heath, 12 Pick. 163, 22 Am. Dec. 418; Beeler v. Jackson, 64 Md. 589. 2 Atl. 916; Livingston v. Bradford, 115 ⁴⁴¹ Mich. 140, 73 N. W. 135; Strode v. Clement, 90 Va. 553, 19 S. E. 177; Bacon v. Michigan Cent. R. R., 66 Mich. 166, 33 N. W. 181, and cases cited.

The case of Republican Pub. Co. v. Conroy, 5 Colo. App. 262, 38 Pac. 423, is cited as supporting appellee's contention that the burden is upon the defendant to prove not only that the occasion was privileged, but that the matter was privileged. The defendant in that case defended upon the grounds that the article was true, that it was published in good faith believing it to be true, and that it was privileged. The court held that, as the article was not published in the discharge of any duty owed by the defendant to itself or others, it was not privileged. The court, in the course of the opinion, said that if the writer had contented himself with giving the fact of the arrest and the charge upon which it was made, the claim of privilege would be entitled to consideration. The plaintiff had been arrested upon a serious charge; the writer had not only published the fact of the arrest and the nature of the charge, "but he proceeded upon his own responsibility to brand the plaintiff with an opprobrious epithet, and to assert him guilty of the most disgraceful and infamous of offenses." This decision is undoubtedly correct. The privilege accorded the publisher of legal or judicial proceedings is that of publishing an accurate and impartial report, and unless it appears that the report is impartial and accurate, the publisher cannot claim immunity upon the ground of privilege; the very essence of the privilege being that the report is impartial and accurate. Not so with respect to communications between persons having a common interest in the subject matter of the communication, as when the officers of a corporation communicate with each other upon the subject of the conduct of one of the officers or servants of the corporation. Then it is that the occasion determines the question ⁴⁴² of privilege. Then language which would otherwise be prima facie actionable is not prima facie actionable, because the occasion repels the inference of malice, and the plaintiff is called upon to show that malice in

fact existed, which malice may be shown by extrinsic facts—an antecedent grudge or previous dispute—and the jury should determine from all the facts and circumstances, as well as from the communication itself, whether in writing the communication the defendants were inspired by a malicious intent to defame the plaintiff. But if the defendants wrote the communication in good faith, in the belief that the statements therein contained were true, then they cannot be held liable.

It is quite clear that instruction No. 3, in which the court charged the jury that suspicion or belief in the mind of the publisher that the article published is true constitutes no justification of the charge, and that the publisher must not only prove that there was such a belief and suspicion, but must prove that the identical charge is true, is positively wrong. Under this instruction one would be liable if he truthfully charged another with the commission of an offense, unless he proved that he believed the charge to be true. The instruction is also erroneous in that it is in direct conflict with No. 12, which directs an acquittal if the charges made are proven to be true, and also in that it instructs the jury that belief in the mind of the publisher that the charge is true is no justification. Authorities we have cited hold to the contrary.

In the fourth instruction the court charged the jury that where a false article is libelous upon its face the law implies malice, and evidence of malice is not required outside of the publication, and that the plaintiff is not bound to offer other evidence than that of the publication in proof of malice, "for in such ⁴⁴³ case the law implies malice in the author and publisher, whether in fact malice existed or not." This is not a correct statement of the law as applicable to this case. The occasion was privileged, the subject matter was privileged, and the law presumes that Jerome in writing the letter was not guilty of malice.

Instruction No. 12 casts upon the defendant the burden of showing that the communication was privileged and that no malice in fact existed. The law is that it is for the court to determine whether the occasion is or is not privileged; and if the communication was written on a privileged occasion, that the burden of showing malice is then cast upon the plaintiff. In cases where there is a dispute as to the occasion upon which the communication was written, it is for the

jury to find the fact, but in this case it is conceded that the occasion was privileged. The court, therefore, should not have required the defendant to prove that the communication was privileged and that it was written without malice in fact.

There was testimony that this letter was shown by Benedict to the night watchman, and instruction No. 20 is equivalent to a direction to return a verdict for the plaintiff if the jury believed that the letter was shown or its contents disclosed by the defendant Benedict to one of the employés of the company. The privilege was not lost by reason of Benedict's showing the letter to an employé. The employé was interested, and Benedict had a right to tell why Holloway was discharged. If the officers of the corporation publishing the letter exceed the just limits which are necessary to accomplish the legitimate purpose of protecting the corporation and the employés, such fact may go to the jury as evidence of malice, but the privilege is not lost unless malice in fact existed: ⁴⁴⁴ *Wagner v. Scott*, 164 Mo. 289, 63 S. W. 1107; *Bacon v. Michigan Cent. R. R. Co.*, 66 Mich. 166, 33 N. W. 181.

In the latter case an employé was discharged upon the alleged ground of larceny. The corporation posted in a conspicuous place a list of names, including plaintiff's, and opposite his name, in a column wherein the causes for discharge were to be placed, the word "Stealing" was written. In the opinion it is said: "But it is said that it was not necessary to state the cause of the discharge; that the communication was from a superior to a subordinate, and would have been sufficient to state the fact of the discharge, without stigmatizing the plaintiff as a thief. This objection goes to the character of the language used, and not to the occasion. The occasion determines the question of privilege. The language is only proper to be considered in connection with the question of malice."

We are of the opinion that the jury was not properly directed by the court, and for the reasons given the judgment is reversed.

Chief Justice Gabbert and Mr. Justice Campbell concur.

What Libelous Statements are Privileged are discussed at length in the recent monographic note to *Holmes v. Clisby*, 103 Am. St. Rep. 110-151.

CASES
IN THE
SUPREME COURT
OF
GEORGIA.

LIPHAM v. STATE.

[125 Ga. 52, 53 S. E. 817.]

INCEST, What is.—Adultery or fornication committed by persons who are prohibited by law from marrying on account of their being related within certain degrees of affinity or consanguinity is incestuous. (p. 182.)

INDICTMENT.—The Name Given an Offense in an Indictment is Immaterial, if its averments are such as to describe an offense against the laws of the state. (p. 182.)

INCEST—Stepdaughter, Who is Within the Meaning of the Law of.—An Illegitimate Daughter of a man's wife, born before his marriage to her, is his stepdaughter within the meaning of the law declaring a marriage between a man and his daughter incestuous. (p. 184.)

INCEST—Evidence of Other Crimes.—On the trial of an indictment charging incest, evidence tending to show that the accused and his stepdaughter, about a year anterior to the time charged in the indictment, and in another county, slept together on different nights, is relevant for the purpose of throwing light on the relations existing between the parties. (p. 184.)

J. A. Wilkes, for the plaintiff in error.

W. E. Thomas, solicitor general, contra.

⁵² **COBB, P. J.** The material portion of the indictment was in the following words: "The grand jurors . . . charge and accuse and present John Lipham, of the county and state aforesaid, with the offense of a felony, for that the said John Lipham, in the county aforesaid, on the first day of July in the year of our Lord nineteen hundred and four, with force and arms and unlawfully, being then and there a married

man, did have sexual intercourse with and carnally know one Della Tipper, who was then and there an unmarried woman, and was then and there the stepdaughter of him, the said John Lipham." There was a demurrer to this indictment, which alleged, that it charges no offense under the laws of this state; that it charges the accused with a felony, and it does not appear of what the felony consisted; that it does not charge the accused with the commission of incestuous fornication or incestuous adultery, nor does it allege that either of these acts was committed; and it does not charge the offense of incest in any manner whatever. ⁵³ This demurrer was overruled, and this ruling is made the basis of one of the assignments of error.

The Penal Code provides that any person guilty of incestuous adultery or incestuous fornication shall be punished by confinement in the penitentiary: Pen. Code, sec. 380. The code does not attempt to define the offense of incestuous fornication or incestuous adultery. Adultery or fornication committed by persons who are prohibited by law from marrying on account of being related within certain degrees of consanguinity or affinity is incestuous: See *Cook v. State*, 11 Ga. 56, 56 Am. Dec. 410. The code prohibits the marriage of a man with his stepdaughter, and declares such a marriage to be incestuous: Civ. Code, sec. 2413. The presentment, therefore, in its descriptive parts sets out an offense against the laws of this state. But it is said that the name of the offense is not set out in the presentment; that it should be alleged that the accused was guilty of incestuous adultery, whereas it was simply alleged that he was guilty of a felony. It is immaterial what the offense is called, if the averments of the presentment are such as to describe an offense against the laws of the state. It is not the name given to the offense in the bill which characterizes it, but the description in the averments of the indictment: *Camp v. State*, 3 Ga. 417, *Van Epps' Annotations*, 421.

2. Upon the trial the evidence of the state established the fact that the alleged stepdaughter was the illegitimate child of the wife of the accused, born before the marriage of the mother with the accused. The question to be determined is whether such a child becomes a stepdaughter within the meaning of the Civil Code, section 2413, which declares that a marriage between a man and his stepdaughter is incestuous. Dictionaries and text-books with unanimity define a stepdaughter

to be the child of a wife or husband by a former marriage. If this definition is controlling the illegitimate child of the husband or wife before their marriage would not become the stepchild of the other party to the marriage contract. Section 2413 of the Civil Code is founded upon the Roman law: See Hunter's Roman Law, 3d ed., 686. "Only the children begotten in legitimate marriage had juristically a father and paternal relations. On the other hand, as regards the mother and the maternal relations, the law made no difference between their children begotten in wedlock and out of wedlock": Salkowski's Roman ⁵⁴ Private Law, 217. This distinction is followed, at least to some extent, in this state. A bastard in the eyes of our law has no father, but the relationship between the illegitimate offspring and the mother is recognized, even to the extent of the capacity of the illegitimate to inherit. It would, therefore, seem unreasonable to hold that no affinity existed between the husband and the illegitimate child of the woman born before marriage. It is true that this court has held that the statute authorizing a parent to recover damages for the wrongful killing of a minor child gives no right of action to the mother of a bastard. This was a statute in derogation of the common law, and its construction was necessarily strict. The word "child" was therefore held to have been used by the legislature in its limited sense, and a bastard was not in contemplation. The ruling cited by counsel for plaintiff in error in the case of *Thornburg v. American Strawboard Co.*, 141 Ind. 443, 50 Am. St. Rep. 334, 40 N. E. 1062, is to the same effect. A statute giving a right of action to a parent for the wrongful killing of a child was held not to apply to a stepchild. It is true that it was there said: "Strictly speaking, therefore, a man who marries the mother of a bastard child does not become the stepfather of such child." But this is obiter, for in the same opinion it is said: "If it were conceded that he was the stepfather of the child named in the complaint, he would not come within the terms of the statute."

A penal statute is subject to careful scrutiny and strict interpretation, but this rule does not impose upon this court a pedantic construction of words and phrases. The framers of statutes are men of affairs, rather than rhetoricians balancing the various shades of meaning of language employed, and words are to be given their ordinary intendment and effect. As was said by Justice Bleckley, in *Minor v. State*,

63 Ga. 318: "It is something easier for an offender to baffle the dictionary than the Penal Code; for the former is perplexed with verbal niceties and shades of meaning, while the latter grasps in a broad, practical way at the substantial transactions of men": See, also, *Sanders v. State*, 74 Ga. 82; *Jones v. State*, 120 Ga. 185, 47 S. E. 561. It is for the protection of the most important unit of society—the family—that incest is pronounced a crime. If a man marry the mother of an illegitimate daughter, and take the daughter into his care and custody, he becomes charged with a duty toward her. His disregard of morality and decency in having ⁵⁵ sexual intercourse with her is a crime transcending a mere misdemeanor. The act has all the elements which constitute incest. As incest it should be punished. "Thou shalt not uncover the nakedness of a woman and her daughter": Leviticus, xviii, 17.

3. Complaint was made that evidence was admitted, over the objection of the accused, to the effect that, about a year before the date of the alleged offense, the accused and his stepdaughter had slept together in a covered wagon on different nights, once in Thomas county and once in Florida. The accused was on trial for an offense committed in Colquitt county. There was no error in the admission of this evidence. It was relevant for the purpose of throwing light on the relations existing between the parties: *Bass v. State*, 103 Ga. 227, 29 S. E. 966; *Underhill on Criminal Evidence*, sec. 93.

Judgment affirmed.

All the justices concur.

The Crime of Incest is the subject of a monographic note to *Tagert v. State*, 111 Am. St. Rep. 19-31. As to the admissibility, in a prosecution for incest, of acts of incestuous intercourse other than the one charged in the indictment, see *Clifton v. State*, 46 Tex. Cr. Rep. 18, 108 Am. St. Rep. 983; note to *Tagert v. State*, 111 Am. St. Rep. 29. When evidence of other crimes is admissible in criminal prosecutions is a question which is discussed in its general aspects in the monographic note to *Sykes v. State*, 105 Am. St. Rep. 976-1006.

ANDERSON v. KIRBY.

[125 Ga. 62, 54 S. E. 197.]

BREACH OF PROMISE to Marry—Allegation of Antecedent Facts.—A complaint in an action for the breach of a promise to marry may allege facts antecedent to the promise and tending to show the state of the defendant's feelings toward plaintiff when the promise is alleged to have been made, and it is error to sustain a demurrer to paragraphs of the complaint containing such allegations. (p. 187.)

PROMISE TO MARRY, When not Conditional, but Absolute.—The Promise of a Man to Marry a Woman as Soon as His Mother Recovers from an illness then existing is not a conditional promise to marry, but an unconditional promise, to be performed at an uncertain time in the future. (pp. 188, 189.)

PROMISE TO MARRY, Breach of by Absolute Renunciation.—If a man promises to marry a woman at some uncertain date in the future, and, without waiting for such date, absolutely renounces all intention to marry her, she may at once sustain an action for the breach of his promise. (p. 189.)

BREACH OF PROMISE to Marry, Seduction in Aggravation of.—Where the common-law rule prevails that a woman cannot maintain an action for her own seduction, seduction under promise of marriage may be alleged and proved in aggravation of the damages consequent upon such breach. (p. 193.)

BREACH OF PROMISE to Marry—Complaint, When Does not State Two Causes of Action.—A complaint in an action for a breach of promise to marry, which, in addition to alleging the promise and its breach, further avers the seduction of the plaintiff by the defendant under such promise, does not state two causes of action. The allegations respecting seduction are to be regarded merely as disclosing facts aggravating the damages resulting from the breach of the contract to marry. (p. 195.)

N. A. Morris and Isaac Grant, for the plaintiff.

John W. Henley and F. C. Tate, for the defendant.

⁶² **FISH, C. J.** Ella Anderson brought an action for damages against Govan Kirby, wherein she set forth a marriage contract between him and herself, the renunciation of the contract by him, and her seduction by him under promise of marriage. The petition alleged, that from July, 1902, to February, 1903, defendant lived with his aged mother, Mrs. Mary Kirby, who, during all of this time, was seriously ill with fever and was nursed by plaintiff, who stayed at Mrs. Kirby's house; that defendant began to court plaintiff and make love to her soon after she went to his mother's house, and that in September, 1902, at his earnest solicitation, plain-

tiff promised to marry him, and he told her "that they would get married just as soon as his mother got well." The circumstances under which the alleged seduction was accomplished were set forth, in connection with which it was alleged that, in persuading plaintiff to have sexual intercourse with him, defendant "reminded her that they were engaged and that they would soon get married, and begged her to yield to him, telling her that no one would ever find it out, and that there was nothing wrong about it, as they would get married as soon as his mother recovered." The petition also alleged that defendant's brother claimed to have caught them in the act of sexual intercourse, and on his evidence they were indicted at the April adjourned term court, and paid the fine; that "after February, 1903, defendant was ^{as} not as attentive to petitioner as he had been; he would give one excuse after another to postpone their marriage, and finally, after they were indicted as aforesaid, defendant refused to marry petitioner, claiming that he did so on account of the publicity of their said intimate relations." In the original petition, plaintiff claimed that she had been injured and damaged in the sum of five thousand dollars, "on account of being seduced as aforesaid by defendant, and on account of his breach of promise of marriage as aforesaid"; and prayed judgment accordingly. The defendant demurred to the petition, the grounds of demurrer being set out below, as paragraphed and numbered therein.

1. There are two causes of action set out in the petition, plaintiff seeking "to recover damages for an alleged tort and an alleged breach of promise, both causes of action being set out and declared upon in a single count and in the same action."

2. There is a misjoinder of causes of action, "a cause of action arising ex delicto with a cause of action arising ex contractu."

3. Specially, to paragraph No. 4 of the petition (a copy of which appears in the following opinion), "upon the ground that the allegations therein stated are immaterial, irrelevant, and foreign to the cause of action claimed."

4. "Specially, to the first five lines in paragraph No. 6 of plaintiff's petition and to all of the sixth line in said paragraph except the last five words in the sixth line," upon the same ground as that just above indicated.

5. To the whole petition, "upon the ground that the same sets forth no sufficient cause of action against defendant, and said petition shows upon the face thereof that the plaintiff is not entitled to maintain her present action, and the allegations therein set out do not authorize a recovery in this case."

Pending the demurrer, the plaintiff amended her petition as follows: "By striking out all of the following words in the prayer, to wit: 'On account of being seduced as aforesaid by defendant and,' " so that the petition, as thus amended, did not pray for a recovery of damages for the alleged seduction. The court, notwithstanding this amendment to the petition, sustained the demurrer, and dismissed the petition, the judgment of his honor being in the following language: "The foregoing demurrer read and considered, and after argument it is ordered by the court, as to paragraphs 3, 4, 5 thereof, that the same be sustained and plaintiff's petition dismissed." Plaintiff filed a ⁶⁴ bill of exceptions, wherein error was assigned upon this judgment, and that "the court erred in sustaining the demurrer or any part of it."

We think the judge erred in sustaining the special demurrers to paragraph 4 and a portion of paragraph 6 of the petition. Paragraph 4 was as follows: "From July, 1902, to February, 1903, defendant lived with his aged mother, Mrs. Mary Kirby, in said county. During all this time said Mrs. Kirby was seriously sick with fever, and petitioner stayed at her house and waited upon her day and night." Paragraph 6 alleged that the petitioner's sister helped her wait upon Mrs. Kirby a part of the time, and contracted fever while doing so, was sick only a few days, and died; that "defendant would often remind petitioner of this fact while courting her, stating to petitioner that her sister contracted fever from his mother and died, and that he loved petitioner more on this account, and as soon as his mother recovered he would marry her and make her happy and comfortable the balance of her life." It is impossible to tell how much of this paragraph, as it is copied in the record, was demurred to; for it is clearly apparent that the lines of written matter in this paragraph in the record do not correspond with the lines of such matter in the original petition. But we think it was permissible for the plaintiff to allege everything contained in this paragraph. Upon denial by defendant of the alleged promise to marry plaintiff, we think it would be com-

petent for plaintiff to prove the circumstances under which she and defendant were thrown in intimate, daily association with each other for some time prior to the alleged engagement, and any facts which tended to show the state of his feelings toward her at the time of the alleged promise. Particularly is this true as to facts and circumstances to which he referred, while paying his addresses to her, as having caused or increased his love for her, and which might naturally have had that effect. Such facts and circumstances, coupled with his declarations as to the influence which they had upon him, would tend to corroborate evidence as to a specific promise by him to marry plaintiff, and thus strengthen the probability that he did, in fact, make such promise. We do not think that in ⁶⁵ cases of this character a rigorous rule of exclusion should be applied to circumstances which, if proved, would tend to illustrate the state of feeling between the parties at the time when it is alleged the contract to marry was entered into. While it was not necessary for plaintiff to allege these circumstances in order to state a cause of action, yet, as it would be proper for her to prove them upon a trial of the case, we see no reason why it was not permissible for her to allege them by way of inducement to the more material and substantial allegations of the petition.

2. Of course, sustaining the special demurrers which we have just been considering would not have resulted in the dismissal of the case, but would have simply stricken from the petition the allegations alleged by the demurrers to be immaterial and irrelevant. The order of dismissal was the logical and inevitable result of sustaining the fifth paragraph of the demurrer, which was, in effect, a separate demurrer upon the ground that the petition set forth no sufficient cause of action, and showed "upon the face thereof that the plaintiff is not entitled to maintain her present action." In support of the judgment of the court, sustaining this general demurrer, counsel for defendant in error contend that "It appears upon the face of plaintiff's petition that the alleged promise of marriage was conditional, contingent upon the recovery of defendant's mother from sickness," and that, as it is not alleged that she recovered, there "is no sufficient allegation of the breach of the promise set out in the declaration." The contention that the promise was conditional is not sound. The promise alleged in the petition is not that the defendant would marry the plaintiff if his mother re-

covered from her sickness, but the promise, on one occasion, was "that they would get married as soon as his mother recovered," and, upon another occasion, it was "that they would get married just as soon as his mother got well"—the same thing, with but slight alteration in the language. This was not a conditional, but an unconditional, promise to marry, to be performed at an uncertain time in the future. The time for the performance of the promise was to be fixed by the recovery of defendant's mother from her illness. The effect of the promise was, that the marriage agreed upon was not to take place while the mother remained ill, but as soon as she ceased to be ill the marriage was to occur. The expressions, "as soon as his mother recovered," and "just as soon ^{as} as his mother got well," carry the idea that the mother's illness was all that prevented an immediate marriage, and that "as soon as" this reason for postponing the marriage was removed, it should take place. It would be utterly unreasonable to construe this promise as being contingent upon the recovery of the defendant's mother from her sickness, so as to absolve him from it if she died. We are clearly of opinion that he would have been bound by this promise if his mother had died. While the petition did not allege that the defendant's mother had recovered from her illness, or that she had died, it did allege that the defendant, after giving "one excuse after another to postpone the marriage," had finally "refused to marry petitioner, claiming he did so on account of the publicity of their [illicit] intimate relations," occasioned by their indictment for fornication. After this absolute renunciation of the contract by defendant, plaintiff was not obliged to wait until the time for its performance arrived before bringing suit, but could treat the contract as broken by defendant and bring suit for its breach at once. This principle is well settled by a long line of authorities. In the English case of *Frost v. Knight*, reported in L. R. 7 Ex. 111, and 41 L. J., N. S., 78, the action was for breach of promise of marriage. The promise of defendant proved was to marry plaintiff on the death of defendant's father. While the father was still alive, defendant announced his intention of not fulfilling his promise on the death of his father, and broke off the engagement, upon which plaintiff, without waiting for the father's death, at once brought suit. The plaintiff obtained a verdict, and upon a rule nisi to arrest the judgment, upon the

ground that a breach of the contract could only arise on the father's death, till which event no claim for performance could be made, and no action for breach of the promise could be maintained, two of the judges of the court of exchequer concurred in making the rule absolute; from which judgment the third judge dissented. But upon a review of this decision in the exchequer chamber, the judgment was reversed, all four of the judges presiding at the time of the decision concurring in the judgment of reversal. Chief Justice Cockburn delivered an elaborate opinion, in which it was held that the case fell within the principle of *Hochster v. De la Tour*, 2 El. & B. 678, 22 L. J. Q. B. 455, and *Danube and Black Sea Co. v. Xenos*, 13 Com. B., ⁶⁷ N. S., 825, 31 L. J. C. P. 284. In the opinion he said: "The considerations on which the decision in *Hochster v. De la Tour*, 2 El. & B. 678, 22 L. J. Q. B. 455, is founded are that the announcement of the contracting party of his intention not to fulfill the contract amounts to a breach, and that it is for the common benefit of both parties that the contract should be taken to be broken as to all its incidents, including nonperformance at the appointed time; as by an action being brought at once, and the damages consequent on nonperformance being assessed at the earliest moment, many of the injurious effects of such nonperformance may possibly be averted or mitigated. It is true, as pointed out by the Lord Chief Baron, in his judgment in this case, that there can be no actual breach of a contract by reason of nonperformance so long as the time for performance has not yet arrived. But, on the other hand, there is—and the decision in *Hochster v. De la Tour*, 2 El. & B. 678, 22 L. J. Q. B. 455, proceeds on that assumption—a breach of the contract when the promisor repudiates it and declares he will no longer be bound by it." After forcibly giving the reasons upon which this principle is based, he said: "It appears to us that the foregoing considerations apply to a contract, the performance of which is made to depend on a contingency, as much as to one in which the performance is to take place at a future time; and we are, therefore, of opinion that the principle of the decision of *Hochster v. De la Tour*, 2 El. & B. 678, 22 L. J. Q. B. 455, is equally applicable to such a case as the present. It is next to be observed that the law as settled in *Hochster v. De la Tour*, 2 El. & B. 678, 22 L. J. Q. B. 455, and *Danube and Black Sea Co. v. Xenos*, 13 Com. B., N. S., 825,

31 L. J. C. P. 284, is obviously quite as applicable to a contract in which personal status or personal rights are involved, as to one relating to commercial or pecuniary interests. Indeed, the contract of marriage appears to afford a striking illustration of the expediency of holding that an action may be maintained on the repudiation of a contract to be performed in futuro."

The rule laid down in *Hochster v. De la Tour*, 2 El. & B. 678, 22 L. J. Q. B. 455, was expressly recognized by this court in *Smith v. Georgia Loan etc. Co.*, 113 Ga. 975, 39 S. E. 410, the first headnote in which is as follows: "After the renunciation by one party of a continuing contract consisting of mutual obligations, the other party is at liberty either to immediately treat such renunciation as a breach of the contract and sue for any damages he has sustained by reason of the breach, or to treat the contract as still binding, and wait until the time arrives for its performance, ^{as} in order to give the party who has repudiated the contract an opportunity to comply with its terms." In the opinion, delivered by Mr. Justice Cobb, it is said: "The rule sought to be invoked was laid down by the supreme court of the United States in a recent case after an elaborate consideration of the authorities. The conclusion reached by the court is thus succinctly stated in the headnotes: 'After a careful review of all the cases, American and English, relating to anticipatory breaches of an executory contract, by a refusal on the part of one party to perform it, the court holds that the rule laid down in *Hochster v. De la Tour*, 2 El. & B. 678, 22 L. J. Q. B. 455, is a reasonable and proper rule to be applied in this case. That rule is, that after the renunciation of a continuing agreement by one party, the other party is at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damage he has suffered from the breach of it; but that an option should be allowed to the injured party, either to sue immediately, or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option': *Roehm v. Horst*, 178 U. S. 1, 20 Sup. Ct. Rep. 180, 44 L. ed. 953. This rule was expressly limited by the court to contracts containing mutual obligations." In *Holloway v. Griffith*, 32 Iowa, 409, 7 Am. Rep. 208, it was held: "Where one of the parties to a contract to marry at a certain time renounces the contract before that time has arrived, the

other party may treat such renunciation as a breach, and may at once maintain an action therefor." In that case counsel for the appellant, who was the defendant in the court below, relied upon the decision which had then been recently made in *Frost v. Knight* (L. R. 7 Ex. 111, 41 L. J., N. S., 78), by the court of exchequer in England, but the Iowa court refused to follow that decision, which, as we have seen, was subsequently overruled in the exchequer chamber in the judgment pronounced by Lord Cockburn. In *Burtis v. Thompson*, 42 N. Y. 246, 1 Am. Rep. 516, the contract between the parties was to marry "in the fall." In October the defendant expressly refused to marry the plaintiff at any time. It was held that an action for breach of the contract, begun October 25th, was not prematurely brought. Grover, J., held broadly that "One who contracts to marry on a future day, and, before that arrives, refuses to perform the contract at any time, is instantly liable to an action for breach of promise to marry." So, in the breach of promise case ⁹⁹ of *Burke v. Shaver*, 92 Va. 345, 23 S. E. 749, it was held: "If one repudiates his promise and declares he will not be bound by it, the promisee need not wait for the time of performance to arrive, and if the engagement is general, need not request its fulfillment, but may sue at once for the breach." And in *Kennedy v. Rodgers*, 2 Kan. App. 764, 44 Pac. 47, it was held: "A positive refusal to perform a contract to marry, even if made before the time for the performance, is such a breach of the contract as will authorize an immediate action for damages." In *Coil v. Wallace*, 24 N. J. L. 291, it was held: "It is unnecessary, in an action for a breach of promise to marry, to prove an actual request and refusal; it is sufficient if there appear by the conduct of the parties and by circumstances an unequivocal intention of the defendant not to perform his contract." In *Gough v. Farr*, 2 Car. & P. 631, the defendant, on being asked by plaintiff's father if he intended to marry plaintiff, replied, "Certainly not," and this was held sufficient to entitle plaintiff to maintain her action, the declaration of intention not to marry her being held equivalent to a refusal. *Willard v. Stone*, 7 Cow. 22, 17 Am. Dec. 496, went even further, and held that "Refusal to marry may be inferred from a total cessation of intimacy without explanation." This ruling was followed in *Hubbard v. Bonestell*, 16 Barb. 360. In *Kelley v. Bren-*

nan, 18 R. I. 41, 25 Atl. 346, it was held that a refusal by the defendant to marry the plaintiff before the suit was begun "was a breach of the defendant's engagement to marry the plaintiff, and dispensed with the necessity for an offer on the part of the plaintiff to marry the defendant before bringing the suit, if such an offer would otherwise have been necessary."

3. Counsel for defendant in error further contend "that plaintiff's petition does not set out a breach of promise of marriage, but shows an attempt to maintain an action to recover damages for her own seduction," and that "she cannot maintain such action." The petition as originally drawn declared upon two causes of action, a breach of promise of marriage and the seduction of plaintiff by defendant, under such promise. It never was susceptible of the construction that it did not declare upon the breach of promise, but before it was amended by striking therefrom the claim, or prayer, for damages for the act of seduction, it did also seek to found a right to recover upon the seduction, independently of the breach of the contract. The first and second paragraphs of defendant's ⁷⁰ demurrer pointed out this defect, and alleged that there was a misjoinder of causes of action, an action arising ex delicto and an action arising ex contractu; and, pending the demurrer, plaintiff amended her petition as above indicated. After this amendment, the petition stood as an action for breach of promise of marriage, with the allegations therein of the seduction under promise of marriage as simply matter alleged in aggravation of the damages sustained by reason of the breach of the contract. There is an abundance of authority—and but few cases to the contrary—to the effect, that where the common-law rule, that a woman seduced cannot maintain an action for her own seduction, prevails, seduction, under promise of marriage, may be alleged and proved in an action for breach of promise of marriage, in aggravation of the damages consequent upon the breach. This rule is deducible from the authorities in England and from the great current of authorities in our American states: 2 Sedgwick on Damages, sec. 639; 1 Bishop on Marriage and Divorce, sec. 232; Cooley on Torts, 510; 3 Sutherland on Damages, 316; **McKinsney v. Squires**, 32 W. Va. 41, 9 S. E. 55; **Dent v. Pickens**, 34 W. Va. 240, 26 Am. St. Rep. 921, 12 S. E. 698; **Geiger v. Payne**, 102 Iowa, 581, 69 N. W. 554, 71 N. W. 571; **Getzel**

son v. Bernstein, 15 Misc. Rep. 627, 37 N. Y. Supp. 220; Kniffen v. McConnell, 30 N. Y. 285; Tubbs v. Van Kleeck, 12 Ill. 446; Burnett v. Simpkins, 24 Ill. 264; Smith v. Braun, 37 La. Ann. 225; Hattin v. Chapman, 46 Conn. 607; Sauer v. Schulenberg, 33 Md. 288, 3 Am. Rep. 174; Sherman v. Rawson, 102 Mass. 395; Kelley v. Riley, 106 Mass. 339, 8 Am. Rep. 336; Bennett v. Beam, 42 Mich. 346, 36 Am. Rep. 442, 4 N. W. 8; Bird v. Thompson, 96 Mo. 424, 9 S. W. 788; Wilds v. Bogan, 57 Ind. 453; Giese v. Schultz, 69 Wis. 521, 34 N. W. 913; Collins v. Mack, 31 Ark. 684; Tyler v. Salley, 82 Me. 128, 19 Atl. 107; Daggett v. Wallace, 75 Tex. 352, 16 Am. St. Rep. 908, 13 S. W. 49; Mussleman v. Barker, 26 Neb. 737, 42 N. W. 759; Williams v. Hollingsworth, 6 Baxt. (Tenn.) 12; Spellings v. Parks, 104 Tenn. 351, 58 S. W. 126; Berry v. Da Costa, L. R. 1 C. P. 331; Millington v. Loring, 6 Q. B. D. 190. Even in states where the common law has been changed by statute, so that a woman may maintain an action for her own seduction, it has been held that the statutory right of action for seduction does not preclude an allegation of seduction, in a breach of promise suit, as an element of damages: Osmun v. Winters, 25 Or. 260, 35 Pac. 250; Haymond v. Saucer, 84 Ind. 3. The ruling in Sheahan v. Barry, 27 Mich. 217, is to the same effect, as a statute in Michigan authorized an action for seduction to be brought by any relative of full age whom the woman might select. In some of the states, evidence as to seduction is⁷¹ only admitted, to aggravate damages, where, as in the present case, the seduction is alleged in the declaration; while in others such evidence is admissible for this purpose even though the seduction is not alleged. A contrary view to that deducible from the many authorities which we have cited has been taken in Pennsylvania and Rhode Island: Weaver v. Bachert, 2 Pa. 80, 44 Am. Dec. 259; Baldy v. Stratton, 11 Pa. 316; Perkins v. Hersey, 1 R. I. 493. The view that evidence of seduction is not admissible in an action for breach of promise of marriage is also taken in Kentucky, in the case of Burks v. Shain, 2 Bibb, 341; but there the seduction occurred prior to the promise to marry. That case, therefore, is simply in line with Espy v. Jones, 37 Ala. 379, where it is held that evidence of seduction before promise is not admissible. In Graves v. Rivers, 123 Ga. 224, 51 S. E. 318, it was held that seduction of the plaintiff by the defendant subsequently to the promise to marry and pending the engage-

ment may be alleged and proved in aggravation of the damages in an action for breach of such promise.

It is clear that the injury which a woman sustains by a breach of a promise of marriage is greater if, pending the contract to marry, the man who promised to marry her has seduced her, than it would be if no seduction had occurred. She is entitled to recover the damages which she has sustained by reason of the breach of the promise, and no fair and reasonable estimate of such damages can be made without taking into consideration the circumstances under which the breach occurred and the condition in which she was left in consequence thereof. She is entitled to recover for her mental suffering caused by the breach of the contract (*Parker v. Forehand*, 99 Ga. 743, 28 S. E. 400), and it seems evident that her sense of mortification, shame and humiliation must be much greater if she is left by the breach both unmarried and seduced. Marriage would, in some measure, atone for the wrong of seduction; but to be discarded and abandoned, after being seduced, brings to her the added mortification and humiliation consequent upon the knowledge being brought home to her that she has surrendered the priceless jewel of her chastity to one who has proved himself utterly unworthy of her love and trust, and who won her implicit confidence only to betray it. The sense of mortification and humiliation which, prior to the breach of the promise to marry, she may have felt from the knowledge of her seduction is necessarily increased and intensified ⁷² by the knowledge of her base betrayal and abandonment by the unworthy object of her affection and trust, which only comes home to her when he repudiates the marriage promise. It follows that the circumstances environing her at the time of the breach of the promise to marry, such as the fact of the seduction and its publicity, are proper matters to be taken into consideration by the jury in estimating the damages which she has sustained by the breach of the contract to marry.

The petition sets forth a cause of action, viz., the breach by defendant of the promise to marry plaintiff; and, as amended, this was the only cause of action which it did set forth, the allegations as to the seduction under promise of marriage being properly retained as allegations of fact showing an aggravation of the damages incident to the repudiation of the contract to marry by defendant. It follows that the judgment

of the court below sustaining the general demurrer and dismissing the petition must be reversed.

Judgment reversed.

All the justices concur.

Seduction is discussed in the monographic notes to *Bradshaw v. Jones*, 76 Am. St. Rep. 659-682; *State v. Carron*, 87 Am. Dec. 405-411; *Weaver v. Bochart*, 44 Am. Dec. 162-179. As to whether seduction can be predicated upon a conditional promise to marry, see *State v. O'Hare*, 36 Wash. 516, 104 Am. St. Rep. 970. Some courts have thought that the seduction of the plaintiff by the defendant cannot be shown in aggravation of damages sustained by a breach of promise to marry: *Wrynn v. Downey*, 27 R. I. 454, 114 Am. St. Rep. 63, but see the authorities cited in the cross-reference note thereto.

SEABOARD AIR LINE RAILWAY v. BRADLEY.

[125 Ga. 193, 54 S. E. 69.]

RAILWAYS, Duty of to Persons Assisting Passengers.—A railroad company owes to one who boards its train for the purpose of assisting a prospective passenger and then disembarking from the train, with the knowledge of the conductor of his presence and purpose, the duty to observe ordinary care for his safety. This requires the delay of the train a reasonable time for him to get off, and if the conductor, without such delay, signals for the train to start, and because of a violent and unusual jerk in starting the train, the passenger's escort is thrown while alighting, and injured, the company is liable. (pp. 197, 198.)

RAILWAYS—Duty to Persons Assisting Passengers, but Whose Purpose is not Known to Conductor.—If one assists a passenger to board a train, not intending himself to become a passenger, no duty arises to hold the train a reasonable time to permit his departure therefrom, unless knowledge of his purpose has been given the company's servants. (p. 199.)

RAILWAYS—Duty of Ascertaining Purpose of Person Entering Car.—A railway company does not owe to a person entering a train to assist another taking passage thereon the duty of ascertaining his purpose. It may assume, until informed to the contrary, that he intends becoming a passenger, and may therefore start the train without giving him an opportunity to alight therefrom. (pp. 199, 200.)

RAILWAYS—Jury Trial—Question for Jury.—Whether it is the duty of the conductor of a passenger train to see that the platform of the coaches is clear of persons before moving the train from the station is a question for the jury. (p. 200.)

EVIDENCE, Expert, When Admissible.—A conductor of a railway train should, as an expert, be permitted to testify as to the time it would ordinarily take a passenger to board or to get off of a train,

or as to what would be ample time for a man to go into a train, deposit baggage, come out again and get off the train. (p. 200.)

APPEAL AND ERROR.—A Motion for a New Trial on the Ground that the Verdict was Contrary to Instructions is equivalent to a motion on the ground that the verdict is contrary to law, and need not be discussed where, for other reasons, the case must be tried over. (pp. 200, 201.)

E. A. Hawkins, for the plaintiff in error.

J. A. Hixon and Shipp & Sheppard, contra.

¹⁸⁴ EVANS, J. The petition made the following cause of action: Plaintiff's sister, intending to become a passenger on defendant's train, boarded the train at one of its regular stations. She was accompanied by some small children, and her baggage consisted of two satchels. It was necessary for some one to take the satchels on the train, as the train only stopped long enough for passengers to get on and off the cars at the station, with a reasonable time to put the baggage on the train. Petitioner assisted his sister on the car and placed the satchels in the coach in as hurried a manner and as expeditiously as possible. The conductor, knowing of petitioner's presence on the train and for what purpose he was there, recklessly and carelessly waved the train to start, and caused the train to start after stopping about one-half of the usual time it stopped at the station, and before his sister could get a seat and before plaintiff could get off the car. When plaintiff "started to step off the platform or steps to the coach, the train gave a violent and unusual jerk, which caused petitioner to fall to the ground, throwing petitioner on his left side, bruising" and injuring him. The injuries thus inflicted were set out, and alleged to be of a permanent nature. Petitioner claimed damages both special and general. The defendant demurred to the petition, on the ground that no sufficient cause of action was plainly and distinctly set forth in orderly paragraphs, entitling plaintiff to recover; and because the petition disclosed that plaintiff was guilty of negligence, and by the use of ordinary care on his part could have avoided the consequences of defendant's negligence, if defendant was guilty of negligence. The demurrer was overruled, and exceptions pendente lite were taken to the overruling of the demurrer.

1. A railroad company owes to one who boards its train for the purpose of assisting a prospective passenger and then disembarking from the train, with knowledge of the conductor

of his presence and purpose, the duty to observe ordinary care for his safety. This duty would have required the company to delay its train a reasonable ¹⁹⁵ time for him to get off. If the conductor signaled the train to start before the escort of the passenger had a reasonable time to alight, and, because of a violent and unusual jerk in starting the train, the passenger's escort was thrown from the car while in the act of alighting and was injured, the company would be liable: *Suber v. Georgia etc. Ry. Co.*, 96 Ga. 42, 23 S. E. 387. Applying the principle of this case to the petition, a cause of action was set forth; and as the plaintiff's case was stated in orderly paragraphs, consecutively numbered, there was no error in overruling the demurrer.

2. The case proceeded to trial and resulted in a verdict for the plaintiff. A motion for a new trial was made by the defendant, which was overruled, and the company excepted. On the trial the plaintiff testified that on the day he received his injury his sister, with four small children, went to the station at Leslie for the purpose of taking the train to Cordele. As to what occurred after the arrival of the train at the station, he said: "I taken the satchels and went up in the car, and the conductor came down on the left side and helped my sister and those three children; one of them had never walked. And as the train stopped I went up on the right-hand side with these satchels, and got eight or ten feet in the train, and put the satchels down and came back out, and as I came back out on the steps the train jerked and pulled out, and I hit the ground about fifteen feet farther east than I was figuring on, and it threw me on the left side and sprained that wrist, which I discovered afterward. . . . I saw the conductor when I got on; I was in four or five feet of him. There was nothing at all to keep him from seeing me. I don't know about how many minutes that train usually stopped at Leslie; long enough for all to get on and off and change the mails; usually three or four minutes. I would say he did not stop the usual length of time on this occasion. . . . As soon as the train stopped, I got on the steps of the forward coach and went right across the platform there to the ladies' coach and went in. . . . The conductor assisted my sister and the children aboard. I went on in the coach ahead of my sister and went two or three seats down in the coach and placed the baggage and came out on the platform. My sister hadn't got into the coach. I crossed over to the next coach, the same coach I

got up on while she was coming up on the steps of the first-class coach, and I passed off the platform ahead of her and she passed in and got out ~~196~~ of my sight. I didn't see her any more. I did not tell the conductor what my business was there; I did not say anything to him at all. I can't say positively whether he saw me." The conductor and other employes of this particular train and the station agent denied any knowledge of the plaintiff being hurt on this occasion. By reference to their memoranda of the business transacted while the train was at the station, they testified that the train stopped the usual time. The conductor denied any knowledge of the plaintiff's presence on the train.

As bearing on the duty of the company to the plaintiff under these circumstances, the court charged: "I charge you that under the laws in Georgia it is the duty of the common carrier—that is, a railroad company—to stop at its regular station a sufficient length of time for passengers to get on and off the cars with reasonable safety, which duty the defendant owed to the plaintiff if its agents or employes knew, or by the use of ordinary diligence could have known, that the plaintiff boarded the train to assist his sister on the train, who was to become a passenger." When one assists a passenger aboard a train at a station, intending not to become a passenger himself, but to leave the train after helping the passenger on the cars, no duty arises to hold the train for a reasonable time in order that such purpose may be accomplished, unless knowledge of such purpose is communicated to the company's servants: *Coleman v. Georgia etc. R. Co.*, 84 Ga. 1, 10 S. E. 498; *Hill v. Louisville etc. R. Co.*, 124 Ga. 243, 52 S. E. 651, 3 L. R. A., N. S., 432. "In such cases the duty is dependent upon the knowledge of the carrier, and the negligence upon the nonperformance of the ascertained duty": *Yarnell v. Kansas City etc. R. Co.*, 113 Mo. 570, 21 S. W. 1, 18 L. R. A. 599. This instruction placed a duty on the company which the law does not impose, viz., to use ordinary diligence to ascertain the purpose of a person boarding its cars. When a person enters a passenger train, the company's servants may assume that he contemplates becoming a passenger. If his mission is simply to assist a passenger on board the cars, he should inform the company's servants of his purpose, unless the attending facts are sufficient to impute such knowledge to them. There is no pretense that the conductor was informed of the plaintiff's purpose in boarding the train, even if the

conductor knew of his presence on the train; nor will the attending circumstances justify the inference of knowledge of the plaintiff's purpose in boarding the train by ¹⁹⁷ any of the company's servants. Not only did this charge incorrectly state the law, but, under the evidence, it was harmful to the defendant. The jury were informed that the company was under a legal duty to use ordinary diligence in ascertaining the plaintiff's purpose in boarding the train, and the verdict may have been reached by a finding that while the company's servants may not have known of the plaintiff's purpose in getting on its cars, yet if ordinary diligence in endeavoring to learn his purpose had been observed, it would have been known to them.

3. The court declined a written request to give in charge the following: "It is not the duty of the conductor of a passenger train to see that the platform of the coaches of the train is clear of persons before moving the train from a station." This request was properly refused, because it is for the jury to say whether performance or nonperformance of a specific act is compliance with the duty which the law imposes upon the carrier under the particular circumstances of each case.

4. The court excluded the following testimony of the conductor: "At a station like that, if there was but one passenger to board the train, ordinarily it would take only about a half minute for him to get into the coach from the ground." The court also refused to allow the conductor to answer the following questions, after being informed of the expected answers: "How long a time was ample for a man to have gone in a train as described, deposit baggage therein, come out again, and get off the train?" "How long would it take a passenger to get off a train at a station like Leslie?" The conductor was an expert witness upon the subject as to which he was interrogated, and his testimony should have been allowed: *Central Ry. Co. v. McClifford*, 120 Ga. 90, 47 S. E. 90. The court also refused to allow the engineer to answer the question: "How did you move off from Leslie that day, according to your recollection?" One of the allegations of negligence in the petition was that the plaintiff was thrown from the car by a violent and unusual jerk, and the plaintiff testified that he was thrown from the car because of the train moving off with a jerk. It was competent for the defendant

to disprove this fact, and the court should have allowed the witness to answer the question.

5. Several grounds of the motion complain that the verdict was contrary to certain instructions of the court. In effect, these are ¹⁹⁸ complaints that the verdict is contrary to law: *Palmer Mfg. Co. v. Drewry*, 113 Ga. 366, 38 S. E. 837. As the case will be tried over, it is not necessary to discuss these grounds of the motion.

6. The court charged: "If you should believe, after going through the testimony and the law as I shall hereafter give you in charge, that Mr. Bradley was injured and that that injury was the result of an accident, pure and simple—that the railway company was not negligent through its agents and employes, but that it was an accident, pure and simple, then the plaintiff would not be entitled to recover." The error complained of consisted in adding, in connection with the charge on the subject of accident, the words, "that the railway company was not negligent through its agents and employes." The idea of accident excludes responsibility because of negligence, and the court might have omitted the words complained of. But the charge as given could hardly have harmed the defendant.

A new trial is ordered.

Judgment reversed.

All the justices concur.

Persons Assisting Passengers to board a train may, under some circumstances, themselves be regarded as passengers: See the monographic note to *Illinois Cent. R. R. Co. v. O'Keefe*, 61 Am. St. Rep. 97.

KINARD v. FIRST NATIONAL BANK.

[125 Ga. 228, 53 S. E. 1018.]

PAYMENT.—Drafts are not Payment until they themselves are paid, in the absence of evidence showing that they were expressly taken in payment. (p. 202.)

PAYMENT—Drafts for the Amount of a Mortgage, When do not Amount to.—The fact that a draft for the amount of a mortgage debt was given by the debtor to his creditor, who marked the note and mortgage paid, and delivered them to the debtor, does not establish that the draft was accepted as a payment, nor preclude the mortgagee, on the dishonor of the draft, from foreclosing the mortgage. (p. 202.)

Payton & Hay, for plaintiff in error.

220 COBB, P. J. Kinard executed to the First National Bank of Sylvester a note for three hundred and fifteen dollars and fifty cents, and secured it by a mortgage. After the maturity of the note, and on a day when he had one hundred and forty-six dollars to his credit on the books of the bank, he came to the bank and "started to draw a draft" on Muse & Co., of Albany, Georgia, for the exact amount due on the note, but upon being informed that a check drawn by him prior to this time for two hundred dollars had not been presented for payment, he drew a draft on Muse & Co. for four hundred dollars. This draft was received by the bank, the amount of it placed to his credit on the books, and the draft forwarded to the drawees. At the same time Kinard drew a check for the amount due on the note and gave it to the bank, and the note and the mortgage were canceled, marked paid, and delivered to him. Subsequently the draft upon Muse & Co. was returned to the bank unpaid. Before the return of the draft by Muse & Co. the check for two hundred dollars was presented to and paid by the bank. The bank obtained a copy of the note and mortgage from the records, and foreclosed the mortgage. An affidavit of illegality was filed by Kinard, setting up that the note was paid. Upon the trial of the illegality a judgment was rendered in the city court in favor of the plaintiffs. Kinard applied for a writ of certiorari. The judge refused to sanction the petition, and Kinard excepted.

"Drafts are not payment until they themselves are paid, there being no evidence that they were taken expressly in payment": *Stewart Paper Co. v. Rau*, 92 Ga. 511, 17 S. E. 748. "A bill, acceptance or promissory note, either of the debtor or of a third person, is no payment or extinguishment of the original demand, unless it is expressly agreed to receive it in payment": *Weaver v. Nixon*, 69 Ga. 699; *Rawings v. Robson*, 70 Ga. 595; *Hall's Cotton Gin Co. v. Black*, 71 Ga. 450; *Freeman v. Exchange Bank*, 87 Ga. 45, 13 S. E. 160; *Hatcher v. Comer*, 75 Ga. 732; *Norton v. Paragon Oil Can Co.*, 98 Ga. 468, 25 S. E. 501. The marking of the note "paid," by the payee, is not alone sufficient to take the transaction out of the rule above laid down: *Weaver v. Nixon*, 69 Ga. 699; *Charleston Ry. Co. v. Pope*, 122 Ga. 577, 50 S. E. 374.

Whether the acceptance by the bank of the draft and the cancellation and delivering up of the note and mortgage was an extinguishment **230** of the debt depended upon the inten-

tion of the parties: *Norton v. Paragon Oil Can Co.*, 98 Ga. 468, 25 S. E. 501. The intention is to be arrived at from all the circumstances. We see nothing in the evidence to take the case out of the general rule that checks and similar instruments are not payment until themselves paid. The check given to discharge the note was not payment until it was paid, and it could not be paid unless the draft was paid. The payment of the check was dependent upon the payment of the draft. It is manifest from the evidence that neither party intended that either the check or the draft was in itself payment of the original demand. The evidence shows that it was the intention of Kinard that one hundred and forty-six dollars should be applied pro tanto in payment of the check for two hundred dollars. The bank was entitled to foreclose its mortgage. The judge did not err in refusing to sanction the petition for certiorari.

Judgment affirmed.

All the justices concur.

Where a Creditor Takes a Note or Check for an antecedent debt, it does not operate to extinguish the debt, unless it is received by express agreement as payment, until the money is received on it: Steinhart v. National Bank, 94 Cal. 362, 28 Am. St. Rep. 132; London etc. Bank v. Parrott, 125 Cal. 472, 73 Am. St. Rep. 64; Johnson-Brinkman Commission Co. v. Central Bank, 116 Mo. 558, 38 Am. St. Rep. 615; Burrows v. State, 137 Ind. 474, 45 Am. St. Rep. 210; Johnston v. Barrills, 27 Or. 251, 50 Am. St. Rep. 717; Delaware County etc. Ins. Co. v. Haser, 199 Pa. 17, 85 Am. St. Rep. 763.

SOUTHERN RAILWAY COMPANY v. STATE.

[125 Ga. 287, 54 S. E. 160.]

A CORPORATION May be Indicted and Fined for offenses consisting of mere nonfeasance, as where it neglects to perform duties which it owes to the public. (p. 205.)

RAILWAYS, Duty of Providing Drinking Water for Passengers.—The legislature may require railway corporations to furnish drinking water for passengers, and provide for the punishment of corporations which fail to do so. (p. 206.)

CORPORATIONS, Constitutionality of Statute for the Punishing of.—A statute making railway corporations guilty of a misdemeanor if they fail to furnish drinking water for their passengers is constitutional, although the only punishment which can be inflicted is by fine, whereas natural persons guilty of misdemeanor may be punished by fine or imprisonment, or by both. (p. 206.)

De Lacy & Bishop, for the plaintiff in error.

John W. Bennett, solicitor general, contra.

²⁸⁷ EVANS, J. The Southern Railway Company was indicted for violating Penal Code, section 522, the indictment charging that the defendant "did run and operate passenger-cars, to wit, a passenger-car on train No. 13, the same being passenger-cars upon which passengers were transported, and did then and there fail to keep in such passenger-cars an adequate supply of good, pure drinking water during the day and night for the use of passengers." On the call of the case for trial the defendant demurred to the indictment, and the demurrer was overruled. The defendant's counsel then orally moved the court to quash the indictment, because service had not been made on the defendant as required by the Penal Code, section 938; the court denied the motion to quash, and continued the case for the term in order that proper service might be made. The bill of exceptions complains of the overruling of the defendant's demurrer, and of the refusal of the court to quash the indictment for want of service on the defendant.

²⁸⁸ 1. Several grounds of the demurrer present the proposition that a corporation is not indictable. In *McDaniel v. Gate City Gas Light Co.*, 79 Ga. 58, 3 S. E. 693, this language was used: "The defendant is a corporation. We do not understand that in this state a corporation can be indicted for an offense." This remark was made by Mr. Justice Blandford in the course of his argument to prove that the penalty imposed by the third section of the act of February 26, 1876 (Civ. Code, sec. 1867), on corporations for neglecting or refusing to record bonds issued by them in the office of the Secretary of State, was enforceable by civil action. It was not necessary, for the decision of any question involved in that case, to hold that a corporation was not indictable; and the quoted extract is obiter. The question was attempted to be raised in a later case, but it was there held that it was too late, after voluntarily going to trial upon the merits, for a corporation to contend that it was not liable to indictment, and the point was not ruled: *Southern Ex. Co. v. State*, 114 Ga. 226, 39 S. E. 899. So the proposition that a corporation may not be indicted is an open one in this state. "Lord Holt is reported as having said that a corporation is not indictable, but the particular members of it are. This doctrine, how-

ever, if it has ever obtained, is not now recognized in any jurisdiction": 1 Clark and Marshall on Private Corporations, sec. 246. And it is now very generally held that a corporation may be indicted and fined for offenses consisting of mere nonfeasance, as where it neglects to perform duties which it owes to the public: 1 Clark and Marshall on Private Corporations, sec. 247; 7 Am. & Eng. Ency. of Law, 841. The old idea that inasmuch as a corporation was created for lawful purposes and had no power to do anything unlawful, it was not responsible for the acts of its servants or officers in excess of its charter authority, has long since been repudiated. An action of trespass, as well as of trespass on the case, will lie against a corporation: Central of Georgia Ry. Co. v. Brown, 113 Ga. 414, 84 Am. St. Rep. 250, 32 S. E. 989. It is perfectly competent for the creator of this artificial person to prescribe corporate responsibility for failure to perform certain acts which may be required of it. Nor can there be any possible objection that corporate disobedience of the sovereign's command may be punished by fine, or by forfeiture of charter. With the power in the state to inflict a penalty for the violation of a statute enjoining duty, it matters little whether the procedure be in its nature civil or criminal. In some instances the remedy by indictment is more efficacious ^{and} prompt than by civil action. While a corporation may not be imprisoned, it may be fined, and the fine enforced by levy on its property.

2. Another ground of the demurrer is, that it is not the inherent duty of a railroad company to furnish drinking water for its passengers, and that a failure to do so cannot be made a crime by legislation. It would certainly be startling doctrine to deny the legislature the power to impose a duty upon a corporation and require its performance, when there is no constitutional restraint. The demurrer also makes the point that Penal Code, section 522, is unconstitutional in so far as it undertakes to make a violation of the same a misdemeanor, because the punitive clause is impossible of enforcement, and because the constitution of this state (Civ. Code, sec. 5732) provides that "laws of a general nature shall have uniform operation throughout the state"; that the Penal Code, section 1039, provides that "every crime declared to be a misdemeanor is punishable by a fine not to exceed one thousand dollars, imprisonment not to exceed six months, to work in the chain-gang . . . not to exceed twelve months, and

any one or more of these punishments may be ordered in the discretion of the judge"; and that the provision in section 522, that a violation thereof shall be punished as for a misdemeanor, "is not uniform, and from the nature of things cannot be uniform, for that it is manifestly impossible to impose on a railroad company, as such, a sentence or punishment of imprisonment or work in the chain-gang or any public works, as may be imposed upon a natural person convicted of a similar offense or misdemeanor, and it is also impossible for the judge to exercise the discretion with which he is invested of imposing any one or more of said punishments prescribed for misdemeanors," wherefore that section of the Penal Code militates with the above-mentioned provision of the constitution. From the very nature of the case, only so much of section 1039 as prescribes a fine is enforceable; so much as relates to imprisonment is inoperative. This clause of the constitution was intended to operate only on laws which declared rights, provided remedies, or denounced certain acts as criminal; to laws complete in themselves. The punitive feature is only a part of a law, and for convenience the legislature fixed a general punishment for those convicted of misdemeanors. In effect, this section (1039) became a part of every section of the Penal Code which defined a misdemeanor.²⁹⁰ The mere inappropriateness of a portion of the penalty would not serve to render section 522 obnoxious to the constitutional provision as to general laws having uniform operation. That section applies only to railroad companies, and all corporations convicted thereunder must necessarily be punished alike, though not, of course, in the same way as may be violators of another penal statute which declares that they may be punished as for a misdemeanor.

3. The Penal Code, section 938, provides the process against a corporation which has been indicted. As this intangible person has no physical existence and cannot be taken under warrant, the legislature has provided a certain mode of service by which the court acquires the power to hear and determine the charge against the corporation under indictment. The sole purpose of the service and notice provided in that section is to bring the artificial person before the bar of the court for trial. Until service is had in the prescribed way, or is waived by the corporation, the trial cannot legally proceed. If the corporation voluntarily appears in court by attorney and demurs to the indictment, the corporation is before the

court, and further proceedings may be had without reference to the regularity of the service. Its appearance and pleading by demurrer may be analogized to the voluntary action of a natural person who, hearing of an indictment against him, comes into court without waiting for process to be issued against him, and demurs or otherwise pleads to the indictment. After demurrer or plea, it is of no consequence whether a warrant issued for his arrest or not; by his voluntary act the court acquires control over his person for all purposes of the particular trial. Likewise, when the defendant corporation demurred to the sufficiency of the indictment, it submitted itself to the jurisdiction of the court in the particular case, and it then became immaterial whether the service was regular or irregular. There was no error in refusing to quash the indictment because of irregularity or insufficiency of the service.

Judgment affirmed.

All the justices concur.

A Railway Corporation may be indicted for obstructing a public street or highway: Palatka etc. R. R. Co. v. State, 23 Fla. 546, 11 Am. St. Rep. 395; Commonwealth v. Erie etc. R. R. Co., 27 Pa. 339, 67 Am. Dec. 471; Louisville etc. R. R. Co. v. State, 40 Tenn. (3 Head) 523, 75 Am. Dec. 778.

LANE v. LANE.

[125 Ga. 386, 54 S. E. 90.]

WILLS.—The Subscribing Witnesses Must Sign After the Testator. If they sign first and he immediately afterward, though the whole constitutes part of one transaction, the will cannot be admitted to probate. (p. 208.)

J. S. James, for the plaintiff.

J. E. Mozeley, for the defendant.

286 LUMPKIN, J. A will was propounded for probate in solemn form. It appeared from the testimony introduced by the propounder that the paper propounded was not signed by the alleged testatrix until after it was signed by the witnesses thereto, though there was evidence to the effect that

the signing by the testatrix and by them was all a part ³⁸⁷ of the same transaction, she having signed just after the last witness had subscribed his name. The presiding judge held that the paper was not valid as a will and not entitled to probate, and directed a verdict accordingly. The propounder excepted.

1. This case is controlled by the decision in *Brooks v. Woodson*, 87 Ga. 379, 13 S. E. 712, 14 L. R. A. 160, and it in turn rests upon that in *Duffie v. Corridon*, 40 Ga. 122. We are asked to review and reverse those decisions, but we are content to adhere to them. It is true that there is a conflict of rulings as to whether a will is valid if the signing by the testator and the attestation by the witnesses are each a part of the same transaction, although the testator may not sign first. In the opinion in the case above cited, Bleckley, chief justice, said: "To witness a future event is equally impossible, whether it occur the next moment or the next week." The note following the decision collects a number of authorities and shows that the view taken in this state by no means stands alone, but has the support of other courts of last resort: See, also, *Marshall v. Mason*, 176 Mass. 216, 79 Am. St. Rep. 305, 57 N. E. 340; *Simmons v. Leonard*, 91 Tenn. 183, 30 Am. St. Rep. 875, 18 S. W. 280; *Welty v. Welty*, 8 Md. 15. The text-writers express different opinions on the subject of where the weight of authority is to be found. This will readily be seen by comparing *Pritchard on Wills*, section 217; *Schouler on Wills*, third edition, section 328; *Underhill on Wills*, section 195; *Page on Wills*, section 222. When it is considered how ancient is the practice of having attesting witnesses to wills, the vast number of them which have been made, and the almost infinite variety of circumstances attending their execution, it is not surprising that some diversity of views should have arisen. As an illustration of the antiquity of the practice of attesting wills, it is said that recently some wills have been unearthed in Egypt which were made in the forty-fourth year of the reign of Amenemhat III (B. C. 2550); and that they were witnessed by two scribes, with attestation clauses very similar to those now in use: *Rood on Wills*, sec. 12.

We are satisfied to rest the present case upon the former decisions of this court.

Judgment affirmed.

All the justices concur.

THE ATTESTATION AND WITNESSING OF WILLS.**I. Nature in General, 209.****II. Necessity and Number of Witnesses, 211.****III. Requisites.**

- a. Subscription or Acknowledgment by Testator, 213.
- b. Request to Witnesses, 216.
- c. Publication or Declaration of Character of Instrument, 217.
- d. Subscription and Attestation by Witnesses.
 1. Necessity of Signing and Attestation, 221.
 2. Mode of Subscription, 222.
 3. Time of Subscription and Attestation, 224.
 4. Presence of Testator.
 - A. Necessity, 224.
 - B. Object and Purpose, 224.
 - C. What Amounts to Presence.
 - (1) Mentally, 225.
 - (2) Physically, 226.
 - D. Acknowledgment of Signature as Equivalent to Presence, 230.
 5. Mutual Presence of Witnesses, 230.
- e. Other Supposed Requisites.
 1. Knowledge of Contents by Witnesses, 231.
 2. Attestation Clause, 231.
 3. Miscellaneous, 233.
- f. Order and Mode of Observing Requisites in General.
 1. Order.
 - A. Of Execution by Testator and by Witnesses, 233.
 - B. Of Publication and Other Requisites, 235.
 - C. Of Request to Witnesses and Other Requisites, 236.
 2. Mode, 236.

IV. Attesting Witnesses and Attestation Clause as Evidence.

- a. The Testimony of the Attesting Witnesses, 236.
- b. The Attestation Clause as Evidence, 238.

I. Nature in General.

Object and Purpose.—In Appeal of Canada, 47 Conn. 450, the court declares that the primary reason for the presence of a witness to a will is not that he has known the testator long or intimately; not that he is required to use or have any skill in detecting the presence of insanity or other forms of mental disease or weakness; not that he is to have any opportunity for discovering the fraudulent scheme which may have culminated in the act of the testator. If the presence of one or three witnesses provides any degree of security against the procurement of a will from a competent testator by fraud, or against the procurement of one from a testator without mental capacity, it is an incidental benefit; it was not in the mind of the law. That only intended that the witness should be able, with a great degree of certainty at all times, possibly at great length of time after his attestation, to testify that the testator put his name upon the identical piece of paper upon which he placed his own. Similarly, in Pollock v. Glassel, 2 Gratt. 439, the court holds that the object of witnessing a will is "not to obtain from the witnesses a certificate of the essential facts of the transaction, but to provide the means

of proving them by persons entitled to confidence and selected for the purpose. The subscription of their names by the witnesses denotes that they were present at, and prepared to prove, the due execution of the instrument so attested, and nothing more": See, also, *Huff v. Huff*, 41 Ga. 696. Some authorities, however, take a broader view of the purposes of attestation and witnessing. Thus, in *Re Pope's Will*, 139 N. C. 484, 111 Am. St. Rep. 813, 52 S. E. 235, the court holds: "One principal purpose in requiring the attestation of wills is to surround the testator with witnesses who are charged with the present duty of noting his condition and mental capacity. Another is to insure the identity of the instrument and to prevent the fraudulent substitution of another document at the time of its execution." To the same effect are *Odenwaelder v. Schorr*, 8 Mo. App. 458; *Cornelius v. Cornelius*, 52 N. C. 593. This latter view is also sustained by other decisions set forth in the discussion of the particular requisites of attestation and witnessing in division III below.

Attestation vs. Subscription.—In some earlier decisions, attestation is distinguished from subscription. It is said: "To attest the publication of a paper as a last will, and to subscribe to that paper the names of the witnesses, are very different things, and are required for obviously distinct and different ends. Attestation is the act of the senses, subscription is the act of the hand; the one is mental, and the other mechanical; and to attest a will is to know that it was published as such, and to certify the facts required to constitute an actual and legal publication; but to subscribe a paper published as a will is only to write on the same paper the name of the witness for the sole purpose of identification": *Swift v. Wiley*, 1 B. Mon. 114; *Upchurch v. Upchurch*, 16 B. Mon. 102; *In re Downie's Will*, 42 Wis. 66. In later decisions, however, this distinction is abandoned. In *Skinner v. American Bible Soc.*, 92 Wis. 209, 65 N. W. 1037, the court says: "It would be difficult, no doubt, to satisfactorily define that element in the attestation of a will which is not also present in the mere subscription to a will. No physical act is required in the one which is not also required in the other, and it is not clear what mental act or fact appropriate to the one is absent from the other": To the same effect, *Luper v. Werts*, 19 Or. 122, 23 Pac. 850. Similarly, in *Drury v. Connell*, 177 Ill. 43, 52 N. E. 368, *Sloan v. Sloan*, 184 Ill. 579, 56 N. E. 952, and *Calkins v. Calkins*, 216 Ill. 458, 108 Am. St. Rep. 233, 75 N. E. 182, 1 L. R. A., N. S., 393, the court holds that a requirement of statutory law that a will shall be "attested" renders essential the "subscriptions" thereof by the attesting witness, that act being involved in attestation. And lest the idea of attestation be confused with the mere physical act of subscription, the court in *Skinner v. Lewis*, 40 Or. 571, 62 Pac. 523, 67 Pac. 951, holds: "The attestation . . . is not a matter of mere formality in affixing one's name to the will as a witness. There must be an active mentality connected with it."

II. Necessity and Number of Witnesses.

Necessity.—It is prerequisite to the validity of a will that it be attested and witnessed in conformity with statute: *Orth v. Orth*, 145 Ind. 184, 57 Am. St. Rep. 185, 42 N. E. 277, 32 L. R. A. 298; *Clark v. Miller*, 65 Kan. 726, 68 Pac. 1071; *Reynolds v. Reynolds*, 1 Spear, 253, 40 Am. Dec. 599; *Davis v. Davis*, 6 Lea, 543; *Simmons v. Leonard*, 91 Tenn. 183, 30 Am. St. Rep. 875, 18 S. W. 280; *Blanchard's Heirs v. Blanchard's Heirs*, 32 Vt. 62; *Pollock v. Glassel*, 2 Gratt. 439; *Rosser v. Franklin*, 6 Gratt. 1, 52 Am. Dec. 97; *McMechen v. McMechen*, 17 W. Va. 683, 41 Am. Rep. 682. This rule also applies in cases of interlineations, corrections, and alterations to wills: *Eschbach v. Collins*, 61 Md. 478, 48 Am. Rep. 123; *Gardiner v. Gardiner*, 65 N. H. 230, 19 Atl. 651, 8 L. R. A. 383; *Jackson v. Holloway*, 7 Johns. 304. See, also, *In re Penniman*, 20 Minn. 245 (Gil. 220), 18 Am. Rep. 368, holding that after alterations and interlineations have been made in a will, it must not only be resubscribed by the witnesses, but also again signed by the testator. The provision often found in the statutes of wills, that the witnesses to a will must be "credible" means that they must be "competent," the words "credible" and "competent" being synonymous when used in this connection: *Sloan v. Sloan*, 184 Ill. 579, 56 N. E. 952; *Standley v. Moss*, 114 Ill. App. 612; *Bucker v. Lambdin*, 12 Smedes & M. 230; *Fowler v. Stagner*, 55 Tex. 393. The requirements of attestation and witnessing generally apply to wills of personality as well as of realty (*Hooks v. Stamper*, 18 Ga. 471; *Lewis v. Maris*, 1 Dall. 278; *Town of Pawtucket v. Ballou*, 15 R. I. 58, 2 Am. St. Rep. 868, 23 Atl. 43; *Reynolds v. Reynolds*, 1 Spear, 253, 40 Am. Dec. 599; *Rosser v. Franklin*, 6 Gratt. 1, 52 Am. Dec. 97; *Blanchard's Heirs v. Blanchard's Heirs*, 32 Vt. 62), though formerly they were not prescribed in cases of personality: *Davis v. Davis*, 6 Lea, 543; *Moore v. Moore's Exr.*, 8 Gratt. 307 (before the statute of 1835). In the absence of statutory requirement, a will is valid without witnessing or attestation: *In re High*, 2 Doug. 515. Moreover, the requirements of attestation and witnessing, as set forth in this article, do not apply to nuncupative wills, nor in jurisdictions where they are recognized to holographic wills.

Number of Witnesses.—Under the law prevailing in most jurisdictions, two competent witnesses to a will are sufficient: *In re Walker*, 110 Cal. 387, 52 Am. St. Rep. 104, 42 Pac. 815, 30 L. R. A. 460; *Clark v. Miller*, 65 Kan. 726, 68 Pac. 1071; *Griffith's Exr. v. Griffith*, 5 B. Mon. 511; *Odenwaelder v. Schorr*, 8 Mo. App. 458; *Williams v. Miles*, 68 Neb. 463, 110 Am. St. Rep. 431, 94 N. W. 705, 96 N. W. 151; *In re Look's Will*, 5 N. Y. Supp. 50; *In re Williams' Will*, 2 Conn. Sur. 579, 15 N. Y. Supp. 828, judgment affirmed 64 Hun, 636, 19 N. Y. Supp. 613; *In re Nevin's Will*, 4 Misc. Rep. 22, 24 N. Y. Supp. 838; *Luper v. Werts*, 19 Or. 122, 23 Pac. 850; *In re Irvine's Estate*, 206 Pa. 1, 55 Atl. 795; *Davis v. Davis*, 6 Lea, 543; *Simmons*

v. Leonard, 91 Tenn. 183, 30 Am. St. Rep. 875, 18 S. W. 280; Pollock v. Glassel, 2 Gratt. 439; Rosser v. Franklin, 6 Gratt. 1, 52 Am. Dec. 97; Skinner v. American Bible Soc., 92 Wis. 209, 65 N. W. 1037. Likewise under the custom prevailing in California before the formation of the state government, two witnesses were sufficient: Adams v. Norris, 64 U. S. 353, 16 L. ed. 539, 1 Fed. Cas. No. 51, McAll. 253. In other jurisdictions, however, the old English rule requiring three or four competent witnesses still prevails; Fortner v. Wiggins, 121 Ga. 26, 48 S. E. 694; Stirling v. Stirling, 64 Md. 138, 21 Atl. 273; Fleming v. Morrison, 187 Mass. 120, 105 Am. St. Rep. 386, 72 N. E. 499; Gardiner v. Gardiner, 65 N. H. 230, 19 Atl. 651, 8 L. R. A. 383; Reynolds v. Reynolds, 1 Spear, 253, 40 Am. Dec. 599; Dean v. Heirs of Dean, 27 Vt. 746; Blanchard's Heirs v. Blanchard's Heirs, 32 Vt. 62. In Reynolds v. Reynolds, 1 Spar, 253, 40 Am. Dec. 599, the reason for requiring three or four witnesses is said to be to protect men against fraudulent wills, for confederates in fraud usually conspire in pairs and can seldom trust with safety any third person.

A will executed with only one witness is invalid (Potts v. Felton, 70 Ind. 166), and where three witnesses are requisite, a will executed with only two is void as a muniment of title; a judgment admitting it to probate is a nullity, and cannot be validated by lapse of time: Fortner v. Wiggins, 121 Ga. 26, 48 S. E. 694.

Substantial Conformity to Law Sufficient.—Only a substantial compliance with the requirements of the law in the attestation and witnessing of wills is requisite, and formalities are not required which the legislature has not plainly prescribed: Montgomery v. Perkin, 2 Met. (Ky.) 448, 74 Am. Dec. 419; Savage v. Bulger, 76 S. W. 361, 25 Ky. Law Rep. 763; Lewis v. Lewis, 11 N. Y. 220, 13 Barb. 17; Hoystradt v. Kingman, 22 N. Y. 372; Gilbert v. Knox, 52 N. Y. 125; Lane v. Lane, 95 N. Y. 494; In re Jones' Will, 85 N. Y. Supp. 294; In re Williams' Will, 2 Conn. Sur. 579, 15 N. Y. Supp. 828, 64 Hun, 636, 19 N. Y. Supp. 613; In re Voorhis' Will, 125 N. Y. 765, 26 N. E. 935, 54 Hun, 637, 7 N. Y. Supp. 596; In re Moore's Will, 109 App. Div. 762, 96 N. Y. Supp. 729. "It is not necessary that any particular form be followed, or that any rigid rule of construction of the statute be imposed. Any other interpretation would be to confine the execution of testamentary documents within a narrow compass, and would in many instances defeat the expressed intentions of a person": In re Menge's Will, 13 Misc. Rep. 553, 35 N. Y. Supp. 493. Yet, in construing the statutes of wills, it is the intention of the legislature that must be kept in mind, and not that of the testator: In re Blair's Will, 84 Hun, 581, 32 N. Y. Supp. 845; In re Fish's Will, 88 Hun, 56, 34 N. Y. Supp. 536. And in Savage v. Bowen, 103 Va. 540, 49 S. E. 668, it is said that courts should strictly follow the requirements of the law in the execution of wills, but should not supplement those requirements with others.

III. Requisites.

a. **Subscription or Acknowledgment by Testator.**—It is provided by the various statutes of wills in effect in the several states that a will must be signed or subscribed (as differently provided) by the testator with his name or mark, or, as permitted in some states, may be signed or subscribed at the direction of the testator by another in his stead.

Necessity that It be Before or to Witnesses.—In order to validate a will, either this act of signing or subscribing must be done in the presence of the witnesses to the will, or in lieu thereof the testator must acknowledge the instrument or signature to the witnesses: *Yoe v. McCord*, 74 Ill. 33; *Webster v. Yorty*, 194 Ill. 408, 62 N. E. 907; *Reed v. Watson*, 27 Ind. 443; *In re Convey's Will*, 52 Iowa, 197, 2 N. W. 1084; *Denton v. Franklin*, 9 B. Mon. 28; *Etchison v. Etchison*, 53 Md. 348; *Stirling v. Stirling*, 64 Md. 138, 21 Atl. 273; *Dewey v. Dewey*, 1 Met. (Mass.) 349, 35 Am. Dec. 367; *Hogan v. Grosvenor*, 10 Met. (Mass.) 54, 43 Am. Dec. 414; *Nickerson v. Buck*, 12 Cush. 332; *Ela v. Edwards*, 16 Gray, 91; *Mundy v. Mundy*, 15 N. J. Eq. 290 (so holding under the law of 1851, but under the statute of wills of 1741 an acknowledgment was not sufficient); *Chaffee v. Baptist Missionary Convention*, 10 Paige, 85, 40 Am. Dec. 225; *Baskin v. Baskin*, 36 N. Y. 416; *In re Look's Will*, 5 N. Y. Supp. 50; *In re Look*, 54 Hun, 635, 7 N. Y. Supp. 298, judgment affirmed, 125 N. Y. 762, 27 N. E. 408; *In re Williams' Will*, 2 Conn. Sur. 579, 15 N. Y. Supp. 828, judgment affirmed, 64 Hun, 636, 19 N. Y. Supp. 613; *In re Carll's Will*, 38 Misc. Rep. 471, 77 N. Y. Supp. 1036; *Eelbeck's Devisees v. Granberry*, 3 N. C. 232; *Raudebaugh v. Shelley*, 6 Ohio St. 307; *In re Irvine's Estate*, 206 Pa. 1, 55 Atl. 795 (such is the law in case of wills disposing of property to charitable or religious uses); *Roberts v. Welch*, 46 Vt. 164; *In re Claffin's Will*, 73 Vt. 129, 87 Am. St. Rep. 693, 50 Atl. 815; *Rosser v. Franklin*, 6 Gratt. 1, 52 Am. Dec. 97. Where a testator makes his mark to his will in the presence of the witnesses, no acknowledgment is necessary (*Savage v. Bulger*, 25 Ky. Law Rep. 763, 76 S. W. 361), and where the testator makes such acknowledgment to the witnesses, they need not see him sign it (*Yoe v. McCord*, 74 Ill. 33; *Webster v. Yorty*, 194 Ill. 408, 62 N. E. 907; *Etchison v. Etchison*, 53 Md. 348; *Stirling v. Stirling*, 64 Md. 138, 21 Atl. 273; *Nickerson v. Buck*, 12 Cush. 332; *Cravens v. Faulconer*, 28 Mo. 19; *Sisters of Charity v. Kelly*, 67 N. Y. 409, reversing 7 Hun, 290; *Simmons v. Leonard*, 91 Tenn. 183, 30 Am. St. Rep. 875, 18 S. W. 280; *Roberts v. Welch*, 46 Vt. 164; *Skinner v. American Bible Soc.*, 92 Wis. 209, 65 N. W. 1037), although he signed his mark only: *In re Kana's Will*, 20 N. Y. Supp. 123.

The acknowledgment need not be made to both nor to all witnesses at the same time: *Chase v. Kittredge*, 11 Allen, 49, 87 Am. Dec. 687; *In re Diefenthaler's Will*, 39 Misc. Rep. 765, 80 N. Y. Supp. 1121. Moreover, where the witnesses are in the presence of

the testator while he signs the will, it is immaterial that the witnesses do not actually see him sign: *Etchison v. Etchison*, 53 Md. 348; *In re Bedell's Will*, 2 Conn. Sur. 328, 12 N. Y. Supp. 96; *Simmons v. Leonard*, 91 Tenn. 183, 30 Am. St. Rep. 875, 18 S. W. 280. But if the witnesses are not present at the time of the signing of the testator's will, and there is no subsequent acknowledgment sufficient to fulfill the requirements of the law, the will is not executed at all: *Sisters of Charity v. Kelly*, 67 N. Y. 409; *Luper v. Werts*, 19 Or. 122, 23 Pac. 850; *Richardson v. Orth*, 40 Or. 252, 66 Pac. 925, 69 Pac. 455; *Roberts v. Welch*, 46 Vt. 164.

Object of Requirement.—The object of the foregoing requirement in the execution of will is to identify and authenticate the instrument as one actually subscribed by the testator: *Baskin v. Baskin*, 36 N. Y. 416.

What Constitutes Sufficient Acknowledgment.—There is a diversity of decision as to the sufficiency of an acknowledgment to the witnesses, depending upon the terms of the statutes of wills in the respective jurisdictions, some of them providing that the testator must acknowledge the will to be his act and deed, and others providing that he must acknowledge his signature to the will to be his act and deed. In *Hobart v. Hobart*, 154 Ill. 610, 45 Am. St. Rep. 151, 39 N. E. 581, affirming 53 Ill. App. 133, the court points out and comments on this distinction, saying in substance: In England and in New York, and perhaps some other of the states, the statute requires that there must be an acknowledgment of the signature. Decisions based on this provision of law hold in substance that there is not a sufficient acknowledgment of the signature by the testator when he produces a will and requests the witnesses to sign it, unless his signature is visibly apparent on the face of the paper, and is seen, or can be seen, by the witnesses, especially if he does not explain the instrument to them. These decisions are not, however, applicable where the statute merely requires that the testator acknowledge the will or codicil to be his act and deed, and does not specially and in terms require the signature to be acknowledged. A man may acknowledge an entire written instrument to be his act and deed without necessarily calling the attention of those before whom he produces it to any particular part of the instrument. But if he is required to make acknowledgment of a specified part of it, it may be requisite that attention should be directed to that part.

Thus where the law is that the will must be acknowledged, it is not necessary that the witnesses see the signature of the testator to the will, or that the testator acknowledge his signature, or that the witnesses know that the instrument is a will, but where the testator acknowledges to the witnesses the execution of the instrument by himself the requirement of the law is satisfied: *Gould v. Chicago Theological Seminary*, 189 Ill. 282, 59 N. E. 536; *In re Barry's Will*, 219 Ill. 391, 76 N. E. 577; *Simmons v. Leonard*, 91 Tenn. 183,

30 Am. St. Rep. 875, 18 S. W. 280; *Rosser v. Franklin*, 6 Gratt. 1, 52 Am. Dec. 97. Thus a declaration by the testator to the witnesses that the instrument is his last will (*Dewey v. Dewey*, 1 Met. (Mass.) 349, 35 Am. Dec. 367; *Nickerson v. Buck*, 12 Cush. 332), or that it is his act and deed (*In re Barry's Will*, 219 Ill. 391, 76 N. E. 577; *Rosser v. Franklin*, 6 Gratt. 1, 52 Am. Dec. 97), or a request by the testator to the witnesses to attest his last will, he producing it for their signatures (*Tudor v. Tudor*, 17 B. Mon. 383; *Dewey v. Dewey*, 1 Met. (Mass.) 349, 35 Am. Dec. 367; *Nickerson v. Buck*, 12 Cush. 332; *Simmons v. Leonard*, 91 Tenn. 183, 30 Am. St. Rep. 875, 18 S. W. 280), is sufficient. Moreover, the declaration or request need not be spoken by the testator himself, but may be made by another in his presence, he himself remaining silent, where it appears from the surrounding circumstances that the other was acting for the testator at his instance: *Denton v. Franklin*, 9 B. Mon. 28. See also, to same effect, *In re Kane's Will*, 20 N. Y. Supp. 123. Furthermore, this acknowledgment need not be made in language at all, but any act, sign, or gesture of the testator which indicates an acknowledgment of the will with unmistakable certainty, will suffice: *Gould v. Chicago Theological Seminary*, 189 Ill. 282, 59 N. E. 536; *In re Barry's Will*, 219 Ill. 391, 76 N. E. 577; *Ela v. Edwards*, 16 Gray, 91; *Ludlow v. Ludlow*, 36 N. J. Eq. 597. Thus where the testator, having heard read the attesting clause of his will reciting that he had executed the instrument as his will, handed the subscribing witnesses the pen and saw them sign it, but uttered not a word, he acknowledged it as satisfactorily as though he had said, "I, _____, do acknowledge this instrument to be my last will and testament": *Allison v. Allison*, 46 Ill. 61, 92 Am. Dec. 237.

Where, however, the law is that the signature to the will must be acknowledged, it is requisite that the testator's signature affixed to the will be shown to the witnesses and identified and recognized by the testator, and in some apt and proper manner acknowledged by him to be his signature: *Lewis v. Lewis*, 11 N. Y. 220, affirming 13 Barb. 17; *Baskin v. Baskin*, 36 N. Y. 416; *In re Mackey's Will*, 110 N. Y. 611, 6 Am. St. Rep. 409, 18 N. E. 433, 1 L. R. A. 491; *In re Eakin's Estate*, 13 Misc. Rep. 557, 35 N. Y. Supp. 489; *Raudebaugh v. Shelley*, 6 Ohio St. 307. Thus where at the time a witness subscribed a will she had just entered the house where the testator was, and as she entered said to the testator, "Are you making your will?" to which he responded, "Yes," and added that he wanted her to put her name to the paper he had in his hand at the place he pointed out, which she did, there is no sufficient acknowledgment of his signature to the will: *In re Simmons' Will*, 56 Hun, 642, 9 N. Y. Supp. 352, affirmed without opinion, 124 N. Y. 663, 27 N. E. 413. The exhibition, however, of a will and of the testator's signature attached thereto, made by the testator to a witness, and his declaration to the witness that it was his last will and testament

and his request to the witness to attest the same, constitute together a sufficient acknowledgment by the testator of the signature to the will: *Baskin v. Baskin*, 36 N. Y. 416, 48 Barb. 200 (Parker and Grover, JJ., dissenting); *Willis v. Mott*, 36 N. Y. 486; *Sisters of Charity v. Kelly*, 67 N. Y. 409; *In re Phillips*, 98 N. Y. 267; *In re Lang's Will*, 9 Misc. Rep. 521, 30 N. Y. Supp. 388; *In re Aker's Will*, 74 App. Div. 461, 77 N. Y. Supp. 643.

b. **Request to Witnesses.**—In some states there must be a request from the testator to the witnesses to sign his will: *Mundy v. Mundy*, 15 N. J. Eq. 290; *In re Williams' Will*, 2 Conn. Sur. 579, 15 N. Y. Supp. 828, 64 Hun. 636, 19 N. Y. Supp. 613; *Vogel v. Lebritter*, 139 N. Y. 223, 34 N. E. 914. "The object of the statute is that an officious signing by the witnesses, without any privity with the testator, should not be recognized as sufficient": *Peck v. Cary*, 27 N. Y. 9, 84 Am. Dec. 220, affirming 38 Barb. 77. The manner and form in which the request must be made, and the evidence by which it must be proved, are not, however, prescribed, and no precise form of words addressed to each of the witnesses at the very time of attestation is required; but any communication importing such request, addressed to one of the witnesses in the presence of the other, and which, by a just construction of all the circumstances, is intended for both, is sufficient. So where one of the subscribing witnesses in the presence of the other asked the testator if he wished him to sign or witness the paper as his will, and the testator answered in the affirmative, and both thereupon subscribed the will, the publication is sufficient: *Coffin v. Coffin*, 23 N. Y. 9, 80 Am. Dec. 235. See, also, *In re Kane's Will*, 20 N. Y. Supp. 123. Likewise where, before the witnesses signed a will, the draftsman said to the testator, "Here are M. and H.; do you wish them to act as witnesses to this, your will?" to which he replied, "Yes, I do," and then subscribed himself, after which the witnesses did, the request is sufficient: *In re Menge's Will*, 13 Misc. Rep. 553, 35 N. Y. Supp. 493. Moreover, where the words of request are made in the presence of the testator, they may proceed from another than the testator, and will be regarded as those of the testator, although the testator said not one word and did not indicate his acquiescence by act or motion, provided that the circumstances show that he adopted them and that the party speaking them was acting for him with his assent: *Bundy v. McKnight*, 48 Ind. 502; *In re Hull's Will*, 117 Iowa, 738, 89 N. W. 979; *In re Murphy's Will*, 15 Misc. Rep. 208, 37 N. Y. Supp. 223; *Cheatham v. Hatcher*, 30 Gratt. 56, 32 Am. Rep. 650. So where the person who had drawn up a will for a testator and was attending to his execution for him, they both being in a bank, called up three persons who were in their hearing to witness the will, which they did, the subscribing by them was done at the testator's request: *Peck v. Cary*, 27 N. Y. 9, 84 Am. Dec. 220, 38 Barb. 77. Likewise, where counsel who drew a will for a testator and acted as witness

with the consent of the testator requested his stenographer to attest as a witness, such request being made in an adjoining room out of the hearing of the testator, after which the witness entered the room where the testator was and signed her name in the testator's presence, nothing further being said to her and no objection being made by the testator, the request to the witness is sufficient: *Ames v. Ames*, 40 Or. 495, 67 Pac. 737.

In other states, the statutes of wills there prevailing do not require that a testator should ask the witnesses to his will to attest it; his assent, either express or implied, is sufficient; yet the act must be done with his knowledge, and not in a clandestine or fraudulent manner: *Higgins v. Carlton*, 28 Md. 115, 92 Am. Dec. 666; *Etchison v. Etchison*, 53 Md. 348; *In re Meurer's Will*, 44 Wis. 392, 28 Am. Rep. 591.

In yet other states, it is immaterial whether or not the witnesses to a will attested it at the request of the testator: *Standley v. Moss*, 114 Ill. App. 612; *Dyer v. Dyer*, 87 Ind. 13; *In re Allen*, 25 Minn. 39; *Savage v. Bowen*, 103 Va. 540, 49 S. E. 668. See, also, *Huff v. Huff*, 41 Ga. 696, where the court held that the law implies a request from the testator to the witnesses to attest his will from their consummation of the act, that no special request by the testator is necessary to constitute the attesting witnesses competent, that if he does not object his assent is equivalent to a request and satisfies the requirements of the law, and that an instruction that if the jury believed from the evidence that one of the witnesses was suggested to the testator as a witness to his will, and the testator assented to such suggestion, such assent was, in law, a request, or equivalent to a request, is not erroneous.

c. Publication, or Declaration of Character of Instrument.—In some states it is prerequisite to the execution of a will that there be some declaration by the testator to the witnesses that the instrument attested by them is his last will and testament: *Cravens v. Faulconer*, 28 Mo. 19; *Mundy v. Mundy*, 15 N. J. Eq. 290; *Ludlow v. Ludlow*, 36 N. J. Eq. 597; *Clark v. Clark*, 64 N. J. Eq. 361, 52 Atl. 225; *Remsen v. Brinckerhoff*, 26 Wend. 325, 37 Am. Dec. 251, affirming *Brinckerhoff v. Remsen*, 8 Paige, 488; *Seymour v. Van Wyck*, 6 N. Y. 120; *Lewis v. Lewis*, 11 N. Y. 220, 13 Barb. 17; *Coffin v. Coffin*, 23 N. Y. 9, 80 Am. Dec. 235; *Baskin v. Baskin*, 36 N. Y. 416; *Gilbert v. Knox*, 52 N. Y. 125; *In re Look's Will*, 5 N. Y. Supp. 50; *In re Look*, 54 Hun, 635, 7 N. Y. Supp. 298, judgment affirmed, 125 N. Y. 762, 27 N. E. 408; *In re Dale's Will*, 56 Hun, 169, 9 N. Y. Supp. 396, affirmed without opinion, 134 N. Y. 614, 32 N. E. 649; *In re Williams' Will*, 2 Conn. Sur. 579, 15 N. Y. Supp. 828, 64 Hun, 636, 19 N. Y. Supp. 613; *Vogel v. Lehritter*, 135 N. Y. 223, 34 N. E. 914; *In re Carll's Will*, 38 Misc. Rep. 471, 77 N. Y. Supp. 1036; *In re Moore's Will*, 109 App. Div. 762, 96 N. Y. Supp. 729 (requisite in case of holographic wills). Such declaration is what is known in

technical language as a publication of a will (*Remsen v. Brinkerhoff*, 26 Wend. 325, 37 Am. Dec. 251), and without it the will is invalid: *Peck v. Cary*, 27 N. Y. 9, 84 Am. Dec. 220, affirming 38 Barb. 77. Publication "is important, first, in denoting that the testator knows the nature of the instrument he is executing, and to check any deception upon him. In the second place, and also in order that there may be no imposition perpetrated, it is important that the subscribing witnesses understand that they are attesting the signature to the will of the person at whose request they severally subscribe their names. They realize, if the document is a will, that they are expected to remember what occurred at its execution and be ready to vouch for its validity in court. The declaration of the testator that the instrument is his will is not solely, therefore, for the purpose of showing that he knew that he was executing his will": *In re Moore's Will*, 109 App. Div. 762, 96 N. Y. Supp. 729. See, also, *Baskin v. Baskin*, 36 N. Y. 416; *Gilbert v. Knox*, 52 N. Y. 125.

A substantial compliance with the requirement of publication is not only requisite but sufficient: *In re Beckett*, 103 N. Y. 167, 8 N. E. 506; *In re Dale's Will*, 56 Hun, 169, 9 N. Y. Supp. 396, affirmed without opinion, 134 N. Y. 614, 32 N. E. 649. "It is a substantial compliance with the statute, if in some way or mode the testator indicates that the instrument that the witnesses are requested to subscribe as such is intended or understood by him to be his executed will. . . . The legislature only meant that there should be some communication to the witnesses indicating that the testator intended to give effect to the paper as his will, and that any communication of this idea or to this effect will meet the object of the statute; that it is enough if in some way or mode the testator indicates that the instrument the witnesses are requested to subscribe as such is intended or understood by him to be his will. The word 'declare' is said to signify 'to make known, to assert to others, to show forth'; and this in any manner, either by words or acts, writing or in signs; in fine, that to declare to a witness that the instrument subscribed was the testator's will must mean to make it distinctly known to him by some assertion or by clear assent in words or signs": *In re Kane's Will*, 20 N. Y. Supp. 123. See, also, *Cravens v. Faulconer*, 28 Mo. 19; *Remsen v. Brinkerhoff*, 26 Wend. 325, 37 Am. Dec. 251; *In re Murphy's Will*, 15 Misc. Rep. 208, 37 N. Y. Supp. 223; *In re Carll's Will*, 38 Misc. Rep. 471, 77 N. Y. Supp. 1036; *In re Moore's Will*, 109 App. Div. 762, 96 N. Y. Supp. 729. *In re Beckett*, 103 N. Y. 167, 8 N. E. 506, the court further says: "Where the testator cannot speak at all, or only with difficulty, he may communicate his knowledge by signs or by words to some listeners unintelligible. He must communicate it, however; but if he does that in a manner capable of conveying to the minds of the witnesses his own present consciousness that the paper being executed is a will,

that must necessarily be sufficient." Likewise in *Mundy v. Mundy*, 15 N. J. Eq. 290, the court holds that the provision of the New Jersey statute of wills of 1851 that the writing must be declared by the testator to be his last will and testament requires no more formality than the act of 1741 which provided that the will must be published. So where one of the subscribing witnesses in the presence of the other asked the testator if he wished him to sign or witness the paper as his will, and the testator answered in the affirmative, the publication was sufficient as to both witnesses: *Coffin v. Coffin*, 23 N. Y. 9, 80 Am. Dec. 235. Or, where the draftsman of a will asked the testatrix "if she wanted B and him to witness the will," which then lay before them with the subscription of the testatrix upon it, and she answered in the affirmative, the publication is sufficient: *In re Menge's Will*, 13 Misc. Rep. 553, 35 N. Y. Supp. 493. To the same effect, *In re Murphy's Will*, 15 Misc. Rep. 208, 37 N. Y. Supp. 223. And where it was understood by the witnesses to a codicil when they were sent for that it was to witness a codicil, the statement of the testator upon their arrival, "It lays there on the desk; I have signed it, and there are only two lines left; you sign it on one, and Frank on the other," constitutes a sufficient publication: *In re Carll's Will*, 38 Misc. Rep. 471, 77 N. Y. Supp. 1036. Likewise where the testator knew and the witnesses understood from his acts and conduct, as he intended they should, that the instrument then executed was his will, there is a sufficient publication: *Lane v. Lane*, 95 N. Y. 494. Moreover, the fact that the testatrix's act of declaration of an instrument as her will included a reference to a previous conversation between her and the attesting witnesses, which reference was of such a character that without it there would be no publication of her will, does not render the publication insufficient: *In re Beckett*, 103 N. Y. 167, 8 N. E. 506. On the other hand, where the messenger who called a witness told him that he was wanted to subscribe a will, but while he was in the room subscribing it nothing was said to him of the nature of the paper, there is no sufficient declaration that the paper was a will: *In re Nevin's Will*, 4 Misc. Rep. 22, 24 N. Y. Supp. 838.

Again, it is not necessary that the testator should, by his own words or acts, publish the will, for this in some cases might be impossible through sickness or bodily infirmity, but it may be done by another in his presence and hearing, acting for him with his assent, he being able to dissent but not dissenting: *Mundy v. Mundy*, 15 N. J. Eq. 290; *Ludlow v. Ludlow*, 36 N. J. Eq. 597; *Gilbert v. Knox*, 52 N. Y. 125.

The act of publication is not complete until the witnesses understand from the testator that the instrument they attest is a will: *In re Moore's Will*, 109 App. Div. 762, 96 N. Y. Supp. 729. And "it will not suffice that the witnesses have elsewhere and from some other sources learned that the document which they are called to

attest is a will, or that they suspect or infer from the circumstances and occasion that such is the character of the paper. The fact must in some manner, although no particular form of words is required, be declared by the testator in their presence, that they may not only know the fact, but that they may know it from him, and that he understands it, and, at the time of its execution, which includes publication, designs to give effect to it as his will": *Lewis v. Lewis*, 11 N. Y. 220, 13 Barb. 17. To the same effect, see *Gilbert v. Knox*, 52 N. Y. 125.

While holographic wills are not recognized in New York as such, yet where a will is wholly in the testatrix's own handwriting, "criticism of the terms and manner of what is claimed to have been a sufficient publication need not be so close or severe as where the question whether the testatrix knew that she was executing a will depends solely upon the fact of publication": *In re Beckett*, 103 N. Y. 167, 8 N. E. 506. To the same effect, *In re Aker's Will*, 74 App. Div. 461, 77 N. Y. Supp. 643; *In re Moore's Will*, 109 App. Div. 762, 96 N. Y. Supp. 729.

In other states no declaration to the witnesses or otherwise of the nature of the document the witnesses are called upon to and actually do witness is requisite, and the fact that its nature and character is unknown to either or all of them does not impair its validity: *Appeal of Canada*, 47 Conn. 450, holding it error to instruct the jury that it was necessary that the subscribing witness of a will should know that the instrument which he subscribed was a will; *Dickie v. Carter*, 42 Ill. 376; *In re Storey's Will*, 20 Ill. App. 183; *Robinson v. Brewster*, 140 Ill. 649, 33 Am. St. Rep. 265, 30 N. E. 683; *Webster v. Yorty*, 194 Ill. 408, 62 N. E. 907; *In re Barry's Will*, 219 Ill. 391, 76 N. E. 577; *Brown v. McAlister*, 34 Ind. 375; *Turner v. Cook*, 36 Ind. 129; *In re Hulse's Will*, 52 Iowa, 662, 3 N. W. 734, holding that a statutory requirement that a will be "witnessed" does not require its publication; *Ray v. Walton*, 2 A. K. Marsh. 71; *Flood v. Pragoff*, 79 Ky. 607, relating to a codicil; *Osborn v. Cook*, 11 Cush. 532, 59 Am. Dec. 155, holding that while it was to some extent the usage of courts of probate to inquire of the witnesses to a will whether the testator had declared the instrument to be his will, and while such declaration frequently makes a part of the attestation clause of wills, it is unnecessary; *Ela v. Edwards*, 16 Gray, 91; *Chase v. Kittredge*, 11 Allen, 49, 87 Am. Dec. 687; *Watson v. Pipes*, 32 Miss. 451; *Luper v. Werts*, 19 Or. 122, 23 Pac. 850; *Skinner v. Lewis*, 40 Or. 571, 62 Pac. 523, 67 Pac. 951; *Loy v. Kennedy*, 1 Watts & S. 396; *Appeal of Linton*, 104 Pa. 228, in case of wills of married women; *Dean v. Heirs of Dean*, 27 Vt. 746; *In re Claffin's Will*, 75 Vt. 19, 52 Atl. 1053, 58 L. R. A. 261. Compare, however, *In re Claffin's Will*, 73 Vt. 129, 87 Am. St. Rep. 693, 50 Atl. 815; *Beane v. Yerby*, 12 Gratt. 239; *Allen v. Griffin*, 69 Wis. 529, 35 N. W. 21; overruling *In re Downie's Will*, 42 Wis. 66. In a few decisions the superfluity of a declaration of the char-

acter of the instrument is explained or excused on the ground that the writing out and signing of the will on paper by the testator constitutes a sufficient publication thereof: *Ray v. Walton*, 2 A. K. Marsh. 71; *Watson v. Pipes*, 32 Miss. 451; *Dean v. Heirs of Dean*, 27 Vt. 746. And in *Loy v. Kennedy*, 1 Watts & S. 396, the court says: "To require more [in the execution of a will] would frequently do mischief, as a testator is frequently disposed to conceal the fact that the instrument executed is a will."

Where, however, after subscription of a will by a subscribing witness the testator declares to the witness that it was "a fake will, made for a purpose," his attestation and subscription of the will is invalid: *Fleming v. Morrison*, 187 Mass. 120, 105 Am. St. Rep. 386, 72 N. E. 499.

d. Subscription and Attestation by Witnesses.

1. *Necessity of Signing and Attestation.*—In most states, it is necessary that the witnesses to a will subscribe and attest the same: See the statutes of the various states. And in Iowa, under a statute requiring a will to be in writing and "witnessed" by two witnesses, the court has held it necessary to the validity of a will that the witnesses should "subscribe" the will. For, as there said by the court, "to say that a writing is witnessed includes, as it seems to us, almost necessarily, the idea that it is witnessed in writing, and to exclude the conclusion that it is witnessed in any other manner. . . . This is sustained by the thought that the witnesses to a will become such from the time they thus sign it. They testify from that moment, and hence, though they should die before the testator or before the probate of the will, it is still good. . . . If without anything more than mere memory to identify the instrument, disregarding the consideration that the testator deliberately and formally made his will, desiring and wishing particular persons to attest it in writing, these most solemn of all writings may be established by the recollection of witnesses months and years afterward, immeasurable would be the temptations to frauds and perjuries": *In re Boyens' Will*, 23 Iowa, 354. In Pennsylvania, however, where the statute of wills requires the signature of the testator to be proved by at least two competent witnesses, neither subscribing nor attesting witnesses are necessary to give validity to a will: *Hight v. Wilson*, 1 Dall. 94, 1 L. ed. 51; *In re Irvine's Estate*, 206 Pa. 1, 55 Atl. 795. And under the custom prevailing in California, before the formation of the state government, to validate a will it was only necessary that the testator and the witnesses should alike hear and understand the testament, and that under such conditions its publication as the will of the testator should be made. It might be drawn in another language from that understood by the testator and witnesses, the notary drawing it understanding both, and the witnesses understanding the language of the testator: *Adams v. Norris*, 64 U. S. 353, 16 L. ed. 539; affirming same case under name of *Adams v. De Cook*, 1 Fed. Cas. No. 51, McAll. 253.

2. Mode of Subscription.

Manner of Performing Act.—A witness to a will may sufficiently subscribe a will by making his mark thereon: *In re Pope's Will*, 139 N. C. 484, 111 Am. St. Rep. 813, 52 S. E. 235; *Ford v. Ford*, 7 Humph. 92. Moreover, a witness' name may be written thereon by another at his instance and direction, and in his presence: *Upchurch v. Upchurch*, 16 B. Mon. 102; *In re Pope's Will*, 139 N. C. 484, 111 Am. St. Rep. 813, 52 S. E. 235; *Simmons v. Leonard*, 91 Tenn. 183, 30 Am. St. Rep. 875, 18 S. W. 280. For such subscription by another "furnishes as much assurance of identity as the making of a mark. . . . A literal adherence to the words of the statute would operate harshly, and exclude all persons unable to write their names, as witnesses to wills, however worthy of credence. A more liberal construction will as effectually accomplish the ends of the statute, and not violate its language": *Upchurch v. Upchurch*, 16 B. Mon. 102. In North Carolina, it is held that the fact that the witness himself is able to write does not impair the validity of such signature by another (*In re Pope's Will*, 139 N. C. 484, 111 Am. St. Rep. 813, 52 S. E. 235); but in Tennessee, it is held that where the witness' name is written by another, the witness himself must countersign it with his mark or other identifying sign, and further, that a competent witness cannot effectively procure his signature to be made thereon by one incompetent to have himself been a witness to a will, for "to permit the devisee to write the name of the subscribing witness would expose the will to little less danger of wrongful alteration and substitution than would exist if the devisee himself were allowed to become the witness; the same evil consequences would follow in the one case as in the other. If he may sign the name of one subscribing witness, he may sign the name of both, and in that way become a more potent factor in the execution and probate of the will than if he were allowed to become a subscribing witness himself. He may not lawfully take the matter so largely into his own hands. A proper construction of the statute excludes the devisee from the doing of any act, even for the subscribing witness, which is essential to a valid subscription": *Simmons v. Leonard*, 91 Tenn. 183, 30 Am. St. Rep. 875, 18 S. W. 280.

In Re Walker, 110 Cal. 387, 52 Am. St. Rep. 104, 42 Pac. 815, 30 L. R. A. 460 (*McFarland*, *Garoutte*, and *Van Fleet*, JJ., dissenting), the court held that a witness could sign only in one way, viz., by affixing his name; and, accordingly, that where a witness, inadvertently signed his name as "C. G. Walker," instead of "C. G. Warren," the will was invalidated.

Place on Will of Subscription.—In the absence of an express statutory requirement that the witnesses attach their signatures at the foot or end of the will, it is immaterial upon what part of a will the attesting witnesses sign their names; all that is necessary is that the witnesses sign their names upon the paper upon which the

will is written. So the fact that two provisions of a will were written after the attestation clause and signatures of the witnesses does not impair its validity: *Kolowski v. Fausz*, 103 Ill. App. 528; *Fowler v. Stagner*, 55 Tex. 393, where the clause appointing executors was appended after the place left for the signatures of the subscribing witnesses, and they signed after the writing of the whole and with the intention of attesting the whole will, the part after their signatures as well as that before. Likewise it is of no importance that the witnesses sign their names in the attestation clause of the will, and not after: *Franks v. Chapman*, 64 Tex. 159. And where, at the conclusion of a will, after the testator's signature, was written a statement by the testator's wife, in substance that she was satisfied with it, and agreed to its provisions, and a subscribing witness to the will signed his name after the above addendum, instead of after the will itself, that fact does not invalidate the will: *Potts v. Felton*, 70 Ind. 166. Also where one of the witnesses to a will signed a sworn certificate on the back thereof, stating in substance that on the date of the will the testator signed, sealed and delivered it for the consideration and purposes stated therein, as his own proper act and deed, the attestation of such witness is sufficient: *Murray v. Murphy*, 39 Miss. 214.

In states, however, where it is requisite that the witnesses sign the will at the foot or end thereof, or that they "subscribe" it, a more rigid rule is applicable. Where a will occupied the first and part of the second page of a four-page sheet of paper, and, after being signed, was folded with the fourth page outside and sealed, and was later presented by the testator to three persons to be by them witnessed as his will, there is no sufficient subscribing of the will by the witnesses: *Soward v. Soward*, 1 Duvall, 126. For "between the paper as subscribed by Soward [the testator], and the names of the witnesses, there is an intervening space of nearly two blank pages. So far from subscribing their names to the will, it may be said, with much more propriety and accuracy of speech, that they merely indorsed the paper enclosing and enveloping the will, without any accompanying writing or memorandum to indicate the purpose of the indorsement or showing any connection whatever between the indorsement and the will. If the paper had been inclosed in a sealed envelope, and the witnesses had written their names on the envelope, it would have been quite as near an approximation to the requirements of the statute. There would also have been just as little room to doubt the identity of the paper in the one case as in the other. And whilst it is true that one of the chief objects of requiring the subscription of the names of the witnesses is to insure identity, it is equally true that another object is to prevent fraudulent additions to or alterations of the instrument to be subscribed. But the mode in which these objects are to be attained is definitely and certainly prescribed by the law, and it admits the substitution of no other mode."

Moreover, where, after a testator's will was written, he caused another paragraph to be written at the end, which clause was of a testamentary character; and he signed both at the end of the original will, and after the new paragraph, but the witnesses signed only at the end of the original will, they failed to subscribe the will, and the will is invalid: *In re Blair's Will*, 84 Hun, 581, 32 N. Y. Supp. 845. And where a will was written on the first and third pages of a double sheet of paper, and at the foot of the first page were the words "continued on the next page," followed by an attestation clause and the signatures of the testator and three subscribing witnesses, and it further appeared from the terms of the will that the matter on the third page was surplusage, yet the will, not being signed by the witnesses at the end of the whole writing, is invalid. The testator intended the clauses on the third page to be part of his will, and it was not completed to his satisfaction until they were added. What shall form part of the instrument which the testator intends as his will must be determined by him: *In re Albert's Will*, 38 Misc. Rep. 61, 76 N. Y. Supp. 965.

3. **Time of Subscription and Attestation.**—It is not necessary, in most states, that both or all the witnesses to a will should subscribe it at the same time, but a will attested by a sufficient number of witnesses, who at different times subscribe their names as witnesses, is well executed: *Johnson v. Johnson*, 106 Ind. 475, 55 Am. Rep. 762, 7 N. E. 201; *Grubbs v. Marshall* (Ky.), 13 S. W. 447; *Dewey v. Dewey*, 1 Met. 349, 35 Am. Dec. 367; *Cravens v. Faulconer*, 28 Mo. 19; *Eelbeck's Devises v. Granberry*, 3 N. C. 232. In Virginia, however, the witnesses to a will must attest at the same time, for otherwise "the testator might be capable of making a will at the time of one of the attestations, and incapable at the time of the other, and only one attesting witness could prove the important fact of mental capacity at either time": *Parramore v. Taylor*, 11 Gratt. 220.

4. Presence of Testator.

A. **Necessity.**—It is prerequisite to the validity of a will that both or all the witnesses thereto subscribe and attest the same in the presence of the testator: *Standley v. Moss*, 114 Ill. App. 612; *Calkins v. Calkins*, 216 Ill. 458, 108 Am. St. Rep. 233, 75 N. E. 182, 1 L. R. A., N. S., 293; *Cravens v. Faulconer*, 28 Mo. 19; *In re Beggans' Will*, 68 N. J. Eq. 572, 59 Atl. 874; *Eelbeck's Devises v. Granberry*, 3 N. C. 232; *In re Pope's Will*, 139 N. C. 484, 111 Am. St. Rep. 813, 52 S. E. 235; *Town of Pawtucket v. Ballou*, 15 R. I. 58, 2 Am. St. Rep. 868, 23 Atl. 43. An instruction that a will to be valid must be attested in the "personal and actual" presence of the testator, is not objectionable, although the adjectives are unnecessary, as, if attested in his presence, it cannot otherwise than in his "personal and actual" presence: *Greene v. Greene*, 145 Ill. 264, 33 N. E. 941.

B. **Object and Purpose.**—"The object of the statute in requiring that a will should be 'attested by the witnesses in the presence of the testator,' so far as the form of the attestation is concerned, was to

identify the instrument as that signed and published by the testator, and to prevent fraud and imposition in establishing spurious wills, and, at the same time, to show the person by whom the facts necessary to establish the will could be proved, when it should be produced for probate": *Fatheree v. Lawrence*, 33 Misc. Rep. 585. To the same effect, see *Robinson v. King*, 6 Ga. 639; *Calkins v. Calkins*, 216 Ill. 458, 108 Am. St. Rep. 233, 75 N. E. 182, 1 L. R. A., N. S., 393; *Orndorff v. Hummer*, 12 B. Mon. 619; *Watson v. Pipes*, 32 Miss. 451; *Crovens v. Faulconer*, 28 Mo. 19; *Mandeville v. Parker*, 31 N. J. Eq. 242. A further object is said to be that the testator may know that the instrument has been witnessed by the persons whom he has chosen for that purpose: *Orndorff v. Hummer*, 12 B. Mon. 619.

C. What Amounts to Presence.

(1) **Mentally.**—From the standpoint of a testator as a rational being, the performance of the act of subscription and attestation in his presence necessarily involves his full consciousness at the time of such performance of the nature and quality of the act: *Watson v. Pipes*, 32 Miss. 451; *Nock v. Nock's Exrs.*, 10 Gratt. 106. For "when the condition of the testator is such that immediately after the acknowledgment and before the subscription of the will, from sleep or other cause, he becomes insensible to what is passing around him, and unconscious of the act of subscribing, which he has a right to supervise, and thus in fact is unable to determine whether he will or will not supervise it, the subscription thus made is not in the sense or within the objects of the statute made in his presence. . . . Although, as far as mere space were concerned, the subscription was in his presence, we are satisfied that the same reasons which require that he should have been physically capable by his own exertion or by the aid of others to see what was going on if he chose to do so, operate even more powerfully to require that he should have been conscious of it, and that he should have had the will or mental power to determine whether he would or would not see it. If this be not requisite, the subscription by the witnesses would be sufficient, though made after the death of the testator, or after he had relapsed into perfect delirium, or had become wholly insensible to external objects from the near approach of death. And if this were sufficient, the objects of the statute would be as fully accomplished if the will were subscribed a year from the testator's death, or at any distance from his presence during his life": *Orndorff v. Hummer*, 12 B. Mon. 619. So where at the time of subscription the testator was in bed and did not speak to the witness while he was in the room, nor did the witness see him, and while both before and after the subscription the testator was able to converse and walk about, but it did not appear that he was sensible or awake at the time thereof, the subscription is insufficient: *Griffith's Exr. v. Griffith*, 5 B. Mon. 511. Where the feebleness of mind and body of a testator at the time of attestation of his will was so great that there was a total prostra-

tion of bodily and mental powers, the will is void: *Spoonemore v. Cables*, 66 Mo. 579. And where a testator declared an instrument to be his will and requested the witnesses to sign, but before the second witness had signed died, and he afterward subscribed, the will is invalid: *In re Fish's Will*, 88 Hun, 56, 34 N. Y. Supp. 536. In *McMechen v. McMechen*, 17 W. Va. 683, 41 Am. Rep. 682, the court in substance, says: If before the attestation of a will, and while it is being done, the testator, by reason either of unconsciousness or physical inability, was unable to dissent from the attestation and to arrest or prevent the same by indicating his dissent or disapproval, if he had desired to do so, the will is not valid. It is not necessary that the testator shall actually assent to the attestation, but when the attestation is made he must be in a mental and physical condition which will enable him to dissent from the attestation if he desires; and if his condition is such that he could give such dissent or disapproval, if he chose to do so, but does not, his assent will be implied.

In *Ambre v. Weishaar*, 74 Ill. 109, it has further been held that an attestation, even in the same room with the testator, if done in a clandestine and fraudulent manner, will not be regarded as done in his presence.

(2) **Physically**—*In General*.—From the standpoint of the testator as a sentient creature, there must be such contiguity between the testator and the witnesses at the time of their attestation as in fact or in the common experience of men will bring the act of the witnesses in subscribing and attesting to the perception of the testator's senses. In *Healey v. Bartlett*, 73 N. H. 110, 59 Atl. 617, the court says: "When a testator is not prevented by physical infirmities from seeing and hearing what goes on around him, it is the general, if not the universal, rule, that his will is attested in his presence if he understands and is conscious of what the witnesses are doing when they write their names, and can, if he is so disposed, readily change his position so that he can see and hear what they do and say. . . . In other words, if he had knowledge of their presence, and can, if he is so disposed, readily see them write their names, the will is attested in his presence, even if he does not see them do it, and could not without some slight physical exertion. It is not necessary that he should actually see the witnesses for them to be in his presence. They are in his presence whenever they are so near him that he is conscious of where they are, and of what they are doing, through any of his senses, and are where he can readily see them if he is so disposed. The test, therefore, to determine whether the will of a person who has the use of all his faculties is attested in his presence, is to inquire whether he understood what the witnesses were doing when they affixed their names to his will, and could, if he had been so disposed, readily have seen them do it."

In view of the tendency, observable in the foregoing and many other decisions, to confuse presence with eyesight, the court in *Maynard v. Vinton*, 59 Mich. 139, 60 Am. Rep. 276, 26 N. W. 401, says: "Courts have held that where the testator is a blind person, still the witnesses must subscribe in such position and proximity that, had the testator been possessed of eyesight, he would have seen them; thus making the test of sight the limit of personal presence. If this is the correct criterion, then the rule, instead of being uniform, would be subject to great fluctuations, according to the degree of eyesight a person has. What would be in the presence of a far-sighted person would be in the absence of a near-sighted one; and what would be a valid execution of a will for one would be wholly worthless for another with equal mental capacity; and a person wearing his eye-glasses or spectacles would have a larger presence than when he laid them aside. Under such a rule, the oculist would appear to be the most important witness to establish or destroy the legal attestation and execution of a will. . . . I confess I do not see why the word 'presence' should not be held to convey the idea attached to its ordinary signification in the ordinary use of language. It is not a technical term or scientific word. Why should such a meaning be put upon this word 'presence' that implies that every person who is called upon to witness the execution of a will is presumed to be willing and anxious to foist upon the testator a spurious document, and hence required to write his name under the eye (if he has one) of the testator."

Other decisions, while recognizing that an attestation may be good although the testator is blind or does not choose to look at the act of attesting, yet hold that to be in the testator's presence the act of attesting must be in the line of the testator's vision if he could or cared to look. In *Calkins v. Calkins*, 216 Ill. 458, 108 Am. St. Rep. 233, 75 N. E. 182, 1 L. R. A., N. S., 393, the court says: "In the case of a blind person, his will would be attested in his presence if the act was brought within his personal knowledge through the medium of other senses. . . . On the other hand, no mere contiguity of the witnesses will constitute presence if the position of the testator is such that he cannot possibly see them. An attestation is not in the presence of the testator, although the witnesses are in the same room and close to him, if some material obstacle prevents him from knowing of his own knowledge or perceiving by his senses the act of attestation": To the same effect, *In re Tobin*, 196 Ill. 484, 63 N. E. 1021; *Riggs v. Riggs*, 135 Mass. 238, 46 Am. Rep. 464; *Reynolds v. Reynolds*, 1 Spear, 253, 40 Am. Dec. 599. The necessity, in case of a blind testator, that the act of attesting should be within the perception of his remaining senses does not appear to be appreciated in the remarks in *Healey v. Bartlett*, 73 N. H. 110, 59 Atl. 617, in respect to the wills of blind testators. In *Bay v. Hill*, 3 Strob. 297, 49 Am. Dec. 647, the will of a blind man was sustained, the will having been

within two feet of the testator at the time the witnesses subscribed their names, and the court said: "In the case of a blind man, the superintending control which in other cases is exercised by sight must be transferred to the other senses; and if they are, or may, at his discretion, be made sensible that the witnesses are subscribing the same will that he had signed, I should think it ought to suffice."

Presence in Case of Clear Vision.—Where a testator is so situated with respect to the witnesses to his will that by a mere movement of his head, which he had the physical ability to make if he chose, they would be in his unobstructed sight during the act of attestation, they are sufficiently in his presence, though he fails to overlook their act of attestation: *Robinson v. King*, 6 Ga. 539; *Ambre v. Weishaar*, 74 Ill. 109; *In re Storey's Will*, 20 Ill. App. 183, 200; *McElfresh v. Guard*, 32 Ind. 408; *Turner v. Cook*, 36 Ind. 129; *Orndorff v. Hummer*, 12 B. Mon. 619; *Edelen v. Hardley's Lessee*, 7 Har. & J. 61, 16 Am. Dec. 292; *Dewey v. Dewey*, 1 Met. (Mass.) 349, 35 Am. Dec. 367; *Hogan v. Grosvenor*, 10 Met. (Mass.) 54, 43 Am. Dec. 414; *In re Allen*, 25 Minn. 39; *Watson v. Pipes*, 32 Miss. 451; *Walker v. Walker*, 67 Miss. 529, 7 South. 491; *Spoonemore v. Cables*, 66 Mo. 579; *Cornelius v. Cornelius*, 52 N. C. 593; *Blanchard's Heirs v. Blanchard's Heirs*, 32 Vt. 62; *Ray v. Hill*, 3 Strob. 297, 49 Am. Dec. 647. This rule applies equally where the witnesses were not in the same room with the testator: *Orndorff v. Hummer*, 12 B. Mon. 619; *Bynum v. Bynum*, 33 N. C. 632; *In re Meurer's Will*, 44 Wis. 392, 28 Am. Rep. 591. If actual sight were necessary, it would vitiate a will if the testator did but turn his back or look off, though literally present by being at the spot where the thing was done: *Bynum v. Bynum*, 33 N. C. 632.

Presence in Case of Obstructed Vision.—Where, however, the testator and witnesses are in the same apartment and fairly contiguous, but some physical object obstructing the sight lies between them during the act of subscribing, the witnesses are not in the testator's presence, and the attestation is insufficient, although the testator was physically capable of changing his position or removing the obstruction had he chose to do so: *Robinson v. King*, 6 Ga. 539; *Brooks v. Duffell*, 23 Ga. 441; *Reed v. Roberts*, 26 Ga. 294, 71 Am. Dec. 210; *Calkins v. Calkins*, 216 Ill. 458, 108 Am. St. Rep. 233, 75 N. E. 182, 1 L. B. A., N. S., 293; *Ray v. Hill*, 3 Strob. 297, 49 Am. Dec. 647. Yet in Michigan, where the sight was interrupted by the fact that the first witness stood between the testator and the second witness while the second was subscribing, the attestation was not thereby invalidated: *Maynard v. Vinton*, 59 Mich. 139, 60 Am. Rep. 276, 26 N. W. 401. And the fact that, while subscribing, a witness is so placed with respect to the testator that the witness' body cuts off the testator's view of the will, the hand of the witness with which he was subscribing, and the act of subscription, does not render the attestation any the less in the presence of the testator: *In re Tobia*,

196 Ill. 484, 63 N. E. 1021; Nock v. Nock's Exrs., 10 Gratt. 106; Baldwin v. Baldwin's Exr., 81 Va. 405, 59 Am. Rep. 669.

Presence in Case of Inability to Look in Direction.—In some decisions it is held that where the testator's ability actually to see the witnesses to his will subscribe the same is dependent upon his ability to turn himself, and his ailment so operates as to prevent him from making this movement, the will is not witnessed in his presence. Aikin v. Weckerly, 19 Mich. 482; Watson v. Pipes, 32 Miss. 451; Walker v. Walker, 67 Miss. 529, 7 South. 491; Neil v. Neil, 1 Leigh, 6, the court being equally divided. But in Riggs v. Riggs, 135 Mass. 238, 46 Am. Rep. 464, the court held that where a will was attested nine feet from a testator's bed in an adjoining room, and in the unobstructed line of vision from his bed, but because of injuries he was unable to turn his head or to look in any direction except upward, it is attested in his presence, for sight is not the only test of presence. "A man may take note of the presence of another by the other senses, as hearing or touch. Certainly, if two blind men are in the same room, talking together, they are in each other's presence. If two men are in the same room, conversing together, and either or both bandage or close their eyes, they do not cease to be in each other's presence."

Position in Same or Another Room—Presumption Therefrom.—In order that the attestation may be in the presence of the witnesses, it is not indispensable that the witnesses should, at the time of their subscription, be in the same room or even in the same house as the testator: Robinson v. King, 6 Ga. 539; Ambre v. Weishaar, 74 Ill. 109; McElfresh v. Guard, 32 Ind. 408; Watson v. Pipes, 32 Miss. 451. Yet where the witnesses subscribe in a different room from that in which the testator is and out of the line of his vision, they are not in his presence: Robinson v. King, 6 Ga. 539, where the witnesses went onto the piazza to subscribe; Edelen v. Hardley's Lessee, 7 Har. & J. 61, 16 Am. Dec. 292; Boldry v. Parris, 2 Cush. 433; Mandeville v. Parker, 31 N. J. Eq. 242, where the will was on a table, behind the partition of the adjoining room, although the backs of the witnesses sitting at the table and subscribing their names might have been visible from the position of the testator; Graham v. Graham, 32 N. C. 219, under same circumstances; Jones v. Tuck, 48 N. C. 202; Reynolds v. Reynolds, 1 Spear, 253, 40 Am. Dec. 599, where a testator in bed could have seen, by raising himself on his elbow, which he had the strength to do, but did not. In Wright v. Lewis, 5 Rich. 1, 212, 55 Am. Dec. 714, where a testator, being in ordinary health, walked onto a piazza to subscribe his will and sat down at a table and did it, and then rose and let the witnesses sit there to sign, meanwhile walking into the room off the piazza from parts of which he could see the witnesses sign, and after the attestation was done was found by the witnesses sitting in a place in the room from which he could not have seen the witnesses when subscribing, the court held

the attestation sufficiently in the testator's presence, and distinguished the case from the others on the ground that in them the will was taken from the actual presence of the testator to be attested, while here the will remained exactly where the testator signed it, and he left the witnesses when he knew they were attesting it.

Moreover, in a number of decisions it is held that where the witnesses are in the same room with the testator at the time of the act of subscribing, they are *prima facie* in his presence, and the burden is on a contestant of the will to rebut that presumption, while if they are not all in the same room at that time, they are *prima facie* out of the presence of the testator, and the burden is on the proponent of the will to establish their mutual presence: *Orndorff v. Hummer*, 12 B. Mon. 619; *Watson v. Pipes*, 32 Miss. 451; *Mandeville v. Parker*, 31 N. J. Eq. 242; *In re Beggan's Will*, 68 N. J. Eq. 572, 59 Atl. 874; *Bynum v. Bynum*, 33 N. C. 632; *Jones v. Turk*, 48 N. C. 202.

D. Acknowledgment of Signature as Equivalent to Presence.—In some states, where the witnesses to a will subscribed the same out of the presence of the testator, their subsequent acknowledgment of the signatures to the testator, although done as part of the same transaction, the signatures being exhibited to the testator, does not amount to subscription in the testator's presence and is insufficient to validate the will: *Calkins v. Calkins*, 216 Ill. 458, 108 Am. St. Rep. 233, 75 N. E. 182, 1 L. R. A., N. S., 393; *Chase v. Kittredge*, 11 Allen, 49, 87 Am. Dec. 687; *Town of Pawtucket v. Ballou*, 15 R. I. 58, 2 Am. St. Rep. 868, 23 Atl. 43; *In re Downie's Will*, 42 Wis. 66. In other states, however, the subscription and attestation is in such case, under the circumstances mentioned, sufficiently done in the testator's presence: *Cook v. Winchester*, 81 Mich. 581, 46 N. W. 106, 8 L. R. A. 822; *Moore v. Moore's Exr.*, 8 Gratt. 307, the court being equally divided; *Sturdivant v. Birchett*, 10 Gratt. 67 (*Daniel and Allen, JJ.*, dissenting).

5. Mutual Presence of Witnesses.—In most states, it is not requisite that the witnesses to a will sign or attest the same in the presence of each other or of one another, but it is sufficient that they do so separately: *Moore v. Spier*, 80 Ala. 129; *Appeal of Gaylord*, 43 Conn. 82; *Flinn v. Owen*, 58 Ill. 111; *In re Hull's Will*, 117 Iowa, 738, 89 N. W. 979; *Hogan v. Grosvenor*, 10 Met. (Mass.) 54, 43 Am. Dec. 414; *Ela v. Edwards*, 16 Gray, 91; *Cravens v. Faulconer*, 28 Mo. 19; *Hoysratt v. Kingman*, 22 N. Y. 372; *In re Potter's Will*, 12 N. Y. Supp. 105; *In re Diefenthaler's Will*, 39 Misc. Rep. 765, 80 N. Y. Supp. 1121; *Raudebaugh v. Shelley*, 6 Ohio St. 307; *Logue v. Stanton*, 5 Sneed, 97; *Simmons v. Leonard*, 91 Tenn. 183, 30 Am. St. Rep. 875, 18 S. W. 280; *Parramore v. Taylor*, 11 Gratt. 220; *Beane v. Yerby*, 12 Gratt. 239; *Green v. Crain*, 12 Gratt. 252 (*Allen, P.*, and *Daniel, J.*, dissenting, by reason of peculiar statutory language); *In re Smith's Will*, 52 Wis. 543, 38 Am. Rep. 756, 8 N. W. 616, 9

N. W. 665. "A requisition that the witnesses shall subscribe in the presence of each other would be a fruitful source of litigation, would defeat many fair wills, and would, I think, be productive of no corresponding good. It would very much clog the exercise of the testamentary power, without throwing around it, so far as I can perceive, a single additional safeguard. It would render it necessary to inquire in every case whether the witnesses, when they subscribed the will, were not only in the presence of the testator or in the range of his vision, but also in the presence of each other or in the range of each other's vision. It would be questionable whether range of the vision would be sufficient in regard to the witnesses inter se, and whether actual sight would not be necessary": *Parramore v. Taylor*, 11 Gratt. 220.

In a few states, however, the witnesses must be together in each other's or one another's presence at the time of their subscription and attestation of the will, to validate the same: *Ludlow v. Ludlow*, 36 N. J. Eq. 597; *Roberts v. Welch*, 46 Vt. 164. In these latter states, where all the witnesses to a will were so situated that they might have seen one another sign, it is not material whether they did in fact or not: *Blanchard's Heirs v. Blanchard's Heirs*, 32 Vt. 62; *In re Clafin's Will*, 73 Vt. 129, 87 Am. St. Rep. 693, 50 Atl. 815. But to constitute presence, it is not sufficient that the witnesses merely were in the same room with the testator. The room might have been so large; but the witnesses must have been together in the presence of one another in such a way and in such a sense that they could see one another sign; whether they actually looked and saw or not, they must have been right where they could have seen one another sign: *In re Clafin's Will*, 75 Vt. 19, 52 Atl. 1053, 58 L. B. A. 261.

a. Other Supposed Requisites.

1. **Knowledge of Contents by Witnesses.**—It is not essential to the validity of a will that it should be read over to the witnesses thereto, nor that they should know its contents: *Dickie v. Carter*, 42 Ill. 376; *Brown v. McAlister*, 34 Ind. 375; *In re Higdon's Will*, 6 J. J. Marsh. 444, 22 Am. Dec. 84; *Flood v. Pragoff*, 79 Ky. 607; *Hogan v. Grosvenor*, 10 Met. (Mass.) 64, 43 Am. Dec. 414; *Osborn v. Cook*, 11 Cush. 532, 59 Am. Dec. 155; *Raudebaugh v. Shelley*, 6 Ohio St. 307; *Luper v. Werts*, 19 Or. 122, 23 Pac. 850; *Skinner v. Lewis*, 40 Or. 571, 62 Pac. 523, 67 Pac. 951; *Appeal of Linton*, 104 Pa. 228, relating to a will of a married woman; *Simmons v. Leonard*, 91 Tenn. 183, 30 Am. St. Rep. 875, 18 S. W. 280.

2. **Attestation Clause.**—Where it is customary to place at the end of a will, before the signatures of the witnesses thereto, an attestation clause setting forth with more or less completeness the performance of the statutory requisites to its due execution and witnessing, yet the total absence of such clause, or of any word of attestation, does not invalidate the will: *Calkins v. Calkins*, 216 Ill. 458, 108 Am. St.

Rep. 233, 75 N. E. 182, 1 L. R. A., N. S., 393; In re Barry's Will, 219 Ill. 391, 76 N. E. 577; Barricklow v. Stewart, 163 Ind. 438, 72 N. E. 128; In re Hull's Will, 117 Iowa, 738, 89 N. W. 979; Ela v. Edwards, 16 Gray, 91; Berberet v. Berberet, 131 Mo. 399, 52 Am. St. Rep. 634, 33 S. W. 61; Williams v. Miles, 68 Neb. 463, 110 Am. St. Rep. 431, 94 N. W. 705, 96 N. W. 151; In re Look, 54 Hun, 635, 7 N. W. Supp. 298; affirmed without opinion, 125 N. Y. 762, 27 N. E. 408; In re Aker's Will, 74 App. Div. 461, 77 N. Y. Supp. 643; In re Cornell's Will, 89 App. Div. 412, 85 N. Y. Supp. 920; Webb v. Dye, 18 W. Va. 376. Where such a clause is used, the particular form of completeness thereof is immaterial to the validity of the will: Keely v. Moore, 196 U. S. 33, 25 Sup. Ct. Rep. 169, 49 L. ed. 376, affirming 22 App. Dist. Col. 9; Robinson v. Brewster, 140 Ill. 649, 33 Am. St. Rep. 265, 30 N. E. 683; Barricklow v. Stewart, 163 Ind. 438, 72 N. E. 128; In re Hull's Will, 117 Iowa, 738, 89 N. W. 979; Osborn v. Cook, 11 Cush. 532, 59 Am. Dec. 155; Chase v. Kittredge, 11 Allen, 49, 89 Am. Dec. 687; Fatheree v. Lawrence, 33 Miss. 585; Chaffee v. Baptist Missionary Convention, 10 Paige, 85, 40 Am. Dec. 225; Jackson v. Jackson, 39 N. Y. 163; Franks v. Chapman, 64 Tex. 159. The same rules hold true with respect to an attestation clause to a codicil: In re Crane, 68 App. Div. 355, 74 N. Y. Supp. 88.

So where the attestation clause of a will consisted merely of the word "witness" (Osborn v. Cook, 11 Cush. 532, 59 Am. Dec. 155; Chase v. Kittredge, 11 Allen, 49, 87 App. Div. 687; In re Aker's Will, 74 App. Div. 461, 77 N. Y. Supp. 643), or "attest" (Robinson v. Brewster, 140 Ill. 649, 33 Am. St. Rep. 265, 30 N. E. 683), or "test" (Fatheree v. Lawrence, 33 Miss. 585), written before the names of the witnesses, it is sufficient. Where at the end of a will, below the testator's subscription were subscribed the phrases "Written by S. S. Ashton," and "Witness Ann R. Ashton," and it appeared that the first witness was the draftsman of the will and wrote the words "Written by S. S. Ashton for" on the will, intending to add the testatrix's name in case she was unable to write her own, but the testatrix, being able to write it, scratched out the word "for" and left the remainder as a subscription and attestation of the will, it is sufficient: Pollock v. Glassel, 2 Gratt. 439. An attestation clause in the form of a formal certificate of acknowledgment of the testator's signature, the witness being one authorized to take acknowledgments, has also been sustained: In re Hull's Will, 117 Iowa, 738, 89 N. W. 979; Franks v. Chapman, 64 Tex. 159. Likewise an attestation clause stating in substance that on the date of the will the testator signed, sealed and delivered it for the consideration and purposes stated therein as his own proper act and deed does not invalidate the attestation, as such superfluous language cannot invalidate the witness' signature thereto: Murray v. Murphy, 39 Miss. 214. Furthermore, the use of one clause in one form signed by two witnesses, and of another clause in another form signed by the third, does

not (three witnesses being necessary) render the attestation of the will insufficient: *Keeley v. Moore*, 196 U. S. 38, 25 Sup. Ct. Rep. 169, 49 L. ed. 376, affirming 22 App. Dist. Col. 9.

But in the early case of *Withinton v. Withinton*, 7 Mo. 589, where a paper offered as a will was in form a deed to take effect at the grantor's death, and had attached to it a certificate of a notary, wherein the notary acknowledged his signature and his act, and that he did it for the purposes in the writing set forth, which certificate was signed by the notary, the court held that the notary's signature cannot, for the purpose of sustaining the writing as a will, be considered the signature of an attesting witness, since the function of a witness to a will is not only to prove that the instrument was executed, but that the testator was of sound and disposing mind, while here the notary certified merely to the due execution and not to the mental capacity of the grantor.

3. *Miscellaneous*.—In order to validate his attestation to a will, a witness thereto need not know the testamentary capacity of the testator: *Huff v. Huff*, 41 Ga. 696. It is error to instruct the jury that prior to the signing of a will by the witnesses thereto, each of the witnesses must know that the other was to be an attesting witness, and each must know that the other had been requested to act in that capacity: *Savage v. Bowen*, 103 Va. 540, 49 S. E. 668.

Under the Pennsylvania act of 1848, it is not necessary that the witnesses to a will of a married woman should be able to testify that the testatrix understood the contents thereof: *Appeal of Linton*, 104 Pa. 228.

It is not requisite to the validity of a will that the witnesses thereto attest to exactly the same act or declaration on the part of the testator, indicating his acknowledgment of the instrument: *In re Hull's Will*, 117 Iowa, 738, 89 N. W. 979.

1. Order and Mode of Observing Requisites in General.

1. Order.

A. *Of Execution by Testator and by Witnesses—First Group of States*.—While the general and regular course in the attestation of a will is for the testator first to execute the will on his part and then call on the witnesses to attest the execution by subscribing their names (*O'Brien v. Gallagher*, 25 Conn. 229), yet in some states the fact that one or more of the witnesses subscribe their names before the testator signs or acknowledges the will does not, where the testator afterward, as part of the same transaction and in the continued presence of the witnesses, himself signs or acknowledges it, invalidate the will: *O'Brien v. Gallagher*, 25 Conn. 229; *Swift v. Wiley*, 1 B. Mon. 114; *Sechrest v. Edwards*, 4 Met. (Ky.) 163; *Cutler v. Cutler*, 130 N. C. 1, 89 Am. St. Rep. 854, 40 S. E. 689, 57 L. B. A. 209; *Rosser v. Franklin*, 6 Gratt. 1, 52 Am. Dec. 97; *Parramore v. Taylor*, 11 Gratt. 220; *Beane v. Yerby*, 12 Gratt. 239. Compare,

however, *Chisholm's Heirs v. Ben*, 7 B. Mon. 408. In *Swift v. Wiley*, 1 B. Mon. 114, the court said: "As all three of the subscribing witnesses were present at the final publication of the will, attested the fact of signing and publishing by the testator, and either then subscribed or acknowledged the subscription of their respective names, on the same paper, so as to insure the identification of the will as then published and attested, every purpose of the statute has been fulfilled, and not even a letter of it violated or disregarded. To resubscribe the names . . . would have been a superfluous and puerile act of mechanical repetition, not necessary for identification; because they had once subscribed the same paper in the presence and at the request of the testator, and which fact was recognized by him, as well as by themselves, after his own name had been subscribed, and when the document, thus recognized and identified, was finally and conclusively published as his will; nor can we perceive any other end of either utility or security that could have been promoted by again subscribing names already sufficiently subscribed."

Moreover, in *Grigg v. Williams*, 51 N. C. 518, the court held that where after one of the witnesses to a will had subscribed his name the testator inserted the name of an additional executor as part of the same transaction, the attestation by such witness was good.

Second Group of States.—In other states, however, where one or more of the necessary witnesses to a will subscribes it before the testator subscribes or acknowledges the same to the witnesses, the attestation of the will is insufficient, although the testator afterward, as part of the same transaction, signs or acknowledges the will: *Duffie v. Corridon*, 40 Ga. 122, where the testator signed the next day in the presence of the witness who had signed the previous day; *Brooks v. Woodson*, 87 Ga. 379, 13 S. E. 712, 14 L. R. A. 160; *Chase v. Kirtledge*, 11 Allen, 49, 87 Am. Dec. 687, where one of the witnesses signed in the absence of and before the testator, and the witness afterward acknowledged his signature to the testator after the testator had signed in his presence; *Lacey v. Dobbs*, 63 N. J. Eq. 325, 92 Am. St. Rep. 667, 50 Atl. 497, 55 L. R. A. 580, overruling *Mundy v. Mundy*, 15 N. J. Eq. 290, to the contrary; *Baskin v. Baskin*, 36 N. Y. 416; *Jackson v. Jackson*, 39 N. Y. 153; *Sisters of Charity v. Kelly*, 67 N. Y. 409; *In re Williams' Will*, 2 Conn. Sur. 579, 15 N. Y. Supp. 828, judgment affirmed, 64 Hun, 636, 19 N. Y. Supp. 613; *Simmons v. Leonard*, 91 Tenn. 183, 30 Am. St. Rep. 875, 18 S. W. 280. See, also, *In re Irvine's Estate*, 206 Pa. 1, 55 Atl. 795, holding that the Pennsylvania statute of 1855 governing the execution of a will disposing of property to charitable or religious uses, presupposes the existence of a writing signed by the testator at the time of attestation. In support of this doctrine, the court in *Brooks v. Woodson*, 87 Ga. 379, 13 S. E. 712, 14 L. R. A. 160, declared that the signature of the testator is the principal, if not the only, matter

to which the attestation applies, and such being the case, the attestation is insufficient if made a moment before the signing by the testator, as well as though made a day before. "To witness a future event is equally impossible, whether it occur the next moment or the next week." And in *Jackson v. Jackson*, 39 N. Y. 153, the court says: "Their signatures do not attest the signing by the testator, if they are placed there before the will is signed by him. For some period, longer or shorter, as the case may be, those signatures attest no execution—they certify what is not true. . . . Execution and the attestation thereof bear a plain relation to each other in point of time, in the good sense and common apprehension of everyone, and the statute prescribing the requisite formalities to a valid execution and authentication plainly contemplates that the acts of the witnesses shall attest the signing and declaration of the testator as a fact accomplished."

Similarly, in *Reed v. Watson*, 27 Ind. 443, where a testator procured the signature of a witness to his will before he signed it, and then took the will away with him and afterward attached his own signature without the knowledge of such witness, the court held the attestation insufficient.

In *Re Phillips*, 98 N. Y. 267, the court, however, held that the statute of wills is complied with, if the declaration that the instrument is a will and the acknowledgment of the testator's signature are simultaneous with the signature of the subscribing witness, especially if these acts are done before the witness has completed his signature and all on the same occasion.

B. Of Publication and Other Requisites.—It is sufficient in those states where publication is essential to the validity of a will that it be done as part of the transaction of witnessing the will, whether before or after the signing or acknowledgment of the will by the testator to the witnesses: In *re Johnson's Estate*, 57 Cal. 529, where the publication was made immediately after a witness finished subscribing; *Jackson v. Jackson*, 39 N. Y. 153, where publication was made immediately before the subscription of the will by the testator; In *re Look's Will*, 5 N. Y. Supp. 50; In *re Look*, 54 Hun, 635, 7 N. Y. Supp. 298, judgments affirmed, 125 N. Y. 762, 27 N. E. 408, holding that publication must be made at the time of subscription or acknowledgment by the testator; In *re Dale's Will*, 56 Hun, 169, 9 N. Y. Supp. 396, affirmed without opinion, 134 N. Y. 614, 32 N. E. 649; In *re Williams' Will*, 2 Conn. Sur. 579, 15 N. Y. Supp. 828, judgment affirmed, 64 Hun, 636, 19 N. Y. Supp. 613, where publication was made immediately before subscription by the testator; In *re Carll's Will*, 38 Misc. Rep. 471, 77 N. Y. Supp. 1036. It is, however, insufficient to publish the will to one of the witnesses thereto several weeks after the attestation by the witness: In *re Dale's Will*, 56 Hun, 169, 9 N. Y. Supp. 396, affirmed without opinion, 134 N. Y. 614, 32 N. E. 649.

C. Of Request to Witnesses and Other Requisites.—The fact that a testatrix requested the witnesses to her will to subscribe as such before she subscribed it does not impair its validity, where they did not actually subscribe until after the testatrix: *In re Williams' Will*, 2 Conn. Sur. 579, 15 N. Y. Supp. 828, 64 Hun, 636, 19 N. Y. Supp. 613.

2. Mode—In General.—“The code provides no special formalities about the witnesses to a will. It is sufficient if they attest and subscribe the will in the presence of the testator”: *Huff v. Huff*, 41 Ga. 696. The law looks to the substance of the transaction, and requires only evidence that all the safeguards against improvidence and fraud, prescribed by statute, have been substantially observed: *Lewis v. Lewis*, 11 N. Y. 220, 13 Barb. 17.

Of Request to Witnesses and Publication.—It is proper and sufficient for a testator to publish his will and to request the witnesses thereto to attest, in the same sentence, or by the same acts, or in response to one question by one of the witnesses. “These acts are distinct in their nature or quality, but the performance may be joint or connected”: *Coffin v. Coffin*, 23 N. Y. 9, 80 Am. Dec. 235; *In re Kane's Will*, 20 N. Y. Supp. 123; *In re Menge's Will*, 13 Misc. Rep. 553, 35 N. Y. Supp. 493; *In re Murphy's Will*, 15 Misc. Rep. 208, 37 N. Y. Supp. 223.

IV. Attesting Witnesses and Attestation Clause as Evidence.

a. The Testimony of the Attesting Witnesses—Necessity and Sufficiency.—Where a will is regular on its face, its due execution may ordinarily be proved by the uncontroverted testimony of one of the witnesses thereto: *Griffith's Exr. v. Griffith*, 5 B. Mon. 511; *Hight v. Wilson*, 1 Dall. 94, 1 L. ed. 51; *Dean v. Heirs of Dean*, 27 Vt. 746. In Illinois, however, it is requisite that the testimony of all the witnesses shall be taken to the point that the testator was of sound mind and memory at the time of the execution of the will: *Allison v. Allison*, 46 Ill. 61, 92 Am. Dec. 237.

Right to Put in Evidence Outside Testimony of Witnesses.—Before any evidence other than the testimony of the witnesses to a will may be produced to prove its due execution, all the witnesses must first be examined, or else their absence accounted for and their signatures proved: *Tudor v. Tudor*, 17 B. Mon. 383, relating to a codicil; *In re Moore's Will*, 109 App. Div. 762, 96 N. Y. Supp. 729; *Alexander v. Beadle*, 7 Colo. 126. No controlling force, however, is to be given to the testimony of the witnesses, and it is liable to be rebutted by other evidence, either direct or circumstantial; yet their direct participation in the transaction gives great weight to their testimony: *Orser v. Orser*, 24 N. Y. 51; *Webb v. Dye*, 18 W. Va. 376. Thus where the testimony of one or even all of the witnesses to a will is adverse to its valid execution, it may be sustained by other evidence adequate to show its due execution: *Griffith's Exr. v. Griffith*,

5 B. Mon. 511; *Jauncey v. Thorne*, 2 Barb. Ch. 40; *In re Carll's Will*, 38 Misc. Rep. 471, 77 N. Y. Supp. 1036; *In re Moore's Will*, 109 App. Div. 762, 96 N. Y. Supp. 729; *Skinner v. Lewis*, 40 Or. 571, 62 Pac. 523, 67 Pac. 951; *Hight v. Wilson*, 1 Dall. 94, 1 L. ed. 51; *Rose v. Allen*, 1 Colo. 23; *Alexander v. Beadle*, 7 Colo. 126; *Simmons v. Leonard*, 91 Tenn. 183, 30 Am. St. Rep. 875, 18 S. W. 280; *Dean v. Heirs of Dean*, 27 Vt. 746; *In re Clafin's Will*, 73 Vt. 129, 87 Am. St. Rep. 693, 50 Atl. 815; *Webb v. Dye*, 18 W. Va. 376; *In re Meurer's Will*, 44 Wis. 392, 28 Am. Rep. 591. So where a witness to a will testifies that his signature thereto is not genuine, and that he knew nothing of its execution, proof of his handwriting is admissible to controvert his testimony: *Jones v. Arterburn*, 11 Humph. 97. Thus a will may be proved by other witnesses than the subscribing witnesses, notwithstanding one of them gives testimony that the testator was unconscious at the time of attestation: *Cheatham v. Hatcher*, 30 Gratt. 56, 32 Am. Rep. 650. Likewise where the witnesses to a will disagree as to the material facts in its execution, that fact alone is not enough to defeat the will: *In re Bedell's Will*, 2 Conn. Sur. 328, 12 N. Y. Supp. 96; *In re Meurer's Will*, 44 Wis. 392, 28 Am. Rep. 591. And where the witnesses to a will were unable to write, and their hands having been guided by the draftsman of the will while writing their respective signatures, were unable to identify them, and expressed the opinion on hearing the will read that certain of its provisions had been changed since it was read to them at the time of its execution, the testimony of the draftsman of the will is properly admitted to sustain it: *Montgomery v. Perkins*, 2 Met. (Ky.) 448, 74 Am. Dec. 419. Furthermore, where the witnesses to a will when called as witnesses cannot remember the facts respecting the execution of the will, it may nevertheless be supported by other evidence, including the presumptions of law properly applicable: *Hobart v. Hobart*, 154 Ill. 610, 45 Am. St. Rep. 151, 39 N. E. 581; *In re Hull's Will*, 117 Iowa, 738, 89 N. W. 979; *Jauncey v. Thorne*, 2 Barb. Ch. 40, 59; *Orser v. Orser*, 24 N. Y. 51; *Peck v. Cary*, 27 N. Y. 9, 84 Am. Dec. 220, 38 Barb. 77; *Rugg v. Rugg*, 83 N. Y. 592; *In re Kane's Will*, 20 N. Y. Supp. 123; *Skinner v. Lewis*, 40 Or. 571, 62 Pac. 523, 67 Pac. 951.

In Illinois, however, where a petition for probate of a will is first heard in a probate court, the evidence in that court is properly confined to that of the attesting witnesses, but if the probate is there denied and the matter goes to the circuit court, on the hearing in the circuit court the proponent of the will is not limited to nor bound by the testimony of the witnesses to the will, but may rightfully resort to any relevant and competent evidence to sustain the will: *Gould v. Chicago Theological Seminary*, 189 Ill. 282, 59 N. E. 536; *Webster v. Yorty*, 194 Ill. 408, 62 N. E. 907; *In re Tobin*, 196 Ill. 484, 63 N. E. 1021; *In re Barry's Will*, 219 Ill. 391, 76 N. E. 577.

Opinion of Witness as Evidence.—"The opinions of subscribing witnesses as to the condition of the testator's mind, at the time of the execution of the will, may be received in evidence, when the facts are stated on which such opinions are founded, though such witnesses do not fall within the class known to the law as experts. In such cases, however, the evidence on which most reliance should be placed are the facts proved, rather than the opinions expressed by the witnesses": *Cilley v. Cilley*, 34 Me. 162. Also *Stirling v. Stirling*, 64 Md. 138, 21 Atl. 273. In Illinois such opinion must, however, be taken in every case of probate: *Allison v. Allison*, 46 Ill. 61, 92 Am. Dec. 237. Where a witness to a will expresses an opinion adverse to the testamentary capacity of the testator, that fact is not necessarily fatal to the will, but as the witness *prima facie* attests the testamentary capacity of the testator by becoming a witness, his adverse testimony will be received with suspicion: *Odenwaelder v. Schorr*, 8 Mo. App. 458; *Mays v. Mays*, 114 Mo. 536, 21 S. W. 921.

Declarations of Witness as Evidence.—Where the variant statements of a witness to a will are put in evidence to impeach him, they cannot be used as substantive evidence of the facts stated: *Stirling v. Stirling*, 64 Md. 138, 21 Atl. 273; *In re Moore's Will*, 109 App. Div. 762, 96 N. Y. Supp. 729; *In re Claffin's Will*, 75 Vt. 19, 52 Atl. 1053, 58 L. R. A. 261.

b. *The Attestation Clause as Evidence.*—*When the Witnesses to a Will are Produced.*—Where, on a proceeding wherein the validity of a will is at issue, the witnesses thereto are produced, the attestation clause may be used as a means of refreshing the memories of the attesting witnesses in respect to the formalities actually observed in the execution of the will to which it is attached: *In re Look*, 54 Hun, 635, 7 N. Y. Supp. 298, affirmed without opinion, 125 N. Y. 762, 27 N. E. 408. Moreover, where there is a dispute as to what occurred at the time of the execution of a will, and the will is on its face in due form, the recitals of the attestation clause must be given some weight in determining the dispute: *In re Menge's Will*, 13 Misc. Rep. 553, 35 N. Y. Supp. 493.

Where Testimony of Witnesses to Will not Obtainable.—Where, by reason of the failure of the memories of the subscribing witnesses to a will, their insanity, death, or absence beyond the reach of process, their testimony cannot be obtained, proof of their signatures subscribed to the attestation clause renders the recitals of that clause *prima facie* evidence of the observance in the execution of such will of all the formalities set forth in such clause. It is not, however, conclusive evidence of the due execution of the will, but is subject to be rebutted by evidence showing that the actual execution was insufficient: *In re Hull's Will*, 117 Iowa, 738, 89 N. W. 979; *Mundy v. Mundy*, 15 N. J. Eq. 290; *Tappen v. Davidson*, 27 N. J. Eq. 459; *Allaire v. Allaire*, 37 N. J. L. 312, 39 N. J. L. 113; *Mandeville v.*

Parker, 31 N. J. Eq. 242; Chaffee v. Baptist Missionary Convention, 10 Paige, 85, 40 Am. Dec. 225; In re Kane's Will, 20 N. Y. Supp. 123; In re Jones' Will, 85 N. Y. Supp. 294, holding that this presumption arises even though the will was of recent date; Skinner v. Lewis, 40 Or. 571, 62 Pac. 523, 67 Pac. 951; Appeal of Linton, 104 Pa. 228; In re Clafin's Will, 73 Vt. 129, 87 Am. St. Rep. 693, 50 Atl. 815; In re Meurer's Will, 44 Wis. 392, 28 Am. Rep. 591, holding that want of recollection on the part of the witnesses to a will would not defeat it, especially where there was a complete attestation clause. Because of its effect as evidence, an attestation clause to a will, comprising a statement of all that is necessary to the execution of the instrument as a will, is therefore in the highest degree useful: Allaire v. Allaire, 37 N. J. L. 312, 39 N. J. L. 113. For the purpose of rebutting the presumption thus arising from the attestation clause, oral evidence is admissible: Fleming v. Morrison, 187 Mass. 120, 105 Am. St. Rep. 386, 72 N. E. 499; Pollock v. Glassel, 2 Gratt. 439.

In Pennsylvania it has been held that where it is shown on the probate of a will that one of the witnesses thereto is dead and that his signature to the will is genuine, that proof is equivalent to positive proof by one witness of every fact stated in the attesting clause: Appeal of Linton, 104 Pa. 228. In New York, however, it has been held that it is clear that the attesting clause is not equivalent to the testimony of a living witness, and cannot stand as against the positive testimony of a witness to the contrary. "If equivalent, it should have equal weight as against conflicting testimony, a force which cannot reasonably be attributed to it. The statute makes it evidence; but it is evidence of a secondary and inferior nature, which is received from the nature of the case": Orser v. Orser, 24 N. Y. 51; Lewis v. Lewis, 11 N. Y. 220, 13 Barb. 17.

Where a will has no attestation clause, or if the attestation clause does not recite the performance of all the requisites to the making of a valid will, and the testimony of the witnesses to the will cannot be obtained, in some states the burden is on the proponent of the will to show, by the circumstances of the case or other proof if necessary, the observance of all the requisites to the valid execution of a will or of those the performance of which is not recited in the attestation clause, as the case may be: Ela v. Edwards, 16 Gray, 91; Mundy v. Mundy, 15 N. J. Eq. 290; Allaire v. Allaire, 37 N. J. L. 312, 39 N. J. L. 113; Ludlow v. Ludlow, 36 N. J. Eq. 597; In re Breining's Estate, 68 N. J. Eq. 553, 59 Atl. 561; In re Beggans' Will, 68 N. J. Eq. 572, 59 Atl. 874; Chaffee v. Baptist Missionary Convention, 10 Paige, 85, 40 Am. Dec. 225. In other states, however, where a will is regular on its face, the performance of the necessary requisites to its due execution will, in the absence of an attestation clause, be implied from proof of the signatures of the witnesses thereto: Fatheree v. Lawrence, 33 Miss. 585; Nock v. Nock's Exrs. 10 Gratt. 106. See, also, Webb v. Dye, 18 W. Va. 376, 388.

**ATLANTIC, VALDOSTA AND WESTERN RAILROAD
COMPANY v. McDILDA.**

[125 Ga. 468, 54 S. E. 140.]

LIMITATION OF ACTIONS for Negligent Homicide.—An action for a negligent homicide, brought by a widow to recover for the death of her late husband, must be regarded as an action for "injury done to the person," and hence, in Georgia, must be brought within two years after his death. (p. 243.)

Toomer & Reynolds, for the plaintiff in error.

Leon A. Wilson and S. C. Townsend, contra.

⁴⁶⁸ **COBB, P. J.** Mrs. L. J. McDilda brought suit against the railroad company for the homicide of her husband. The homicide occurred September 1, 1899, and the suit was filed September 7, 1901. The defendant demurred to the petition, one of the grounds being that it appeared therefrom that the right of action was barred by the statute of limitations. The demurrer was overruled, and the defendant excepted.

The controlling question in this case is, What is the statute of limitations applicable to a suit brought on a cause of action arising from a negligent homicide? There is no statute which in its very terms is applicable to suits of this character. The limitation act of 1856 (Acts 1855-56, p. 233) was evidently intended to be exhaustive of all suits that could be brought in the courts of this state. The title of the act was in the following language: "An act limiting the time in which suits in the courts of law in this state must be brought, and also limiting the time in which indictments are to be found and presented in certain cases, and for other purposes therein mentioned." It is utterly repugnant to the genius of our laws for a person to be forever liable for a wrong done, whether that wrong arise out of contract or out of tort. As was said by Mr. Chief Justice Marshall, in *Adams v. Woods*, 2 Cranch, 342, "In a country where not even treason can be prosecuted after a lapse of three years, it can scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture." It is therefore to be determined under what provision of the limitation laws of this state a cause of action of the character now under consideration will fall. The present law allowing a cause of action ⁴⁶⁹ for a negli-

gent homicide had its origin in the act of February 23, 1850 (Cobb's Dig. 476), which was in force at the time that the limitation act of 1856 was passed. It is therefore to be presumed that the General Assembly intended this character of action to be embraced within some one of the provisions of that law. We think it comes within that provision which is now contained in the Civil Code, section 3900, which declares, "Actions for injuries done to the person shall be brought within two years after the right of action accrues." In the Code of 1863 there is a distinct chapter which bears the heading, "Of injuries to the person." Article 1 of this chapter is headed, "Physical Injuries," and section 2913 in that article contains the provision of the law giving a widow, or, if no widow, a child or children, the right to recover for the homicide of the husband or parent. This was a codification of the act of 1850 and its various amendments, and is the law which is now embraced in the Civil Code, section 3828, along with the amendments which have been passed since the adoption of the Code of 1863. The law in reference to a cause of action for a negligent homicide has in every code been placed in a chapter headed "Of injuries to the person." Two of the codes have been adopted by the General Assembly and one of them by a constitutional convention. The classification of a suit for a negligent homicide as an injury to the person rests, therefore, not only upon the opinion of the different codifiers, which is itself entitled to great weight, but also upon direct legislative action approving the classification thus made: See, in this connection, *Johnson v. Bradstreet Co.*, 87 Ga. 79, 13 S. E. 250; *Hutcherson v. Durden*, 113 Ga. 987, 39 S. E. 495, 54 L. R. A. 811.

It seems from the briefs of counsel that there is no contention on either side that the action is subject to no limitation of time, but they disagree as to the time in which the action should be brought. Counsel for plaintiff in error contend that as the action is in the nature of a suit for a penalty, the bar of the statute attaches after the lapse of one year from the time the cause of action arose. On the other hand, counsel for defendant in error contend that the cause of action is the injury to the property rights of plaintiff, and the suit is not barred until after the lapse of four years from the time the cause of action arises. The contention that the action is in the nature of a suit for a penalty is based on some ex-

pressions contained in the dissenting opinion in the case ⁴⁷⁰ of *Southern Bell Tel. Co. v. Cassin*, 111 Ga. 575, 36 S. E. 881, 50 L. R. A. 694. In *Savannah Elec. Co. v. Bell*, 124 Ga. 663, 53 S. E. 109, the statute giving a right of action for a negligent homicide is declared to be in effect both penal and remedial. It is remedial in that there must be a dependence upon the person killed; and a contribution to the support of the plaintiff must have been made by the deceased. It is penal in that the measure of the recovery is the full value of the life of the deceased, irrespective of its real value to the person in whom the cause of action is vested. That the action is partly penal in its nature would not authorize its characterization as a suit for a penalty. The case of *Glover v. Savannah etc. Ry. Co.*, 107 Ga. 34, 32 S. E. 876, expressly rules that if such an action as the one now under consideration be brought within two years from the date of death, no bar of the statute attaches. It is true that in that case the theory now advanced, that the action is one for the recovery of a penalty, was not under consideration. But it is clear to our minds that this contention cannot be maintained, and the ruling in the *Glover* case (107 Ga. 34, 32 S. E. 876) is adhered to. The real question here presented is whether the action is one for personal injuries, or one for injuries to a property right. In the former instance the action would be barred after two years had elapsed; in the latter the right to sue would continue for four years. In the case of *Frazier v. Georgia R. Co.*, 101 Ga. 70, 28 S. E. 684, this court held that the injury to a father by the homicide of a minor son was an injury to his property rights, and the statute of limitations would not bar a recovery until after four years from the homicide. It will be noted that the cause of action in that case was not dependent upon the statute now under consideration. At common law the father had a right to the services of a minor child, and could sue for a tort depriving him of those services. "When that right is injured or illegally taken from him, it is a damage to his personal estate; and an action brought to recover damages for the injury to or loss of such personal estate is governed and controlled, so far as the time in which such action must be brought, by the law which limits the time in which actions for damages to personalty or personal estate are to be instituted": *Frazier v. Georgia R. Co.*, 101 Ga. 77, 28 S. E. 662. In the same case (page 75) there is

quoted with approval the following extract from an opinion of Mr. Justice Masten in *Fried v. New York Cent. R. Co.*, 25 How. Pr. 285: "If, upon legal rules, injury to the person is the gist of the action, and ⁴⁷¹ injury to property or to pecuniary interests is merely matter of aggravation, the right of action dies with the person. But if, upon legal principles and analogies, the gist of the action can be injury to the property or to pecuniary rights or interests, the right of action is transmitted to the personal representative, who may recover to the extent that the wrong touched the estate of the deceased." We might invert this test, and determine whether the gist of the action be an injury to the person, or to property rights, by looking to see whether the right of action would survive to a personal representative. A right of action where the gist is injury to property rights would survive, a right of action where the gist is injury to the person would not survive. A father's right of action for damages for loss of the services of a minor child would, in case of the father's death, survive to his administrator. A mother's right of action for the homicide of her son, based on the statute which also gives her a right of action for the homicide of her husband, when no suit had been brought thereon, would not survive to her administrator (*Frazier v. Georgia R. Co.*, 101 Ga. 77, 28 S. E. 662); neither would the wife's right of action for the homicide of her husband.

We think it is clear that in an action by a wife for the homicide of her husband, the gist of the action is an injury to the person. A wife has no property rights in the services of her husband, and no property rights in his life. Her statutory right to recover for his homicide is a substitution of the wife in his place for the purposes of recovering for the injury inflicted upon him, and the measure of damages is the value of the husband's life to the man himself, not the value of his life to the wife. In *Southern Bell Tel. Co. v. Cassin*, 111 Ga. 575, 36 S. E. 881, 50 L. R. A. 694, it was said: "However new it [the cause of action] may be, in the very nature of things it cannot be independent; it is inherently rooted and grounded in the injury to the husband. It grows out of it, and is a part of it, having almost complete identity of substance, and subject to the same defenses." In *Titman v. New York*, 10 N. Y. Supp. 689, 57 Hun, 469, the question here under consideration was decided. "The statute, says Judge Cooley,

'continues, for the benefit of the wife, husband, etc., a right of action which at the common law would have terminated at the death, and enlarges its scope to embrace the injury resulting from death': Cooley on Torts, 264. In other words, the right of action growing out of what was clearly a personal injury, in the most restricted sense, is practically, though ⁴⁷² not technically, continued and extended by the statute. As Rapallo, J., points out in *Littlewood v. Mayor etc.*, 89 N. Y. 24, 42 Am. Rep. 271, the statute 'was intended to apply to the case of a party who, having a good cause of action for a personal injury, was prevented by his death, which resulted from such injury, from pursuing his legal remedy, or who omitted in his lifetime to do so.' Such being the purpose of the change in the common law, I think the action thus authorized may be reasonably and naturally called an action for damages for personal injuries." In *Sherman v. Western Stage Co.*, 22 Iowa, 556, an action by a husband to recover damages for the killing of his wife and child "is construed to be an action for personal injuries," and the statute of limitations applicable to actions of this class was held to bar a recovery.

We think the court should have sustained the demurrer, and dismissed the petition.

Judgment reversed.

All the justices concur.

The Principal Case is supported by *Sherman v. Western Stage Co.*, 22 Iowa, 556; *Titman v. New York*, 57 Hun, 469, 10 N. Y. Supp. 689. See in this connection the note to *Brown v. Electric Ry. Co.*, 70 Am. St. Rep. 686.

WILSON v. COMER.

[125 Ga. 500, 54 S. E. 355.]

SALE—Title, When Dependent on Payment.—If chattels are sold on condition that they are to be paid for on delivery, and are delivered upon the faith that this condition will at once be performed, no title passes, and the vendor, on the refusal or failure of the purchaser to pay after demand, may maintain trover for the property. (p. 245.)

Hulsey & Field, for the plaintiffs.

James H. Gilbert and Edward R. Austin, for the defendant.

⁵⁰¹ COBB, P. J. Wilson & Wallace brought trover against W. T. Comer, for certain lumber. On the trial of the case Wallace testified as follows: "He [Comer] told me to ship the lumber and file the bill of lading in the Lowry National Bank. I told him I didn't do any business with any bank, and it would be trouble to me, and would be less trouble for me to ship the lumber to him and for him to mail me a check at once. He said, 'Very well.' There was something said about mailing the check on receiving the lumber, and I told him when he received the lumber to mail me a check for the same at once. He said he would do it. That was the contract of sale. I have never received the check. My firm has not received the check for that lumber." Wallace further testified as to his efforts to collect the amount due. At the conclusion of the plaintiff's evidence the defendant moved for a nonsuit, upon the ground that the transaction was an ordinary sale, title had passed, and trover for the lumber would not lie. This motion was granted. The plaintiffs excepted.

The sole question in this case is whether title to the lumber passed to the defendant, or whether it remained in the plaintiffs until the check was received in payment of the lumber. If title passed, trover would not lie, and a nonsuit was properly granted. "If personal chattels be sold upon the express condition that they are to be paid for on delivery, and they are delivered upon the faith that the condition will be immediately performed, and performance is refused upon demand in a reasonable time, no title passes to the buyer": *Bergan v. Magnus*, 98 Ga. 514, 25 S. E. 570. The transaction in this case was clearly a cash sale, and no title passed to the defend-

ant. The granting of a nonsuit was therefore erroneous, and the judgment is reversed.

All the justices concur.

If Goods are Sold for cash on delivery, the payment and delivery are concurrent acts, and the title to the property does not pass, without payment of the price, unless payment is waived: *Drake v. Scott*, 136 Ala. 261, 96 Am. St. Rep. 25.

GEORGIA RAILWAY AND ELECTRIC COMPANY v. BAKER.

[125 Ga. 562, 54 S. E. 689.]

STREET RAILWAYS—Transfers Voluntarily Given, When are not Gratuities.—Though no law or ordinance requires a street railway to give a transfer from one line to another, yet if the company adopts the custom of issuing such transfers for the consideration paid to the conductor of the first car, the transfer is not a gratuity, but binds the company to transport the passenger from the point where he first enters a car to a point on any line to which, under the custom of the company, it is usual to issue transfers. (pp. 249, 251.)

STREET RAILWAYS, Transfer Slips, Mistakes in.—If, by the mistake or negligence of the conductor in issuing a transfer, it is inaccurate and does not correctly express the contract between the carrier and passenger, he has the right to rely upon the acts and statement of such conductor in issuing the transfer, and if expelled from the second car on account of a mistake or defect in the transfer, the passenger having acted in good faith and offered a reasonable explanation, the carrier is liable to him for the damages suffered. (p. 250.)

STREET RAILWAYS.—A Condition on a Transfer Slip that if There is Any Controversy in Reference Thereto, the holder will pay fare and call on the company for correction, is unreasonable. (p. 252.)

STREET RAILROADS.—A Threat to Eject the Holder of a Transfer Slip, Though Made in a Gentlemanly Manner, and without anything insulting in word or conduct, by a conductor of a street-car, may entitle such holder to recover of the company, if he was in fact entitled to ride and gave the conductor a reasonable explanation of the mistake in the transfer. (p. 252.)

STREET RAILWAYS, Amount Recoverable from for Threat of Expulsion Followed by and Inducing a Second Payment of Fare.—Where, owing to a mistake in a transfer slip due to the conductor who gave it out, the holder is threatened with expulsion in the presence of other passengers, to avoid which she pays a second fare, her right of recovery against the company is not limited to the fare paid, though there is no other insult or aggravating circumstance,

but may include substantial damages, as for an inexcusable trespass. (pp. 253, 254.)

JURY TRIAL—Erroneous Instruction as to the Circumstances of the Parties.—If the court instructs the jury in an action for damages that the worldly circumstances of the parties and all the attendant facts are to be weighed, when there is no evidence respecting such circumstances, a new trial must be awarded the defendant, though the verdict in favor of the plaintiff is not large, and possibly a verdict for a larger sum might have been permitted to stand as a recovery of general damages had such instruction been omitted. (p. 254.)

Rosser & Brandon and W. T. Colquitt, for the plaintiff in error.

O. E. and M. C. Horon, contra.

⁵⁶³ COBB, P. J. Mrs. Baker sued the street railway company for damages. The petition alleged that she boarded a car of the defendant at Grant park in the city of Atlanta, about 3:30 P. M., that she paid her fare and requested of the conductor a transfer to the Marietta street line, and, in response, a transfer was given to her by the conductor. On arrival at the transfer point established under the rules of the company, she inquired how long she would have to wait for a Marietta street car, and the conductor told her that the car was then approaching, and pointed to it. The plaintiff alighted, and immediately boarded the Marietta street car, which was the first car on that line passing after her arrival. The conductor of this car approached plaintiff, and she gave to him the transfer slip which had been given to her by the conductor of the other car. He refused to honor the transfer, and demanded that she pay another fare, threatening to eject her if she refused to do so. This was all done in an insulting manner, the conductor charging her with having had the transfer since 11 o'clock A. M. The bell was rung in order to eject her, and she paid to the conductor a fare. He was proceeding to eject her at the time, and she paid the fare under ⁵⁶⁴ protest. The car was filled with passengers, and the threats of the conductor that he would eject her were made in the presence of these passengers, among whom were a number of her acquaintances. She was humiliated and mortified, and her feelings greatly wounded. The petition avers that it was the duty of the defendant to carry her to her destination on Marietta street without extra pay; and she prays for damages, actual, punitive, and vindictive. Damages were

laid in the sum of fifteen hundred dollars. By amendment a copy of the transfer slip was attached to the petition as an exhibit. Upon this transfer appears the following: "This transfer is good for one continuous trip on the route punched, provided it is presented at the first intersecting point by the person to whom originally issued and used on the date and before the expiration of time punched and upon first car passing transfer point for route shown, and is otherwise subject to the rules of the company." "This transfer is issued upon further condition, and holder, by accepting, agrees, that should any controversy arise as to its validity, holder will pay fare and call at company's office for correction." On the transfer appear the names of the streets on which the lines of the company run. The street on which the first car was boarded is marked by a punch. Marietta street is not so marked, but there is a punch mark on Magnolia street. The punch marks indicate 11 o'clock as the hour at which the transfer was issued. But this mark does not appear in the column headed "A. M.," or in the column headed "P. M."

The defendant filed an answer, in which it admitted some of the allegations of the petition and denied others. The defense set up was in effect a denial of liability, on the ground that the transfer did not upon its face confer the right to ride. The allegations as to the alleged wrongful conduct of the conductor were all denied. The trial resulted in a verdict in favor of the plaintiff for sixty dollars. The defendant excepted to the judgment refusing a new trial.

It is conceded that there is no law in this state, and no valid ordinance of the city of Atlanta, requiring street railway companies to issue transfers to passengers, authorizing them to ride upon a car other than the one which they originally board. This fact being conceded, ⁵³⁵ the argument is made that the right to ride upon the second car, resulting from the issuance of the transfer, is a mere gratuity. This is not true. The issuance of transfers is a voluntary act on the part of the company, using the word "voluntary" in its ordinary sense. The company is not bound to issue transfers. It is under no obligation to transport the passenger to any other point than one on the line of the car originally boarded. But when the company voluntarily and without any compulsion adopts the custom of issuing transfers for the consideration paid the conductor of the first car, it binds itself by a

contract to transport the passenger from the point where he enters the car to a point on any line to which, under the custom of the company, it is usual to issue transfers. In the absence of a custom, the company simply sells to the passenger for the fare paid the right to ride between points on the first line. Under a custom of issuing transfers, the offer is made for a stated consideration to transfer the passenger from a point on one line to a point on any other line embraced within the custom. When the passenger pays his fare to the conductor of the first car and requests a transfer, and a transfer is delivered, the offer arising under the custom is accepted, and the contract becomes complete, and the one fare is the consideration for the transportation of the entire journey. The company does not contract merely for the journey on the first line and donate a journey on the second line. Some companies will issue tickets entitling passengers to six rides for twenty-five cents, when the usual fare paid is five cents for each ride. No one would seriously contend that only the first five rides, under such circumstances, were paid for, and the sixth was a mere donation. The company is in the business of selling rides. It may fix the amount which shall be paid for a ride upon either one or more cars. When this amount is paid, the passenger is a purchaser of a ride between the points covered by the contract. This is true whether or not, as an original proposition, the passenger could demand a right to ride between these points for the amount paid. The position that the transferred passenger is receiving a mere gratuity when he rides upon the second car is untenable.

2. Whether the transfer slip used by a street railway company is to be looked to as conclusive evidence of a right to ride on the second car, and whether any mistake made in the issuance of the ⁵⁶⁶ transfer, resulting in its showing upon its face that the right to ride upon the second car does not exist, is a question about which the courts are not agreed. According to some of the decisions, the transfer received must be considered as conclusive evidence of the passenger's right to ride, although it may not in its true sense express or evidence the contract into which the passenger enters. These decisions hold that if the transfer is inaccurate, the expulsion of the holder upon the refusal to pay additional fare is justified, although the mistake or defect is due to the negligence of the conductor who issued the transfer. On the other

hand, there are numerous decisions which deny the transfer such conclusive force and dignity, and rule that the passenger has a right to rely upon the acts and statement of the conductor issuing the transfer, and if he is expelled from the second car on account of a mistake or defect in the transfer, notwithstanding he has acted in good faith and offered a reasonable explanation, the carrier is liable in damages for such expulsion: See the cases cited in *Hornesby v. Georgia Ry. etc. Co.*, 120 Ga. 913, 48 S. E. 408, and in the note to that case in 1 Am. & Eng. Annotated Cases, 392. In the *Hornesby* case it was held that when a street railway company voluntarily offered to passengers the right to a transfer from one of its cars to another, to continue the journey without the payment of additional fare, it was reasonable to require, as a condition precedent to the exercise of this right, that the passenger should tender to the conductor of the second car a punched transfer ticket, which must be used within the time indicated by punch marks, provided a car upon which the passenger could be conveniently and comfortably transported passed the transfer point within the time so limited. The question now before us was not directly involved in that case. Attention was then, however, called to the conflict of authority above referred to, on the question now under consideration. We think that our rulings in reference to tickets issued by ordinary railway companies are more in line with those authorities that hold that the transfer slip is merely evidence of the contract, and that if any mistake is made in issuing the transfer, so that it does not express the true contract, the conductor of the second car, on presentation of the transfer, and a reasonable explanation of the mistake that appears on the slip, would at his peril decline to transport the passenger, if as a matter of fact a proper transfer was called for and the passenger ⁵⁶⁷ was in no fault in reference to the matter. And we think this is the true rule. As was aptly said by Caldwell, J., in *O'Rourke v. Citizens' St. Ry. Co.*, 103 Tenn. 124, 76 Am. St. Rep. 639, 52 S. W. 872, 46 L. R. A. 614: "It is the contract, and not the ticket, that gives the right to transportation. The ticket is but an evidence of the contract, made out and furnished by the carrier; and if it fail to disclose the true contract, the fault is with the carrier, and it is responsible for the natural consequences of the variance. The passenger is not required in law, nor allowed in

fact, to print or write or stamp the ticket. The carrier alone has that right, and the passenger is authorized to believe and presume that it will be properly exercised, and that the ticket, when delivered, is a faithful expression of the contract as made." In the case just quoted from there was printed on the transfer a statement requiring the passenger to examine the date, time, and direction, and see that the transfer was correct. There was also a statement that the passenger accepting the transfer agreed "to read and be bound by all the conditions on the back" of the same, "subject to the rules of the company." These conditions, so far as they required the passenger to read the transfer and examine the date, etc., were held to be unreasonable, for two reasons. In the first place, the time usually occupied in making a trip of a street-car was not such as to permit a compliance with the regulation; and in the second place, if there was time for the purpose, the transfer was more or less complicated in its nature, and an inexperienced though intelligent passenger, who happened to be unacquainted with the system of punch marks, names of streets, etc., of the particular company, would be unable to ascertain whether it was correctly issued or not. In that case the transfer was of such a character that even an intelligent officer of the company, who testified as a witness, was unable to explain the system to the satisfaction of the trial judge. As was said by Caldwell, J., in the opinion: "It cannot be fair or just or reasonable to require passengers, in the hurry of rapid street-car travel, to decipher at their peril a check whose meaning so intelligent a judge cannot ascertain by careful and deliberate inspection." In *Laird v. Pittsburgh Traction Co.*, 166 Pa. 4, 31 Atl. 51, a similar condition on a transfer check was under consideration; and it was said: "If that is intended to be regarded as a reasonable regulation, the check should be given to the passenger before he leaves the car, a sufficient ⁵⁶⁸ length of time to afford him at least an opportunity of reading it, and, if wrong, having it corrected."

The contract between the carrier and the passenger is made by the offer held out by the company, although voluntary on its part, to transport the passenger on two lines. The transfer slip is mere evidence of the right to ride upon two lines; and if there has been in fact a contract between the passenger and the agent of the company in charge of the first car, the right

to ride upon the second car is complete, although the evidence of the right is defective. We are aware that this rule may lay the carrier open to imposition in some cases. But, on the other hand, a contrary rule would impose upon the traveling public, and especially those members of it who are inexperienced and uninformed, a serious burden, and one which it is not reasonable or proper that they should be compelled to carry. It is true that the carrier is under no obligation to make the contract; but when it voluntarily enters into one, it is none the less a contract, and, on account of the public character of the business in which it is engaged, the courts have authority to determine whether the rules and regulations adopted by it in reference to the conduct of its business as a carrier of passengers are reasonable and proper. If what is contained in the statements on the transfer slip were embodied in an express contract based upon a sufficient consideration, it may be that the courts would not interfere.

3. It is said that there is a condition on the transfer that if there is any controversy in reference to the same, the holder will pay fare, and call at the company's office for correction. There was a similar condition on the transfer involved in the case decided by the supreme court of Tennessee, above referred to. In reference to this stipulation, the court said: "This condition is unreasonable, in that it makes the conductor, for the time, the sole judge of the sufficiency of the ticket, and requires the passenger to pay additional fare though his ticket may be refused without sufficient cause; and further, in that it requires the wronged passenger, who so pays, to apply for refund at the office of the company, which must be remote from the houses and business places of most passengers, and then limits the amount to be received by such person to that wrongfully exacted. It puts all of the burden of the 'controversy' upon the wronged passenger, and none upon the wrongdoing ⁵⁶⁰ company, and thereby makes the just suffer for the unjust." We thoroughly concur in this view. Counsel in their argument say that the decision of the supreme court of Tennessee which we have followed was based upon a statute of that state requiring a street railway company to issue transfers. There is no reference to a statute in the opinion of the court. In addition to this, none of the reasoning of the learned judge who delivered the opinion is based upon any statute, and the questions seem to have been solved merely by the application of general rules of law.

4. The averments of the petition, that the conductor of the second car refused to recognize the transfer and demanded payment of a second fare, and threatened to eject the plaintiff, in an insulting manner, were not sustained by the proof. The evidence, however, does show that he refused to accept the transfer, and that he demanded a second fare, and that he told the plaintiff that if she did not pay the second fare he would be compelled to eject her from the car. But the plaintiff testified that he acted in a gentlemanly manner, and that there was nothing insulting, either in his words or in his conduct, other than such an insult as may arise from a simple threat to eject. It is a case, therefore, where the conductor has simply complied with what he understood to be the rules and regulations of the company by which he was employed. In complying with these rules, although he might have had the manner of a perfect gentleman, and used language which would be proper in the most polite society, still, if the plaintiff had a right to ride upon the car, and was threatened with expulsion, no matter in what words, it was a breach of the duty which the company owed her as a passenger, and gave her a right of action against the company. A jury would have been compelled to find that the explanation made by the plaintiff of the mistake in the transfer was reasonable, and although the conductor was placed in an embarrassing position, under the law he was compelled to choose between two alternatives; and if he made a mistake and used a threat to expel a passenger who had a right to ride on the car, the company would be liable, without reference to the manner in which he made the threat and his good faith in the matter.

5. There are some decisions which hold that the damages recoverable for an expulsion resulting from the wrongful refusal to accept a transfer, the mistake being due to the conductor of the ⁵⁷⁰ initial car, are compensatory only: *Pine v. St. Paul City Ry. Co.*, 50 Minn. 144, 52 N. W. 392, 16 L. R. A. 347; *Eddy v. Syracuse Rapid Trans. Co.*, 50 N. Y. App. 109, 63 N. Y. Supp. 645. In Ohio it was held by a circuit court that the passenger's recovery was limited to the additional fare paid, when there were no aggravating circumstances: *Carr v. Toledo Trac. Co.*, 9 Ohio C. C. 281. But we think the decision by the supreme court of Pennsylvania in the case of *Laird v. Pittsburg Trac. Co.*, 166 Pa. 4, 31 Atl. 51, takes the better view of the matter. It was there held that in such a case the damages are not limited merely to the

amount sufficient to compensate the plaintiff for the trouble and delay caused by the conduct of the company and the expense necessary to complete his journey, but he is entitled to substantial damages, as for an inexcusable trespass. In that case there was a request to instruct the jury that the damages to be recovered were simply those resulting from the trouble and inconvenience caused by the expulsion from the car. In commenting on the propriety of this instruction, Sterrett, C. J., well says: "To sanction such a measure of damages, as is suggested in this point, would tend to encourage rather than prevent the commission of indignities to which no well behaved passenger in a public conveyance should be subjected."

6. The charge of the court was in effect an instruction that the plaintiff was entitled to recover. There would have been no error in instructing the jury in terms to this effect. Under the undisputed facts, a recovery was demanded, and the only question to be determined was the amount of the verdict. In the instructions on the subject of damages the court charged: "The worldly circumstances of the parties and all the attendant facts are to be weighed." This charge was assigned as error, for the reason that there was no evidence to authorize it. There was no evidence as to the worldly circumstances of the parties. While the verdict is not large, and possibly a larger verdict, as a recovery of general damages, would be permitted to stand, still the question of what should be assessed as general damages was a matter for determination by the jury, and we cannot undertake to say that the jury was not misled by the erroneous charge into giving a larger amount than they in their judgment would have thought sufficient, in the absence of such an instruction.

Judgment reversed.

All the justices concur, except Fish, C. J., absent.

The Doctrine of the Principal Case is obviously sound and just, and is supported by perhaps the weight of authority: *Memphis St. Ry. Co. v. Graves*, 110 Tenn. 232, 100 Am. St. Rep. 803; *Citizens' St. R. R. Co. v. Clark*, 33 Ind. App. 190, 104 Am. St. Rep. 249; *Indianapolis St. Ry. Co. v. Wilson*, 161 Ind. 153, 100 Am. St. Rep. 261, and cases cited in the cross-reference note thereto.

CASES
IN THE
SUPREME COURT
OF
IDAHO.

HOWES v. BARMON.

[11 Idaho, 64, 81 Pac. 48.]

A LICENSE CREATES No Estate in Lands, and may therefore rest in parol. (p. 258.)

AN EASEMENT is an Estate or Interest in real property, and subject to the statute of frauds. (p. 258.)

LICENSE OR EASEMENT, When may be Enforced.—If a contract or agreement, whether it amounts to a license or an easement, looks to the acquirement of a right of passage over a stairway and rests entirely in parol, the licensee or grantee must have entered into possession, expended money and made improvements in such manner and to such extent that a refusal to enforce the agreement in specific terms would work a fraud on him. (p. 258.)

FRAUDS, STATUTE OF.—The Part Performance which will support an agreement for a license or easement must have been founded upon, and be referable solely to, the specific terms of such agreement. (p. 258.)

FRAUDS, STATUTE OF—Easement, Part Performance not Sufficient to Support Claim of.—If A, when engaged in erecting a building, agrees with B, the owner of an adjacent building, to erect a stairway which may serve as an entrance to both buildings, if the latter will allow a porch to be erected and used on his lot along the line of the former's building, and such porch and stairway are erected and for a time used in pursuance of such agreement, this is not such part performance as takes the agreement out of the statute of frauds and entitles B. to specific performance. (pp. 258, 259.)

A PAROL LICENSE to do Something on the Lands of Another is revocable at the option of the licensor. (p. 260.)

Walter A. Jones and Samuel R. Stearn, for the appellants.

W. W. Woods and R. N. Dunn, for the respondents.

¶ AILSHIE, J. In this case the trial court entered a decree for the specific performance of a parol contract to grant a perpetual easement in a stairway maintained in appel-

lants' building. The principal facts upon which the decree was entered are briefly as follows: In the month of November, 1899, the respondents, Howes & King, were the owners of lot 6 and the south one-half of lot 8 in block 21 in the city of Wallace, on which stood a two-story brick building, the ground floor of which was occupied by them as a store building and the second floor as a dwelling. About this time the appellants purchased the north half of lot 8, which adjoins the Howes & King property on the east, and began to erect a two-story brick building fifty feet square. Prior to this time Howes & King had maintained a back stairway to their building with the landing on the vacant lot purchased by the Barmons, and in passing from the street to and from their stairway they passed over this vacant lot. When the Barmons began to build they tore away the landing, and, of course, left Howes & King without any means of ingress or egress to and from the second story of their building. At this juncture the respondent Howes and the appellant Abraham Barmon had some discussion over the construction of a stairway by the Barmons and the future use thereof by Howes & King. Up to this time the Barmons had planned to build their stairway on the east side of their building. Howes and Barmon do not agree as to what conversation took place between them with reference to the stairway and the future use thereof, and we therefore quote from the finding of the trial court on that point. He finds "that during the time of the construction of said building these defendants offered to give the plaintiffs the use forever of the front stairway leading to the upper story of their said building and connecting with the upper story of the building so occupied by the plaintiffs and their families, for the consideration of a strip of land of five feet on the north part of the south one-half of lot 8, block 21, and plaintiffs agreed to said proposition." This finding of the court is followed by a finding that in the month of November, 1899, in pursuance of said contract, the plaintiffs went into the possession and use of the stairway, and the defendants at the same time went into ^{as} the possession and use of the five foot strip off the north end of the south half of lot 8. This strip of land was contiguous to and immediately south of the Barmon premises, on which the building was erected. The record shows that after the conversation took place between Howes and Barmon, the plans for the Barmon building were so modified as to run the stairway

up on the west side of the building and next to the Howes & King building instead of on the east side as originally planned. No written agreement of any kind was entered into, and after the building was completed the stairway was used by the Barmons and their tenants and also by Howes & King and their tenants. On the other hand, the Barmons, by means of posts, erected a porch five feet wide and fifty feet long (the full length of their building) to the second story of the building, and used that in connection with their residence in the second story of that building until a few days prior to the commencement of this action. Matters ran along in this manner until about the fourteenth day of June, 1902, when the Barmons tore away the porch and ceased to use the same, and notified Howes & King that it was their intention to revoke the license previously granted to them to use the stairway, and they thereupon proceeded to lock up the front entrance and close up the entrance from the top of the stairway into the Howes & King building. The respondents thereupon commenced this action and secured a temporary injunction against the appellants, restraining them from closing up the stairway or interfering with their free use thereof. The Barmon property was purchased in the name of Fannie Barmon, the wife of the defendant, Abraham Barmon, and at all times has stood upon the records in her name and is claimed by her as her separate property. A great portion of the briefs of counsel have been devoted to the discussion of the evidence on that question and the law applicable thereto. The court found, however, that the property was the community property of the defendants, and we are inclined to think there is sufficient evidence in the record to justify that finding. It is not necessary for us, however, to discuss the sufficiency of the evidence ⁶⁸ to sustain the findings, for the reason that in the view we take of this case the findings of fact do not support the legal conclusions that the court has drawn from them.

The appellants claim that the privileges exercised by each over the realty of the other were merely mutual licenses revocable by either at will. On the other hand, the respondents claim that these transactions amounted to mutual contracts for conveyances by good and sufficient deeds—a title from Howes & King to the Barmons to the five-foot strip of ground immediately south of the Barmon building, and a conveyance from the Barmons to Howes & King of a perpetual easement

in the stairway ascending from the street to the second story of their building.

It is difficult to ascertain from the great mass of conflicting decisions just when a license to use or impose a servitude upon the real property of another ceases to be a mere license revocable at will, and ripens into the certainty and dignity of an easement. Still, there are some primary and fundamental principles well established which underlie this class of cases, a reference to which should afford a reasonably safe guide.

It is settled law that a license creates no estate in lands, and may therefore rest in parol: *Johnson v. Skillman*, 29 Minn. 95, 43 Am. Rep. 192, 12 N. W. 149; *Mumford v. Whitney*, 15 Wend. 380, 30 Am. Dec. 60; *Great Falls Waterworks Co. v. Great Northern Ry.*, 21 Mont. 487, 54 Pac. 963; *Cook v. Stearns*, 11 Mass. 533; *Clark v. Glidden*, 60 Vt. 702, 15 Atl. 358; *Wood v. Leadbitter*, 16 Eng. Rul. Cas. 54; *Jones on Easements*, secs. 63, 68. On the other hand, an easement is an interest or estate in real property, and is subject to the operation of the statute of frauds: *Rev. Stats.*, sec. 6007; 14 Cyc. 1144; *Pifer v. Brown*, 43 W. Va. 412, 27 S. E. 399, 49 L. R. A. 497, and note; *Clark v. Glidden*, 60 Vt. 702, 15 Atl. 358; *Jones on Easements*, sec. 65. Where the contract or agreement, whether it be called a license or an easement, looks to the acquirement of a right of passage, as in this case, over a stairway, and rests entirely in parol, it is clear under all the authorities that the licensee or grantee must have entered into possession, expended money and made improvements in such ⁷⁰ manner and to such an extent that a refusal to enforce the agreement in specific terms would work a fraud upon the licensee or grantee: 10 Am. & Eng. Ency. of Law, 2d ed., 412; 18 Am. & Eng. Ency. of Law, 2d ed., 1146; *Baltimore etc. R. Co. v. Algire*, 65 Md. 337, 4 Atl. 293. See note to *Pifer v. Brow*, 43 W. Va. 412, 27 S. E. 399, 49 L. R. A. 497. It is also true that the alleged part performance relied on to take the case out of the statute of frauds must be founded on and referable solely to the specific terms of the agreement: *Johnson v. Skillman*, 29 Minn. 95, 43 Am. Rep. 192, 12 N. W. 149; *Wheeler v. Reynolds*, 66 N. Y. 227; *Wiseman v. Hucksinger*, 84 N. Y. 31, 38 Am. Rep. 479. In this case the respondents had parted with nothing whatever. They paid no consideration for the perpetual easement they claim to have purchased. They were out nothing for the construction of the stairway, and the evidence shows that

they never at any time have assisted in maintaining or keeping up the stairway, keeping the same cleaned or lighted; nor did the respondents offer to show upon the trial what agreement, if any, they made with reference to the maintenance of the stairway or the care and lighting of the same, or the width thereof or the character of the stairway which should be constructed or maintained. It is true that the appellants entered into the possession and use of the five-foot strip of land which respondents contend was to be given as a consideration for this easement. But it is not contended anywhere that the use of this strip of land was of any greater value for the same period of time than was the right to pass over the stairway for a like period of time. These rights appear to have been mutual and interchangeable, and one would apparently offset the other. This arrangement or agreement should be interpreted and dealt with in the light of the circumstances under which the parties acted. It is clearly apparent from the testimony of both Howes and Barmon that whatever conversation or agreement they had it was merely in the light and spirit of an exchange of neighborly courtesies, and was never given the consideration which the parties would attach to a contract which looks to one party parting with the fee to his property and the other to burdening his realty with a perpetual servitude. ⁷¹ As an instance of this, the title to the property stood on the records in the name of Mrs. Barmon at the time of the agreement, and yet no contract was made with her and nothing appears to have been said in reference to the transfer of title or whether or not the property was community property or the separate property of the wife.

There is no reason shown in this case that we can discover why the aid of a court of equity should be invoked in behalf of the plaintiffs. If the court should refuse to decree them a perpetual easement in this stairway, they would be in no worse position than they would have been in the first place had the Barmons erected their building without permitting plaintiffs to use their stairway. In that event Howes & King would have been under the necessity of erecting a stairway by means of which to reach the second story of their building. They have parted with no consideration for the use of this stairway, nor have they lost any property or right by reason of having neglected to build a stairway themselves. If they are refused a decree in this case they will only be left in the same position they originally occupied. This is a

case where a refusal by the court to grant plaintiffs a decree will leave them absolutely in statu quo. But courts of equity grant relief in such case upon the principal theory that the parties cannot be placed in the position they originally occupied, and therefore equity will compel them to live up to their agreements. Here the reasons for equitable interposition do not seem to exist, and we do not think it would be either just or conscionable for a court to encumber the appellants' property with a perpetual servitude which the evidence shows would depreciate the property from ten to twenty-five per cent. The privileges granted by appellants to respondents were evidently of a purely personal character, and would not have been conferred on a stranger to the licensors, even though he had had title to the Howes & King property. But if the easement should be decreed as contended for it would run with the Howes & King property and would pass to their grantees, whoever they might be. After the perusal of a great number of conflicting and inharmonious ⁷² decisions, we have been unable to find any case where the courts have held a license such as this irrevocable on the grounds alone that the licensee had been let into possession; but in such cases, where specific performance has been required, the courts have uniformly rested their decision upon the grounds that the licensee had not only been let into possession, but that he had made expenditures or erected valuable improvements for which he could not be adequately compensated in damages: *Lawrence v. Springer*, 49 N. J. Eq. 289, 31 Am. St. Rep. 702, 24 Atl. 933; *Wheeler v. Reynolds*, 66 N. Y. 227; notes to cases hereinbefore cited. The modern decisions seem strongly inclined to hold parol agreements looking to the encumbering real property with a servitude as a mere license revocable at will, and this, we think, the much safer rule. While this court is not now prepared to go to the extent announced in *Crosdale v. Lanigan*, 129 N. Y. 604, 26 Am. St. Rep. 551, 29 N. E. 824, still the language there used by the New York court appeals to us as both safe and just when they say: "The courts in this state have upheld with great steadiness the general rule that a parol license to do an act on the land of the licensor, while it justifies anything done by the licensee before revocation, is nevertheless revocable at the option of the licensor, and this, although the intention was to confer a continuing right, and money had been expended by the licensee upon the faith of the license. This is plainly the

rule of the statute. It is also, we believe, the rule required by public policy. It prevents the burdening of land with restrictions founded upon oral agreements easily misunderstood": See, also, *Johnson v. Skillman*, 29 Minn. 95, 43 Am. Rep. 192, 12 N. W. 149; *Cronkhite v. Cronkhite*, 94 N. Y. 323; *St. Louis Nat. Stock Yards v. Wiggins*, 112 Ill. 384, 54 Am. Rep. 243; *Wood v. Michigan etc. R. R. Co.*, 90 Mich. 334, 51 N. W. 263. This seems to grow out of the proposition that since a parol license to impress real property with a servitude cannot be perpetual or irrevocable on account of the prohibitions of the statute of frauds, and the parties not having complied with the requirements of the statute, they will be presumed ⁷³ to have dealt in conformity with law, and therefore to have intended a license rather than an easement.

The trial court evidently concluded in this case that the acts and conduct of the parties amounted to an executed contract for a perpetual easement over the appellants' property, but we are clearly of the opinion that it only amounted to a license revocable at will. It follows that judgment must be reversed, and it is so ordered. The cause is remanded, with directions to enter judgment in accordance with the views herein expressed. Costs awarded to appellants.

Stockslager, C. J., and Sullivan, J., concur.

A Parol License to enter upon land is generally revocable at the pleasure of the licensor: Hodson v. Kennett, 73 N. H. 225, 111 Am. St. Rep. 607; *Miser v. O'Shea*, 37 Or. 321, 82 Am. St. Rep. 751. Whether or not this rule is applicable where the licensee has expended money or labor in the execution of the license, the authorities are conflicting: See the note to *Lawrence v. Springer*, 31 Am. St. Rep. 715-719; *Entwhistle v. Henke*, 211 Ill. 273, 103 Am. St. Rep. 196; *Huber v. Stark*, 124 Wis. 359, 109 Am. St. Rep. 937; *Stoner v. Zucker*, 148 Cal. 516, 113 Am. St. Rep. 301.

WALKER v. BACON.

[11 Idaho, 127, 81 Pac. 155.]

CONSTITUTIONAL LAW—Statute Forbidding the Herding of Sheep Within Two Miles of a Dwelling.—A statute making it unlawful for any person to herd sheep, or permit them to be herded, on the land or possessory claim of any other person or within two miles of his dwelling-house is not unconstitutional. (p. 262.)

Wyman & Wyman, for the appellant.

W. C. Howie, for the respondents.

¹²⁰ SULLIVAN, J. This is an action brought to recover damages for herding and grazing sheep within two miles of the dwelling of the plaintiff under the provisions of sections 1210 and 1211 of the Revised Statutes. To the complaint the defendant interposed an answer not denying any of the allegations of the complaint, but set up as a defense the unconstitutionality of the provisions of said sections. Counsel for the respondent thereupon moved for judgment on the pleadings, which motion was granted by the court and judgment was entered against the appellant for the sum of one hundred dollars and costs of suit, from which judgment this appeal is taken.

This appeal involves the constitutionality of the provisions of said sections of our Revised Statutes, and on the decisions of this court in the cases of *Sifers v. Johnson*, 7 Idaho, 798, 97 Am. St. Rep. 271, 65 Pac. 709, 54 L. R. A. 785, *Sweet v. Ballentyne*, 8 Idaho, 431, 69 Pac. 995, *Walling v. Bown*, 9 Idaho, 184, 72 Pac. 960, *Phipps v. Grover*, 9 Idaho, 415, 75 Pac. 64, *Walling v. Bown*, 9 Idaho, 740, 76 Pac. 318, and *Spencer v. Morgan*, 10 Idaho, 542, 79 Pac. 459. The judgment of the court must be affirmed, and it is so ordered. The costs of this appeal are awarded to the respondents.

Ailshie, J., concurs.

Stockslager, C. J., dissents.

On a Writ of Error to the Supreme Court of the United States, it, in *Bacon v. Walker*, 00 U. S. 000, 27 Sup. Ct. Rep. 289, affirmed the judgment in the principal case, saying:

“This action involves the validity, under the constitution of the United States, of the following sections of the Revised Statutes of the state of Idaho:

"Sec. 1210. It is not lawful for any person owning or having charge of sheep to herd the same, or permit them to be herded, on the land or possessory claims of other persons, or to herd the same or permit them to graze within two miles of the dwelling-house of the owner or owners of said possessory claim.

"Sec. 1211. The owner or the agents of such owner of sheep violating the provisions of the last section, on complaint of the party or parties injured, before any justice of the peace for the precinct where either of the interested parties may reside, is liable to the party injured for all damages sustained; and, if the trespass be repeated, is liable to the party injured for the second and every subsequent offense in double the amount of damages sustained."

"Defendants in error, under the provisions of those sections, brought this action in the justice's court of Little Camas precinct, Elmore county, state of Idaho, for the recovery of one hundred dollars damages, alleged to have accrued to them by the violation by plaintiff in error of the statutes, and obtained judgment for that sum. The judgment was successively affirmed by the district court for the county of Elmore, and the supreme court of the state: 81 Pac. 155. The case was then brought here.

"It was alleged in the complaint of defendants in error, who were plaintiffs in the trial court, that plaintiff in error caused his sheep, about three thousand in number, to be herded upon the public lands within two miles of the dwelling-house of defendants in error. The answer set up that the complaint did 'not state a cause of action other than the violation of sections 1210 and 1211 of the Revised Statutes of the state of Idaho,' and that said sections were in violation of the fourteenth amendment of the constitution of the United States. The specifications of the grounds of the unconstitutionality of those sections were, in the courts below, and are, in this court, (1) that plaintiff in error has an equal right to pasture with other citizens upon the public domain, and that, by imposing damages on him for exercising that right, he is deprived of his property without due process of law; (2) that a discrimination is arbitrarily and unlawfully made by the statutes between citizens engaged in sheep grazing on the public domain and citizens engaged in grazing other classes of stock.

"These grounds do not entirely depend upon the same considerations. The first denies to the state any power to limit or regulate the right of pasture asserted to exist; the other concedes such power, and attacks it only as it discriminates against the grazers of sheep. We speak only of the right to pasture, because plaintiff in error does not show that he is the owner of the land upon which his sheep grazed, and what rights owners of land may have to attack the statute we put out of consideration: *New York ex rel. Hatch v. Beardon*, 204 U. S. 000, 27 Sup. Ct. Rep. 188, 51 L. ed. 000. But we may remark that the supreme court of Idaho said in *Sweet v.*

Ballentyne, 8 Idaho, 431, 69 Pac. 995: 'These statutes [sections 1210, 1211, quoted above] were not intended to prevent owners from grazing sheep upon their own lands, although situated within two miles of the dwelling of another.' Is it true, therefore, even if it be conceded that there is right or license to pasture upon the public domain, that the state may not limit or regulate the right or license? Defendants in error have an equal right with plaintiff in error, and the state has an interest in the accommodation of those rights. It may even have an interest above such accommodation. The laws and policy of a state may be framed and shaped to suit its conditions of climate and soil. Illustrations of this power are afforded by recent decisions of this court. In *Clark v. Nash*, 198 U. S. 361, 25 Sup. Ct. Rep. 676, 49 L. ed. 1085, a use of property was declared to be public which, independent of the conditions existing in the state, might otherwise have been considered as private. So, also, in *Strickley v. Highland Boy Gold Min. Co.*, 200 U. S. 527, 26 Sup. Ct. Rep. 301, 50 L. ed. 581. In the first case there was a recognition of the power of the state to deal with and accommodate its laws to the conditions of an arid country and the necessity of irrigation to its development. The second was the recognition of the power of the state to work out from the conditions existing in a mining region the largest welfare of its inhabitants. And again, in *Offield v. New York etc. R. Co.*, 203 U. S. 372, 27 Sup. Ct. Rep. 72, 51 L. ed. 000, the principle of those cases was affirmed and applied to conditions entirely dissimilar, and it was declared that it was competent for a state to provide for the compulsory transfer of shares of stock in a corporation, the ownership of which stood in the way of the increase of means of transportation, and the public benefit which would result from that. Of pertinent significance is the case of *Ohio Oil Co. v. Indiana*, 177 U. S. 190, 20 Sup. Ct. Rep. 576, 44 L. ed. 729. There a statute of the state of Indiana was attacked, which regulated the sinking, maintenance, use, and operation of natural gas and oil wells. The object of the statute was to prevent the waste of gas. The defendants in the action asserted against the statute the ownership of the soil and the familiar principle that such ownership carried with it the right to the minerals beneath and the consequent privilege of mining to extract them. The principle was conceded, but it was declared inapplicable, as ignoring the peculiar character of the substances—oil and gas—with which the statute was concerned. It was pointed out that those substances, though situated beneath the surface, had no fixed situs, but had the power of self-transmission. No one owner, it was therefore said, could exercise his right to extract from the common reservoir in which the supply was held without, to an extent, diminishing the source of supply to which all the other owners of the surface had to exercise their rights. The waste of one owner, it was further said, caused by a reckless enjoyment of his right,

operated upon the other surface owners. The statute was sustained as a constitutional exercise of the power of the state, on account of the peculiar nature of the right and the objects upon which it was exerted, for the purpose of protecting all of the collective owners.

"These cases make it unnecessary to consider the argument of counsel based upon what they deem to be the limits of the police power of a state, and their contention that the statute of Idaho transcends those limits. It is enough to say that they have fallen into the error exposed in *Chicago etc. R. Co. v. Illinois*, 200 U. S. 561, 26 Sup. Ct. Rep. 341, 50 L. ed. 596, 609. In that case we rejected the view that the police power cannot be exercised for the general well-being of the community. That power, we said, embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety. We do not enter, therefore, into the discussion whether the sheep industry is legitimate, and not offensive. Nor need we make extended comment on the two-mile limit. The selection of some limit is a legislative power, and it is only against the abuse of the power, if at all, that the courts may interpose. But the abuse must be shown. It is not shown by quoting the provision which expresses the limit. The mere distance expressed shows nothing. It does not display the necessities of a settler upon the public lands. It does not display what protection is needed, not from one sheep or a few sheep, but from large flocks of sheep, or the relation of the sheep industry to other industries. These may be the considerations that induced the statutes, and we cannot pronounce them insufficient on surmise or on the barren letter of the statute. We may refer to *Sifers v. Johnson*, 7 Idaho, 798, 97 Am. St. Rep. 271, 54 L. R. A. 785, 65 Pac. 709, and *Sweet v. Ballentyne*, 8 Idaho, 431, 69 Pac. 995, for a statement of the practical problem which confronted the legislature and upon what considerations it was solved. We think, therefore, that the statutes of Idaho are not open to the objection that they take the property of plaintiff in error without due process of law, and pass to the consideration of the charge that they make an unconstitutional discrimination against the sheep industry.

"Counsel extend to this contention the conception of the police power which we have just declared to be erroneous, and, enumerating the classes discriminated in favor of, as cattle, horses, hogs, and even poultry, puts to question whether, in herding or grazing sheep, 'there is more danger to the public 'health, comfort, security, order, or morality,' than the classes of animals and fowls above enumerated.' 'What,' counsel asks, 'are the dangers to the public growing out of this industry that do not apply with equal force to the others? Does the herding or grazing of sheep necessarily, and because of its unwarrantable character, work an injury to the

public? And, if dangerous in any degree whatever, are the other classes which are omitted and in effect excepted entirely free from such danger, or do such exceptions tend to reduce the general danger? Contemplating the law in the aspect expressed in these questions, counsel are unable to see in it anything but unreasonable and arbitrary discrimination. This view of the power of the state, however, is too narrow. That power is not confined, as we have said, to the suppression of what is offensive, disorderly, or unsanitary. It extends to so dealing with the conditions which exist in the state as to bring out of them the greatest welfare of its people. This is the principle of the cases which we have cited.

"But the statutes have justification on the grounds which plaintiff in error urges as determinative, and on these grounds they were sustained by the supreme court of the state. They were deliberate enactments, made necessary by and addressed to the conditions which existed. They first (1875) had application only to three counties, while Idaho was a territory. They were subsequently extended to two other counties, and were made general 1887. They were continued in force by the state constitution: *Sweet v. Balleentyne*, 8 Idaho, 431, 69 Pac. 995. The court said in the latter case: 'It is a matter of public history in this state that conflicts between sheep owners and cattlemen and settlers were of frequent occurrence, resulting in violent breaches of the peace. It is also a matter of public history of the state that sheep are not only able to hold their own on the public ranges with other livestock, but will in the end drive other stock off the range, and that the herding of sheep upon certain territory is an appropriation of it almost as fully as if it was actually inclosed by fences, and this is especially true with reference to cattle. The legislature did not deem it necessary to prohibit the running at large of sheep altogether, recognizing the fact that there are in the state large areas of land uninhabited, where sheep can range without interfering with the health or subsistence of settlers or interrupting the public peace. The fact was also recognized by the legislature that, in order to make the settlement of our small isolated valleys possible, it was necessary to provide some protection to the settler against the innumerable bands of sheep grazing in this state.'

"And the court pointed out that it was not the purpose or effect of the statutes to make discriminations between sheep owners and owners of other kinds of stock, but to secure equality of enjoyment and use of the public domain to settlers and cattle owners with sheep owners. To defeat the beneficent objects of the statutes, it was said, by holding their provisions unconstitutional, would make of the lands of the state 'one immense sheep pasture.' And further: 'The owners of sheep do not permit them to roam at will, but they are under the immediate control of herders, who have shepherd dogs with them, and wherever they graze, they take full possession

of the range as effectually as if the lands were fenced. . . . It is a matter of common observation and experience that sheep eat the herbage closer to the ground than cattle or horses do, and, their hoofs being sharp, they devastate and kill the growing vegetation wherever they graze for any considerable time. In the language of one of the witnesses in this case: "Just as soon as a band of sheep passes over, everything disappears, the same as if fire passing over it." It is a part of the public history of this state that the industry of raising cattle has been largely destroyed by the encroachments of innumerable bands of sheep. Cattle will not graze, and will not thrive, upon lands where sheep are grazed to any great extent.'

"These remarks require no addition. They exhibit the conditions which existed in the state, the cause and purpose of the statutes which are assailed, and vindicate them from the accusation of being an arbitrary and unreasonable discrimination against the sheep industry.

"Judgment affirmed.

"Mr. Justice Brewer and Mr. Justice Peckham dissent."

DALLIBA v. WINSCHELL.

[11 Idaho, 364, 82 Pac. 107.]

RECEIVER OF MINING PROPERTY, Lien, When cannot be Created on Property in Custody of to Take Precedence of Pre-existing Liens.—A court of equity placing a receiver in charge of mining property cannot authorize him to operate it and carry on the general mining business, and when it turns out to be a loss, charge the deficiency up as a preferred claim and make it a lien having precedence over prior recorded liens on the same property. (p. 271.)

RECEIVER, When Forfeits Right to Compensation.—A receiver who has been guilty of a glaring and flagrant abuse of his office, including extravagance and recklessness, ought not to be allowed any compensation. (p. 272.)

A RECEIVER is not Entitled to an Allowance for His Attorney When the services of such attorney consist only in presenting the receiver's accounts and securing orders for their allowance. (p. 272.)

RECEIVERS, Loans Made to, Allowance for, Though Irregular.—Though the orders of court authorizing a receiver to procure loans were made ex parte, still if they were such as to induce the belief in the average person that they were legal and valid, the repayment of such loans out of funds in the hands of the receiver should be allowed. (p. 273.)

F. S. Dietrich, for the appellants.

Hawley, Puckett & Hawley, for the receiver, etc.

³⁶⁷ AILSHIE, J. This is an appeal from an order and judgment settling and allowing a receiver's report and account. The record comes to us containing the receiver's amended petition and final report, findings and judgment of the court and a bill of exceptions. The action out of which this litigation arose was commenced in the district court of Bingham county in 1899. In that action a receiver was appointed to take charge of certain placer mining properties situated in the Carriboo mining district, Bingham county. W. H. Holden ³⁶⁸ was appointed receiver of the property and took possession thereof and continued to act until the spring of 1900, when he resigned and William Winschell was appointed and qualified and took possession. The action in which the receiver was originally appointed resulted in a judgment in favor of the plaintiffs, from which judgment the defendants appealed, and the judgment was reversed by this court, in *Dalliba v. Riggs*, 7 Idaho, 779, 67 Pac. 430. After the remittitur went down some misunderstanding seems to have arisen as to the extent of the judgment rendered on appeal, which resulted in an application to this court for a writ of mandate against the district judge of the fifth district, and in *American Hydraulic Placer Co. v. Rich*, 8 Idaho, 570, 69 Pac. 280, this court again considered the question and caused a writ to issue directing the district judge to dismiss the action. The case was accordingly dismissed and the receiver thereafter turned the property in his possession back to the defendants. No settlement of the receiver's account was made until the sixteenth day of March, 1905, when a decree was entered from which this appeal is prosecuted. The receiver's report is very voluminous and the findings of the court are somewhat lengthy covering the principal facts put in issue upon the settlement of the account. It appears that the property consisted of eight unpatented placer mining claims upon which it was necessary to have the annual assessment work done, and upon which there were flumes and ditches requiring some attention, as well as buildings and other fixtures that required care and preservation. During Winschell's receivership he not only cared for the property and did the assessment work, but it seems that he carried on active mining operations upon a large scale, "running a boarding-house" at which he boarded the workmen, and a "commissary" from which he sold the miners rubber boots, slickers, clothing, tobacco, whisky and other miscellaneous ar-

titles. During this time Winschell was also operating a stage line from Soda Springs to a point near the mines in question; also running a saloon about thirty miles from the mines and a general merchandise store, besides being engaged in the ³⁰⁰ lumber business. The trial court, among other things, finds that: "Said Winschell only in a few instances took receipts for money paid out; that many of his payments were made by check; that some of the checks produced and tendered as vouchers were signed 'William Winschell, Rec.,' others were signed 'William Winschell, R.,' others were signed 'William Winschell, P.,' and still others were signed simply 'William Winschell,' and no clear or satisfactory explanation was furnished as to why these various signatures were used, but there was some explanation by the receiver why said abbreviations were used. Many of the items of charge in said report and account were not supported by any receipts or checks or entries in books or other memoranda; and the balance were supported by checks, books, or memoranda. . . . Said receiver carried upon the pay-rolls of the receivership estate numerous members of his own family, including his wife and three children; one of whom at the age of fourteen years, and another at the age of fifteen years, he paid the same rate of wages as to grown men, in all of which cases the court reduced said claims. That no accurate accounts were kept of his dealings with members of his own family, and some credits for payments to them were claimed where there was no voucher or check or book entry supporting the same. That during one season he, as receiver, being unable to procure a cook, paid his wife regular wages as cook, and during the said time boarded his entire family at the expense of the estate, four of his children so supported not being in his employ as receiver, said children being from five to fifteen years of age, the oldest being a girl. That in the course of the hearing upon the account counsel for the receiver expressly conceded overcharges and erroneous charges aggregating over eighteen hundred dollars, and the court in addition to said items has disallowed many others as being erroneous or improper or false."

It does not appear that the court ever made any order directing the receiver to work and operate these mines or do anything other than care for, preserve and protect the property. Debts were incurred on every hand without any order ³⁷⁰ of court therefor. On the twenty-fourth day of October,

1900, the receiver presented an unverified petition to the district judge setting forth that there was an indebtedness of some three thousand one hundred dollars, and asking for an order authorizing him to borrow money for the purpose of paying such indebtedness, and thereupon the district judge, without notice to any other parties concerned or interested in the matter, made and issued his ex parte order directing the receiver to procure a loan of two thousand five hundred dollars, bearing interest at ten per cent per annum for the purpose of defraying the indebtedness. At the same time it seems there was an indebtedness of six hundred dollars to one of the banks with which the receiver had been doing business, and the payment of which was not authorized by this order for a loan. In pursuance of the order so made the receiver procured a loan on fifteen hundred dollars from one John C. Millick, and one thousand dollars from one John G. Brown. Thereafter, and on March 9, 1901, the receiver again presented to the district judge an unverified application for leave to borrow one thousand dollars for the purpose of operating the mines during the season of 1901, and thereupon the district judge made his ex parte order authorizing the securing of such a loan. In pursuance of such order the receiver borrowed the sum of six hundred dollars from John G. Brown and executed his note therefor, and thereafter and on April 12, 1901, the receiver borrowed the additional sum of four hundred dollars from Brown and executed his further note therefor. This furnishes only a brief insight into the reckless, careless and indifferent manner in which this receiver, an officer of the court, conducted the business and plunged the estate into debt. The court finds that during all this time there was a valid existing and unpaid mortgage on the entire property in favor of the defendant, John Francis Smith, for the sum of thirty-seven thousand dollars. The court, after scaling down these accounts a couple thousand dollars or more, finds that the estate is indebted to the receiver in the sum of six thousand seven hundred and nineteen dollars and ninety-four cents, and decrees the same to be a prior and paramount lien to all other mortgages, liens and encumbrances, and orders the property sold to pay such indebtedness. The evidence not being before us, we are unable to ascertain the nature or character of the indebtedness for 371 which these sums of money were borrowed. Neither can we gather, with any degree of accuracy, from this record the

expenditures that were actually necessary in protecting and preserving the property and doing the assessment work. Of course, we know it was necessary to do eight hundred dollars' worth of assessment work annually, and it must be true that other expenditures were necessary in protecting and caring for the property, but as to the amount or extent thereof we have no means of information. It does appear, however, from the findings that Winschell had previously worked and operated the mines at a net profit of about four thousand dollars per annum, and that he had also offered Holden, the receiver who had previously had charge of the property, that he would furnish all supplies and do the assessment work and pay the taxes for the proceeds which he might derive from working and operating the mines. It is therefore difficult to understand where the amount of these loans could have been expended except in a general working and operating of the mines. It is clear to us, however, that a court of equity has no authority to place its receiver in charge of such property and operate the same, carrying on a general mining business, and when it turns out to be at a loss, as is likely to be the result in such cases, charge the same up as a preferred claim and lien against the property to the prejudice and loss of the holders of prior recorded liens on the same property: *United States Inv. Corp. v. Portland Hospital*, 40 Or. 523, 64 Pac. 644, 67 Pac. 194, 56 L. R. A. 627; *Hooper v. Central Trust Co.*, 81 Md. 559, 32 Atl. 505, 29 L. R. A. 262; *Farmers' Loan etc. Co. v. Grape Creek Coal Co.*, 50 Fed. 481, 16 L. R. A. 603; *Hanna v. State Trust Co.*, 70 Fed. 2, 16 C. C. A. 586, 30 L. R. A. 201; *Belknap Sav. Bank v. Lamar Land etc. Co.*, 28 Colo. 326, 64 Pac. 212; *Terry v. Martin*, 7 N. Mex. 54, 32 Pac. 157; *Vilas v. Page*, 106 N. Y. 439, 13 N. E. 743; 23 Ency. of Law, 2d ed., 1068. This class of property is not like railroads and the property of other common carriers and quasi public corporations, the business and engagements of which must be carried on at all times, even if it be by the officer of the court. "This is done," says Judge Gresham in *Farmers' Loan etc. Co. v.* ³⁷² *Grape Creek Coal Co.*, 50 Fed. 481, 16 L. R. A. 603, "on account of the peculiar character of the property. It is generally mortgaged to secure bonds, and persons who invest in such securities know that the mortgage rests upon property previously impressed with a public duty. Private corporations owe no duty to the public, and their continued operation is not a matter of public concern.

It is only against railroad mortgages that the supreme court of the United States has sustained orders giving priority to receivers' certificates representing particular indebtedness, and, as already stated, it is only on principles having no application to a mortgage executed by a private corporation owing no duty to the public": *Hooper v. Central Trust Co.*, 81 Md. 559, 32 Atl. 505, 29 L. R. A. 262; *Kneeland v. American etc. Trust Co.*, 136 U. S. 89, 10 Sup. Ct. Rep. 950, 34 L. ed. 379; 3 Cook on Corporations, 5th ed., secs. 876, 877. There is no question but that a court of equity has the power and authority in a proper case to appoint a receiver to take charge of property and to care for and protect the same, and decree the charges therefor as a prior claim and lien against the property paramount to all mortgages or other liens or encumbrances. But for the court to go beyond the protection and preservation of an ordinary placer mine and assume to enter into mining operations and the running and conducting of a mine, as appears to have been done by the receiver in this case, is outside of the line of duty of courts of equity and of their receivers, and this excessive exercise of jurisdiction becomes dangerous when indebtedness thus incurred supplants prior existing mortgages and obligations upon the property. The findings in this case show conclusively that the receiver did not keep anything like accurate accounts; that he did not take vouchers for his expenditures; that he was extravagant to the verge of recklessness in the employment of help and servants about the property, and that when he came to filing his account he made many charges against the estate where no charge whatever should have been made and none in fact existed. This case appears to us as presenting the most glaring and flagrant abuse of the office of a receiver, and under the plainest precepts³⁷³ of justice and equity he should be allowed no compensation whatever for his time or services rendered in connection with this estate: See *Smith on Receiverships*, p. 587; *Welsh v. Brown*, 50 N. J. Eq. 387, 26 Atl. 568; 2 *Perry on Trusts*, sec. 821; *In re Gaston Trust*, 35 N. J. Eq. 60. We are further satisfied that the receiver is not entitled to any allowance for attorneys' fees. That charge must be borne by him individually and out of his private estate. He has never at any time, so far as it appears from this record, been authorized to employ an attorney in the administration of his office, nor does it appear that

he has ever had occasion for an attorney other than in presenting this account and securing an order and judgment allowing the same, and for such services the estate should not be charged. He should not be allowed to bring extraordinary and exorbitant claims and charges against the estate and then be allowed attorneys' fees out of the estate for prosecuting those claims to final judgment against the estate he has been representing. In *Wilkinson v. Washington Trust Co.*, 102 Fed. 28, 42 C. C. A. 140, paragraph 1 of the syllabus says: "A receiver is not entitled to an allowance for disbursements to attorneys for making reports to the court involving nothing more than a simple narrative of his acts, and on account of his receipts and disbursements": *Henry v. Henry*, 103 Ala. 582, 15 South. 916; *Gunn v. Ewan*, 93 Fed. 80, 35 C. C. A. 213; *Olson v. State Bank*, 72 Minn. 320, 75 N. W. 378; *Sowles v. National Union Bank*, 82 Fed. 139; *Terry v. Martin*, 7 N. Mex. 54, 32 Pac. 157.

As hereinbefore observed, we are not in a position (not having the evidence before us) to say that the loans secured by the receiver under order of the court should be disallowed. While such orders should not be made by the judge on ex parte application (*Gaffney v. Piper*, 5 Idaho, 490, 51 Pac. 99), and, indeed, may have been entirely without authority (a question which we do not here decide), still, these orders were such as to induce the belief in the average person that they were valid and legal, and emanating from the proper tribunal were undoubtedly looked upon by the lenders of ³⁷⁴ these sums of money as ample protection for their loans. With the findings before us as they are, we must affirm that part of the judgment which allows and orders paid the sums of money borrowed by the receiver under these orders and directions of the trial judge. On the other hand, we shall reverse that portion of the judgment allowing the receiver two thousand six hundred and sixty-six dollars as salary or compensation for his services as receiver, and also that part of the judgment allowing the sum of five hundred and seventy-five dollars, as fees to the receiver's attorneys. The cause will be remanded to the trial court, with instructions that the judgment be modified as herein indicated. Costs awarded to appellants.

Stockslager, C. J., and Sullivan, J., concur.

The Power of Courts of Equity to continue a business under a receiver and to make his charges and expenses a charge upon the property should be exercised with great caution: *Makeel v. Hotchkiss*, 190 Ill. 311, 83 Am. St. Rep. 131. Under what circumstances this power may be exerted is discussed in the monographic note to *International Trust Co. v. United Coal Co.*, 83 Am. St. Rep. 72-80. Where a manufactory and the property intended for use therein are in the hands of a receiver, the court has power to direct the discharge of threatened encumbrances, and to have its accumulated raw materials manufactured into marketable products, and to this end can authorize the receiver to contract debts and to issue receiver's certificates therefor, and to order them paid out of the products thus manufactured: *American Pig Iron etc. Co. v. German*, 126 Ala. 194, 85 Am. St. Rep. 21.

INLAND LUMBER AND TIMBER COMPANY v. THOMPSON.

[11 Idaho, 508, 83 Pac. 933.]

TAXATION, ESTOPPEL OF TAXPAYER.—One Who Has Furnished the Assessor with a List of His Property for the purposes of taxation is estopped, in the absence of fraud, accident, or mistake, from subsequently denying the ownership of such property for the purpose of avoiding the payment of taxes. (p. 279.)

TAXATION—Notice of Assessment and Equalization.—One who has given the county assessor a list of property for the purposes of assessment and taxation is not, on such property being assessed pursuant to such list, as property that has escaped assessment, entitled to any notice, other than that prescribed by statute, of the meeting of the board of equalization at which such property is ordered assessed. (p. 282.)

TAXATION.—A List of Property Furnished to the Assessor by a person subject to taxation, whether sworn to or not, and whether strictly official or not, estops him from denying that it is correct, and from urging that such property is not assessable to him. (pp. 284, 285.)

Hamblin, Lund & Gilbert, for the appellant.

Ezra R. Whitla, for the respondent.

512 AILSHIE, J. This action was commenced by the plaintiff, a Washington corporation, for the purpose of having an assessment against certain timber lands owned by plaintiff and situated in Kootenai county vacated and set aside, and to restrain and enjoin the collector from collecting a tax under such assessment. The plaintiff's first cause of action alleges that under the act of Congress approved June 4, 1897,

the plaintiff had located forest reserve lieu land scrip on a body of government lands situated in Kootenai county, and that the location and selection had not been approved by the commissioners of the general land office up to January 12, 1903, and that on January 12th, the title to all such lands was still in the United States, and that the same was not taxable by or under the authority of the state of Idaho. The second cause of action alleges that prior to January 1, 1903, the plaintiff made soldiers' additional homestead applications under the act of Congress as embodied in sections 2306 and 2307 of the Revised Statutes of the United States, for certain lands situated in Kootenai county, but that none of said applications were approved or allowed by the commissioner of the general land office up to and including January 12, 1903, and that on January 12th the title to such lands still remained in the United States government, and that the same was not taxable by the state of Idaho. It is further alleged in each of the foregoing causes of action that the assessor and the board of commissioners, acting as a board of equalization, proceeded to and did assess all of the lands embraced under these scrip applications and locations for the year 1903. The third cause of action includes all the lands contained in both the first and second causes of action, and also lands which the plaintiff admits that it did own and were taxable for the year 1903. Plaintiff alleges, however, under the third cause of action that the assessment was made after the board of equalization had met and without notice to the plaintiff, and that the assessment so made was "far higher than the assessment of other lands in the county of Kootenai of precisely the same class, character and value, and are in excess of the fair values of said ⁵¹³ lands. Said assessments are unequal as compared with the assessments of lands in other parts of the county of Kootenai of the same class and character, and are unjust."

The defendant demurred to the plaintiff's complaint, and the demurrer was overruled as to the first cause of action and was sustained as to the second and third causes of action. Plaintiff refused to further plead, and the court entered judgment of dismissal as to the second and third causes of action, and the defendant answered the first cause of action. The plaintiff thereupon demurred to the answer, and the demurrer was overruled by the court, and the plaintiff elected to stand on its demurrer. Judgment was thereupon entered

in favor of the defendants. It is from these judgments that this appeal has been prosecuted.

The first proposition argued by the appellant is that the state had no right or authority to tax lands the legal and equitable title to which was still in the United States. That neither the forest reserve lieu land scrip location nor the soldiers' additional homestead location had been accepted or allowed or approved by the commissioner of the general land office prior to the date on which the tax lien attached for the year 1903. The respondent contends that such question does not arise in this case, and that if it should be resolved in favor of the appellant, that still appellant could not succeed in this case. Respondent insists that the appellant is estopped to deny that it was the owner of these lands and that they were taxable within Kootenai county for the year 1903, for the reason that appellant on July 16, 1903, through its legal and authorized agent, furnished the assessor with a statement of its taxable property for the year 1903, which statement contained a description of the identical lands from the payment of taxes on which the appellant is seeking to be relieved in this action.

There appears to be some diversity of opinion among courts as to how far the doctrine of estoppel will be carried in its application to the taxpayer who is required by statute similar to ours to furnish the assessor a statement of all ⁵¹⁴ of his property. It seems to us upon an examination of the authorities that the general trend thereof is to hold the taxpayer estopped from denying his ownership of the property listed in his statement unless he shows that the same was done through fraud, accident or mistake. In *People v. Stockton etc. R. R. Co.*, 49 Cal. 414, the railroad company sought to avoid paying taxes on a tract of land which had been included in a statement furnished by its agent, but which, in fact, belonged to one Jackson. In considering this question the supreme court of California said: "It appears from the evidence that the list so furnished by the superintendent included, with other described property, the lots now claimed to have been owned by Jackson. We think the defendant should not be heard, against the admission of the pleadings, to disturb the authority of its agent, and that the list given by him to the assessor is binding upon the corporation, and justified the assessor in adopting it as a correct statement of its property."

In *San Francisco v. Flood*, 64 Cal. 504, 2 Pac. 264, the court, in discussing the duty of a taxpayer to furnish the assessor with a list of his property and the effect of his failure to do so, said: "Whether the description was furnished by the taxpayer, or was made by the assessor, the taxpayer having failed to furnish a list, the complaint of the taxpayer in regard to it should not be regarded. In our opinion it is the duty of the taxpayer to furnish a true and correct list of his taxables to the assessor, and if he fails to do so, and any loss should result to him in consequence of such failure, his complaints on such score should meet with no favor in a court of justice."

In *People v. Atkinson*, 103 Ill. 45, it is said: "Where a person makes out and delivers to the assessor of the town in which he keeps his business office, the schedule of the amount, quantity and quality of all his personal property required to be listed for taxation, he will be bound by such return, though a portion of the property is required to be returned by him to the assessor of a different town, where it is also assessed." This last case was cited with approval and followed ⁵¹⁵ in *Re Bank of Marion*, 153 Ill. 516, 39 N. E. 118. The syllabus to which case follows: "In absence of any evidence of fraud, accident, or mistake, a property owner is bound by a schedule of his taxable personal property given by him to the assessor."

In *Hamacker v. Commercial Bank*, 95 Wis. 359, 70 N. W. 295, the cashier of the bank had furnished the assessor with a statement of the property of the bank which contained twenty thousand dollars' worth of personal property which did not in fact belong to the bank and was not assessable to the bank. The supreme court, however, held that the bank and its officers and receiver were estopped to deny that the bank was the owner of such property. On this branch of the case the court said: "Upon the tax-roll the bank was assessed directly as the owner of personal property valued at twenty thousand dollars, and the various items of taxes were carried out. Although this was an improper mode of taxation, we do not perceive how the bank could escape from paying the tax which was based upon a personal property return made by its own cashier. In such cases the principle of estoppel has been frequently applied, and certainly with justice: 25 Am. & Eng. Ency. of Law, 209; *Ives v. North Canaan*, 33 Conn. 402; *Republic L. Ins. Co. v. Pollak*, 75 Ill. 292; *People v. Stockton*

etc. R. R. Co., 49 Cal. 414. If the bank could not question or resist the tax, no ground is perceived upon which the receiver could resist it." To the same effect see *Kirkwood v. Ford*, 34 Or. 552, 56 Pac. 411; *Phelps Mtg. Co. v. Board of Equalization*, 84 Iowa, 610, 51 N. W. 50; *Lake County v. Sulphur Bank etc. Min. Co.*, 68 Cal. 14, 8 Pac. 593; 27 Am. & Eng. Ency. of Law, 2d ed., 671. It must be conceded, we think, that the estoppel which has been applied against the taxpayer in the foregoing cases does not rest upon the usual principles nor contain the elements necessary or usually required in courts of equity in the application of that doctrine. It seems to be applied rather upon the principle that it is the duty of the taxpayer to see that a list of his property is furnished to the proper officers for taxation, and although that fact might not be misleading ⁵¹⁶ to the officers, that nevertheless when they have once acted upon it he shall not be allowed to thereafter question its correctness and thereby disturb the usual ordinary procedure pursued in the collection of taxes. The public at large have an interest in the collection of the just proportion of taxation from every property owner, and the reasons, therefore, become much stronger for holding the individual to a strict accountability when he seeks to avoid payment than in cases where the controversy arises between citizen and citizen. In opposition to the application of this principle of estoppel, counsel for appellant have cited *Charleston v. Middlesex*, 109 Mass. 270, *State v. Burrough*, 174 Mo. 700, 74 S. W. 610, *Chicago etc. Ry. Co. v. Cass Co.*, 51 Neb. 369, 70 N. W. 955, *Centennial Eureka M. Co. v. Juab Co.*, 22 Utah, 395, 62 Pac. 1024, *State v. Bellew*, 86 Wis. 189, 56 N. W. 782, *State v. Baker*, 129 Mo. 482, 31 S. W. 924, *People v. Central Pac. Ry. Co.*, 105 Cal. 576, 39 Pac. 905, *Central Pac. Ry. Co. v. People*, 162 U. S. 91, 16 Sup. Ct. Rep. 766, 40 L. ed. 903.

From an examination of these cases it will be seen that in the Missouri, Nebraska and both of the Wisconsin cases, the courts declined to apply this principle of estoppel, for the reason that the property which had been assessed was outside of and beyond the jurisdiction of the taxing officer and situated within the jurisdiction of another county. These courts held that inasmuch as property included in the statements made by the taxpayers was situated, as shown by these statements, beyond the limits of the county, and subject to taxation within another county, that the taxing officers there-

fore had no jurisdiction over the property, and that the assessment was for that reason void. The Missouri court, however, in *State v. Burrough*, 174 Mo. 700, 74 S. W. 610, observed that the defendants might be estopped from denying the ownership of the land described in the tax bill by reason of the fact that they furnished a list of their property including the land in question therein. *Centennial Eureka M. Co. v. Juab County*, 22 Utah, 395, 62 Pac. 1024, seems to rest for its authority upon two propositions: 1. The peculiarity of the Utah statutes ⁵¹⁷ with reference to furnishing a statement by the taxpayer and the recovery of a tax which has been unlawfully collected; 2. On the broad principle that the furnishing of a statement by the taxpayer does not constitute such a fraud upon the taxing officer or the public, nor does it constitute such misrepresentation as to constitute an estoppel within the general meaning of that term as defined by the text-writers and authorities on that question.

On the general statement of the doctrine the Utah court is undoubtedly correct, but when we come to consider the respective duties and obligations imposed by law and public policy on the taxpayer on the one hand, and the tax assessing and collecting officer on the other hand, we at once see the necessity of a more liberal application of that principle in favor of upholding and enforcing an assessment and against the taxpayer. We are of the opinion that in the case at bar, the appellant having furnished a statement which included these lands as its property, and the board of equalization and the assessor having acted on the faith of such statement, appellant should not now be heard to say that it did not own them. If these taxes are not paid and the property should be sold, such a sale cannot affect the government, but only such right and title as the appellant has. The government is not here complaining, and it is difficult to see what injury can result to appellant on account of the assessment of those lands, if indeed they belong to the government.

Passing now to a consideration of the question of notice, we will first observe the provisions of the revenue act of March 22, 1901. Sections 28 to 35 of the act (Sess. Laws 1901, pp. 245-248) make it the duty of every person owning property to furnish the assessor of his county a statement under oath setting forth specifically all of the real and personal property owned by such person or under his control at 12 M. on the second Monday in January of that year, and any person

failing or neglecting to furnish such statement, under oath, after demand made therefor, is subject to the penalty of having his property listed and assessed by the assessor, ⁵¹⁸ which assessment cannot thereafter be reduced by the board of equalization: Sec. 35. By section 91 of the act it is made the duty of the assessor to complete his assessment-roll on or before the first day of July in each year, and he and his deputies must take and subscribe the oath provided therein. By section 92 the assessor is required as soon as the assessment-roll is completed to deliver the same, together with the statements furnished him by the taxpayers, to the clerk of the board of county commissioners, who is required to immediately give notice thereof of the time of the meeting of the board of equalization by publication in a newspaper printed and published in the county. By section 53 of the act it is made the duty of the board of county commissioners to meet on the second Monday in July of each year as a board of equalization. At this meeting it is the duty of the board to examine the assessment-roll name by name, together with the valuation of property of each taxpayer assessed, and raise or cause to be raised any assessment of property which in the judgment of the board has not been assessed at its fair cash value. By section 60 it is provided that at such meeting the board "may direct and require the assessor to assess any taxable property that has escaped assessment, increase any valuation or add to the amount, number, quantity or value of any property, when a false, inaccurate, or incomplete list has been furnished or rendered." By the same section it is provided that "All persons whose assessment is altered, modified or affected in the amount of valuation of property charged to them, shall be notified by the clerk of said board by letter deposited in the United States mail, postpaid and addressed to such person interested, at least ten days before the final action is taken in fixing and equalizing such assessment, of the day fixed when he may be heard upon the matters affecting the assessment of his property for taxation, which shall be on the fourth Monday in July of each year, or as soon thereafter as he can be heard or his matter be reached." By the provisions of section 53 above referred to it is made the duty of the board to continue in session for the purpose of ⁵¹⁹ equalizing assessments "until the business of equalization is disposed of." Section 65 provides that the board shall meet on the fourth Monday in July "and continue in session until all

the parties appearing have been heard, and until all the proposed additional assessment, changes and corrections have been acted upon, . . . and the clerk of the board must keep a record of their proceedings, and as auditor he may receive from the tax collector the original assessment-book, and may retain the same for the time necessary to enter the additional assessments, changes and corrections ordered by the board."

Appellant complains that it had no notice that its property had been assessed and no opportunity to appear before the board of equalization. We find the following state of facts as contained in the record: The board of commissioners met as a board of equalization on July 13, 1903, and continued in session until July 16th, when they adjourned until July 20th. On July 20th they convened and continued in session during that day, and thereupon adjourned until July 27th. On July 27th, which was the fourth Monday, they met and continued in session until the 28th, when they adjourned sine die. The assessor alleges that he completed the assessment-roll for the year 1903 on the eleventh day of July, and delivered the same to the clerk of the board of commissioners, and that prior to that time he had no knowledge or information concerning the property described in plaintiff's complaint, and for that reason the same had not been by him assessed up to the time he completed the roll and delivered it to the clerk of the board. That prior to the sixteenth day of July, 1903, the plaintiff had failed and neglected to furnish the assessor with a statement of its property, and that on the sixteenth day of July he made a request that it furnish such list, and that thereupon the plaintiff furnished a statement as required by law which contained a description of the property described in plaintiff's complaint, and concerning the assessment of which the plaintiff is complaining in this action. The assessor further alleges that thereafter, and on about the twenty-eighth ⁵²⁰ day of July, 1903, the board of commissioners, while sitting as a board of equalization, and knowing of the list and statement which had been furnished to the assessor by the plaintiff, ordered and directed the assessor to assess the property contained in said statement as property that had escaped taxation, and that he, as assessor, thereupon, in compliance with the order of the board, placed the property on the assessment-roll and made the assessment as exhibited in plaintiff's complaint, and that after such assessment was made the board of equalization did not alter, change or modify such

assessment in any manner. It therefore appears that the assessment complained of in this action was a new and additional assessment made under the provisions of sections 60 and 65 of the revenue act, *supra*. Under the provisions of that act it is the duty of the board to convene on the second Monday of July and examine the assessment-roll and order any raises or changes that it may deem necessary, and to require notice thereof given to the taxpayer by the clerk, and that at their second meeting convened on the fourth Monday they hear any complaints made against any proposed raises or changes, and at the latter meeting they finally determine and pass upon such matters. At the first meeting they are also required to direct the assessor to make any new or additional assessments where property has escaped assessment. The times of both of these meetings are fixed by statute, and in addition thereto it is made the duty of the clerk of the board to publish notice of the time and place that the board of equalization will meet. These statutes and the publishing of such notice give ample opportunity to every taxpayer to appear before the board in relation to any matter of assessment concerning which he desires to be heard. In this case the appellant furnished the assessor with a list of its property between the second and fourth Mondays of July (July 16th), and it must have known as a matter of fact the purpose of this statement and the use to which it would be put by the assessor and the board of equalization. In addition to this actual notice, the appellant had notice by statute that the board would ⁵²¹ convene on the fourth Monday and finally pass upon all new and additional assessments. As a matter of fact, the board did convene in conformity with law, and at such meeting it directed this property assessed, and after it was placed upon the assessment-roll and assessed by the assessor, it appears that such assessment was satisfactory to the board of equalization, and they thereafter made no alteration or change therein. It is true that plaintiff alleged that the assessment was made after the adjournment of the board, but as the case comes here on demurrer to the answer, we must concede all the allegations of the answer. If appellant had been present during this last session of the board, it would have had its opportunity to be heard concerning the assessment and valuation placed upon its property, and if it failed to do so it was its own fault and it should not be heard to complain at this time.

Section 60 only requires notices to be mailed to persons who have already been assessed and whose assessments are "altered, modified, or affected in the amount of valuation of property charged to them." There is no requirement that a notice be mailed to a person who has never been assessed and whose assessment is ordered by the board. Every person who has not been assessed prior to the date on which the assessor delivers the assessment-roll to the clerk of the board has notice that the board will order his property assessed if they discover it. Therefore, if any person whose property has not been assessed wants to know the amount for which his property is assessed or to be heard in relation thereto, he should appear during the session convened on the fourth Monday in July and present his grievances: Oregon etc. Ry. Co. v. Lane County, 23 Or. 386, 31 Pac. 964; Ramp v. Marion County, 24 Or. 461, 33 Pac. 681; Kirkwood v. Ford, 34 Or. 552, 56 Pac. 411; Albany Mutual Bldg. Assn. v. City of Laramie, 10 Wyo. 54, 65 Pac. 1011; Aggers v. People, 20 Colo. 348, 38 Pac. 386; United States Trust Co. v. Territory, 10 N. Mex. 416, 62 Pac. 987; Orr v. State Board of Equalization, 3 Idaho, 190, 28 Pac. 416.

⁵²² The judgments appealed from are affirmed. Costs awarded to respondents.

Sullivan, J., concurs.

STOCKSLAGER, C. J. It must be conceded that lands belonging to the government are not assessable to anyone so long as the title remains in the United States. The homesteader or entryman under any of the provisions of the land laws can only be assessed for the improvements he may have on the land. It is true in this case that the land in controversy was returned by an agent or officer of the corporation as part of the assets of the company or corporation. It is possibly true that after such return they should not be heard to complain of the assessment, as the defendant assessor was in no way responsible for the error, if such it was, in the return of the property. Entertaining these views, I express no opinion as to the rights of recovery in this action.

ON REHEARING.

SULLIVAN, J. A petition for rehearing has been filed in this case, and it is stated therein that "it is apparent from

a reading of the opinion relating to the third cause of action that the court assumed that the respondent filed an answer to this cause of action, whereas the fact is, as stated in the first part of the opinion, that the respondents demurred to this cause of action and the demurrer was sustained. This being true, it seems to us that an entirely different aspect is put upon this part of the case." And in support of that contention counsel quotes from the opinion as follows: "It is true that the plaintiff alleged that the assessment was made after the adjournment of the board, but as the case comes here on demurrer to answer, we must concede all the allegations of the answer." The facts are as follows: The complaint purports to state three causes of action; a demurrer was sustained to the second and third, and overruled as to the first. That left the complaint standing ⁵²³ with one cause of action. To that cause plaintiff answered, and to no other. The court does not intimate in the opinion that the respondents answered either cause of action but the first. On the trial the issues were made up by the first cause of action in the complaint and the answer thereto, the second and third causes of action having been stricken out on demurrer. No evidence whatever was introduced on the trial, and it is stated in the judgment as follows: "By agreement of counsel, the first cause of action of the plaintiff's amended complaint and the defendant's answer thereto were submitted to the court for decision, the respective counsel agreeing that the facts set forth in the plaintiff's first cause of action and the defendant's answer thereto correctly set forth the issues."

Upon that state of facts the court in its decision must find all of the material allegations of the complaint denied by the answer in favor of the defendant. Upon all issues denied by the answer, the plaintiff must produce a preponderance of evidence to recover, and the lower court, we think, rightly concluded that on the complaint and the answer thereto, the plaintiff was not entitled to a judgment: *Walling v. Bown*, 9 Idaho, 184, 72 Pac. 960; *Mills Novelty Co. v. Dunbar*, 11 Idaho, 671, 83 Pac. 932.

It is further contended by petitioner that it is not pretended that the list of taxable property furnished the assessor was the official statement which the assessor had a right to exact and which the law provides must be sworn to, and for that reason the doctrine of estoppel will not apply. We cannot agree with that contention. The appellant furnished

a list, and under the facts of this case, whether it be sworn to or not, whether it be the official list or not, he is estopped at this time from denying that it is correct. The petition for rehearing is denied.

Stockslager, C. J., and Ailshie, J., concur.

An Injunction does not Lie to restrain the collection of taxes, unless the assessment is void or levied for an illegal or unauthorized purpose: Philadelphia Mtg. etc. Co. v. Omaha, 63 Neb. 280, 93 Am. St. Rep. 442. See, too, Buck v. Miller, 147 Ind. 586, 62 Am. St. Rep. 436; Hayes v. Douglas, 92 Wis. 429, 52 Am. St. Rep. 926.

STATE v. CALLOWAY.

[11 Idaho, 719, 84 Pac. 27.]

MUNICIPAL CORPORATIONS, Power of to Regulate Liquor Saloons.—A municipal corporation authorized by statute to "license, tax, regulate and restrain bar-keepers, saloon-keepers, dealers in spirituous, vinous, or malt liquors, and places where such liquors are kept for sale or in any manner disposed of," may regulate the persons and business referred to, and prescribe the hours when such places must be closed. (p. 288.)

MUNICIPAL CORPORATIONS.—An Ordinance Forbidding a Saloon-keeper from permitting any person, other than himself and members of his family, from entering the room or place where intoxicating liquors are sold during the hours when the sale of liquor is prohibited, is valid, when the time during which the place is permitted to be open amounts to eighteen hours every day except Sundays. (p. 293.)

A MUNICIPAL ORDINANCE Requiring Saloons to be Closed Every Day from midnight until 6 o'clock A. M. following, and from 12 o'clock Saturday night until 6 o'clock A. M. of the Monday following, and making it unlawful for the proprietor to permit any person other than himself or a member of his family to enter such saloon during such closing hours, is valid. (pp. 293, 294.)

CONSTITUTIONAL LAW—Class Legislation, What is not Forbidden as.—A Municipal Ordinance Requiring All Places for the Sale of Liquors to be Closed at midnight of each day and kept closed for six hours thereafter, and all day Sunday, is not forbidden class legislation. (p. 294.)

MUNICIPAL CORPORATIONS.—Wholesale as Well as Retail Liquor Dealers may by municipal ordinance be required to close their places of business on Sunday, and until 6 o'clock A. M. of each week day, and not permit the entry of any person, except themselves and members of their families, into any room where liquor is sold during such closed periods. (p. 294.)

MUNICIPAL CORPORATIONS—Regulation of Liquor Traffic, When not a Prohibition.—An ordinance requiring all places where liquor is sold to be closed until 6 o'clock A. M. of every day,

and all day Sunday, is a regulation and not a prohibition of the liquor business. (p. 297.)

MUNICIPAL ORDINANCES, TITLE OF.—The title, "An ordinance regulating the hours in which intoxicating liquors shall be sold in Boise City, and for Sunday closing, and providing for a penalty for the sale thereof during prohibited hours," is sufficiently comprehensive to sustain an ordinance specifying the hours when all places for the sale of liquors must be closed, and making it criminal and punishable for the proprietor of such a place to permit, during such closing hours, any person except himself or a member of his family to enter any room therein. (pp. 297, 298.)

Hawley, Puckett & Hawley, for the appellant.

J. J. Guheen, attorney general, Charles F. Koelsch, R. P. Quarles and Charles M. Kahn, for the respondent.

725 SULLIVAN, J. The appellant was convicted of the crime of keeping open his saloon in Boise City after the hour of midnight, or between midnight and the hour of 6 o'clock the following morning; and in another and separate suit he was convicted of keeping open his saloon in said city on the day of the week known as Sunday, in violation of the provisions of ordinance No. 623 of the ordinances of said city. From which convictions he appealed to the district court, where both cases were tried upon an agreed stipulation of facts, and the appellant was again convicted, from which judgments the appellant appeals to this court. It is agreed between respective counsel that as the same legal questions are involved in each case, both cases shall be submitted to this court upon the same briefs and arguments. The cases were tried in the court below upon an agreed statement of facts, which is as follows:

"It is stipulated and agreed by and between the parties hereto that the above-entitled cause shall be tried and determined by the court without a jury, and that a jury is expressly waived.

"It is further stipulated and agreed by and between the parties hereto that the facts in this case are as follows:

"1. That on the sixth day of July, 1905, at a regular meeting of the common council of Boise City, Idaho, said common council passed an ordinance No. 623, which said ordinance was on the eighth day of July, 1905, duly approved by the mayor of said city; and which said ordinance since last-mentioned date has not been repealed, and which said ordinance is in the words and figures following, to wit:

“ ‘Ordinance No. 623—By Barber.

“ ‘An Ordinance Regulating the Hours in Which Intoxicating Liquors shall be Sold in Boise City, and for Sunday Closing, and Providing for a Penalty for the Sale Thereof During Prohibited Hours.

“ ‘Boise City Does Ordain as follows:

“ ‘Sec. 1. Any room where intoxicating, spirituous, vinous or malt liquors are sold by virtue of a license under the ordinances of Boise City, shall be so arranged that the same shall be securely closed and locked and admission thereto prevented; ⁷²⁶ and the same shall be securely locked and all persons excluded therefrom each and every day, after the hour of 12 o'clock midnight until the hour of 6 o'clock A. M., following, and on Sundays from 12 o'clock Saturday night until 6 o'clock A. M., on Monday mornings, and no intoxicating liquors shall be sold between such hours.

“ ‘And it is hereby made unlawful for the proprietor of such a place and the business herein contemplated of selling intoxicating liquors, to permit any person or persons other than himself and family to enter such room and place where intoxicating liquors are sold during the hours when the sale of such liquors is prohibited.

“ ‘Sec. 2. Any person or persons failing to comply with the provisions of Section 1 of this ordinance, or violating any of the provisions of said Section 1, shall be deemed guilty of a misdemeanor, and upon conviction in the Police Magistrate's Court of Boise City shall be fined in any sum not exceeding Two Hundred (\$200.00) Dollars, or by imprisonment in the city jail for a period not to exceed sixty days, or both such fine and imprisonment.

“ ‘Sec. 3. This ordinance shall take effect and be in full force from and after the 8th day of July, 1905.’

“2. That on the 23d day of July, 1905, defendant, Frank Calloway, was a citizen of the United States and the owner of that certain saloon known as the Exchange Bar, situate in Boise City, Idaho, and was operating said saloon at said time under a saloon liquor license issued by Boise City.

“3. That said defendant, Frank Calloway, did on the twenty-third day of July, 1905, said day being the first day of the week commonly called Sunday, allow and permit people to enter his said saloon for the purpose of purchasing intoxicating liquors.”

These cases involve the legality or constitutionality of said ordinance No. 623, and the only question before the court is whether or not said ordinance is a valid and existing ordinance of said city.

It is first contended that the common council of Boise City is not by the charter of said city given the power to pass such ⁷²⁷ ordinance. Subdivision 4 of section 37 of the charter of said city grants to said city the right "to license, tax, regulate and restrain bar-keepers, saloon-keepers, dealers in (manufacturers of) spirituous (vinous) or malt liquors (and places where such liquors) are kept for sale or in any manner disposed of." The provisions of said grant are broad enough to authorize reasonable regulation of the persons and business therein referred to. Then if the provisions of said ordinance are reasonable, the common council had the authority under the charter to enact said ordinance. In *McQuillan on Municipal Ordinances*, section 480, the author says: "Charter power to regulate saloons and dramshops is usually considered as ample to justify penal ordinance prescribing the hours when such places shall open and close": *Smith v. Knoxville*, 3 Head (Tenn.), 245; *Gabel v. City of Houston*, 29 Tex. 335; *Maxwell v. Jonesboro*, 11 Heisk. (Tenn.) 257; *City of Tarkio v. Cook*, 120 Mo. 1, 41 Am. St. Rep. 678, 25 S. W. 202; *Provo City v. Shurtliff*, 4 Utah, 15, 5 Pac. 302; *Ex parte Wolf*, 14 Neb. 24, 14 N. W. 660; *Staates v. Washington*, 44 N. J. L. 605, 43 Am. Rep. 402; *Decker v. Sargeant*, 125 Ind. 404, 25 N. E. 458. Second, it is contended that said ordinance is repugnant to the general laws of the state. There is nothing in this contention, as the general laws contemplate a reasonable control of the liquor traffic, and the legislature has authorized the proper officers of Boise City to enact such ordinance as they may deem best for its reasonable regulation and control. This ordinance in no manner conflicts with the general laws of the state. It is admitted by counsel for the appellant that the common council has the authority to make reasonable regulations in regard to the conduct of the saloon business and the sale of intoxicating liquors within Boise City. But he contends that the following provision of said ordinance is unreasonable and therefore unconstitutional, to wit: "And it is hereby made unlawful for the proprietor of such a place and the business herein contemplated, of selling intoxicating liquors, to permit any person or persons other than himself and family to enter such room and place where intoxicating

liquors are sold during the hours when the sale of such liquors is prohibited." It is ⁷²⁸ argued that this prevents the hired help of the proprietor of the saloon from entering such place during the prohibited hours to clean up the place and put it in order for the next day's business, and that it prevents the bookkeeper of the proprietor from going into such place for the purpose of posting his books and arranging his accounts. All except the proprietor and his family are prohibited from entering the place where such liquors are sold each and every day after the hour of 12 o'clock midnight, until the hour of 6 o'clock the next morning following, and on Sundays from 12 o'clock Saturday midnight until 6 o'clock A. M., on Mondays. I do not think that an unreasonable regulation, for it would seem that eighteen hours out of twenty-four was a reasonable time for the proprietors of saloons to do their business, clean up their places of business and keep their books; and it does seem that the good health of the proprietor of the saloon and his bar-keeper and bookkeeper, as well as that of the citizen, and the good order of the city would require that saloons be closed from 12 o'clock midnight until 6 o'clock the following morning, and on Sundays. While the saloon and liquor business may be a very strenuous business, I do not think that the health of the people and the peace and quiet of the community demands that business to be carried on for more than eighteen hours during a single day. It certainly would be hard to convince the general public that the peace, good order and welfare of a community demanded dramshops and even wholesale liquor stores to be kept open for twenty-four hours per day.

It is most strenuously contended by counsel for the appellant that this ordinance makes the gist of the offense the entering of such room and place where intoxicating liquors are sold, and that it was undoubtedly the intention of the framers of that ordinance to make the gist of the offense the selling of intoxicating liquors during the prohibited hours. It is clear to me that the object of said ordinance was to prohibit the sale of intoxicating liquors during the prohibited hours, and that the only effective way to do so was to make it a misdemeanor for the proprietor to permit any person other ⁷²⁹ than his family to enter his saloon during the prohibited hours. Great reliance is placed by counsel for appellant upon the case of *Bennett v. Pulaski* (Tenn.), 47 L. R. A. 278. That action was brought by a retail liquor dealer doing business

in Pulaski, against the mayor and aldermen of that town, to enjoin them from enforcing against him certain ordinances enacted by the municipal authorities on the ground that they were arbitrary, unreasonable, oppressive, contrary to common rights and deprived him of his property without due process of law, and that they were passed in obedience to the edicts of the church to which the mayor and aldermen belonged, for the purpose of furthering its propaganda for the prohibition of the liquor traffic and not to regulate it. The validity of four ordinances were involved in that action, and they are designated, first, as the "Curtain Ordinance"; second, the "Letting in and Out Ordinance"; third, the "Insertion of Hours of Business in Saloon License Ordinance," and the "Closing and Opening Hour Ordinance." The court held that the ordinance requiring the curtains to front windows and doors of the lower story of a retail liquor house to be hoisted, raised up or otherwise removed from sunset to sunrise during the night was unreasonable and invalid as applied to the retail liquor dealer. Also that the ordinance requiring saloons to be closed between 10 P. M., and 4 A. M., and also on Sunday, is a reasonable and valid exercise of the power to regulate such business, and that the ordinance making it a misdemeanor to let persons in or out of the saloon during the hours in which the saloon is required to be closed is unreasonable and void; and that the ordinance requiring the insertion in every saloon license the legal hours in which the saloon-keeper is permitted to do business is not invalid as it is harmless though useless. The court also held without comment, *arguendo*, or citation of authorities, that the letting in and out ordinance was open to the objection that it was unreasonable and void. The court further held that the motive that prompted the enactment of such ordinance could not be considered by the court in determining whether the ordinance was reasonable or unreasonable or oppressive. The court ⁷⁸⁰ in commenting upon the authority of the municipality to determine the first instance which regulations of the whisky traffic were proper and reasonable, said: "The court is also of the opinion that it is within the province of the municipal authorities of the town to determine, in the first instance, what regulations of the whisky traffic within its limits are proper and reasonable for the preservation of the peace, quiet and good order, and that, if reasonable and in conformity to its charter and the general law, the court cannot substitute its

judgment for that of the authorities as to the need of the community in the matter." It will be observed that that court held the ordinance requiring saloons to be closed between 10 o'clock P. M. to 4 o'clock A. M., and also on Sunday, was a reasonable and valid exercise of the power to regulate such business. The said letting in and out ordinance made it a misdemeanor for the owner of a saloon or his clerk to let a person in or out of such saloon between the prohibited hours, and also made it unlawful for any person to go in or out of such saloon except the owner or clerk, between such hours. This court is not inclined to follow the supreme court of Tennessee upon the question of the letting in or out ordinance, as the decided weight of authority is adverse to the position taken by that court.

The supreme court of the state of North Carolina, in the case of *Paul v. City of Washington*, 134 N. C. 363, 47 S. E. 793, 65 L. R. A. 902, which was a case involving the validity of an ordinance requiring liquor saloons to be closed between 8 o'clock in the evening and 6 o'clock in the morning, and forbidding the doors to be open during those hours, was not unreasonable. That court also held that an ordinance forbidding the owners or employes in places where liquors are sold to be in such places between the hour of closing on Saturday night and the hour for opening on Monday morning, is not so clearly unreasonable as to require the court to set aside an ordinance making such provision. From the language there used the court evidently concluded that the ordinance came very close to the line of "unreasonableness" as they say it is not so "clearly" unreasonable. ⁷³¹ But in the case at bar this court concludes that the provisions of said ordinance are clearly reasonable.

It was contended in that case that said ordinance was arbitrary, oppressive, vexatious, unreasonable and void, in that it deprived the plaintiff of the use and convenience of his property without due process of law. The court held against the liquor dealer on that proposition, and further held that police regulation statutes are valid unless the purpose or necessary effect is not to regulate the use of property but to destroy it. And in the case at bar it certainly will not be contended that the provision of the ordinance prohibiting any person from entering the saloon except the owner and his family would deprive him of the use and convenience of his property without due process of law. In the last-mentioned

case the owners of the saloon were excluded from their places of business during prohibited hours and still it was held reasonable, while in the ordinance in question the owner and his family are permitted to enter the saloon during prohibited hours. If people can be legally restrained from working more than eight hours per day in some of the ordinary avocations of life, it certainly does not seem unreasonable that liquor dealers should be restrained from plying their vocation more than eighteen hours per day.

In the case of *State of Indiana v. Gerhardt*, 145 Ind. 439, 44 N. E. 469, 33 L. R. A. 313, the court said: "The power to prohibit the sale of intoxicating liquors in the interests of public safety or welfare during certain prescribed periods is not denied. The legislature possessing the right, as it unquestionably does, may further extend or exercise it so as to require a proprietor of a liquor saloon to securely close the same and permit no person to enter therein during the time when the sale of intoxicating liquor is forbidden." That case involved the validity of a statute, but that makes no difference so far as this case is concerned. The legislature in this state has authority to regulate the sale of intoxicating liquors, and the charter of Boise City authorizes the city to regulate the liquor traffic within its corporate limits. A part of the statute under consideration in the case ⁷³² last above cited is substantially the same as that provision of the ordinance here under consideration, and makes it unlawful for the proprietor of a saloon to permit any person or persons other than himself and family to go into such room and place where intoxicating liquors are sold upon the days and hours when the sale of such liquors is prohibited. In commenting on that provision, the supreme court there said: "It is true that the part relative to the exclusion of persons is somewhat sweeping, making but one exception. However, criminal statutes are not always literally construed, and possibly an emergency might arise of great necessity to admit some one other than those mentioned in the section; and while such admission might infringe upon the letter of the statute, it would not come within its spirit, and the court under the particular circumstances might make the necessary exception": See, also, *Davis v. Fasig*, 128 Ind. 271, 27 N. E. 726. It would seem to me that the effect of the ordinance would be nullified if such places were permitted to be kept open and visited by everybody who desired to do so.

In *McCarty v. City of Atlanta*, 121 Ga. 365, 49 S. E. 287, the court said: "If once excuses were admitted for keeping open such places upon prohibited days or after prohibited hours, the law would be practically nullified. It would rarely be possible for the state or city to meet the excuses or to show that the place had been open for an unlawful purpose. The fact furnishing the excuse of the illegal act after the innocent entry would be so blended that they could not be separated. The opening, absolutely prohibited by law, would be legalized by the motive with which the prohibited act was done. If such excuse could be given in one case, it could be in others, and the issue on each trial would be diverted from the question as to whether the place had been open at an unlawful hour into a consideration of the question as to whether it had been opened for an innocent purpose. It is manifest that any such construction would in effect repeal the law and be utterly subversive of the very policy on which it was enacted." In that case and in the case of *State v. Binnard*, 21 Wash. 349, 58 Pac. 210, it apparently is held that the very gist of ⁷²³ such ordinances and statutes is the opening of liquor saloons during prohibited hours and not the purpose for which they were open.

In *People v. Waldvogel*, 49 Mich. 337, 13 N. W. 620, the defendant was arrested for allowing persons in his saloon for the purpose of cleaning it out during prohibited hours. It was there held that the question of intent is wholly immaterial under the statute there involved; that the legislature in order to guard against the danger of sales being made had directed that the place where liquors are kept should be closed so that no opportunity to violate it by making sales should be afforded, and that such places must be closed and cannot be kept open for any business purpose of any kind.

In *People v. Roby*, 52 Mich. 577, 50 Am. Rep. 270, 18 N. W. 365, the court said: "The purpose for which the bar was open was immaterial; the offense was committed by opening it for cleaning as much as it would have been by opening it for the sale of liquors."

In the case of *Village of St. Anthony v. Brandon*, 10 Idaho, 205, 77 Pac. 322, which was a case where a restaurant or lunch counter was conducted in a room where intoxicating liquors were sold, this court held that the sole purpose of the ordinance there under consideration was to control the retail liquor trade of that village as to best preserve the quiet and

peace of its citizens, and if the room where the saloon was kept is permitted to be kept open during the prohibited hours the officers would be hampered in the enforcement of the ordinance. We therefore conclude from the decided weight of authority and the reason of the case that the letting in and out ordinance is not unreasonable, and that under the charter of Boise City and the general statutes of the state, the city council was authorized to enact the same.

Counsel for appellant contends that said ordinance is unconstitutional, upon the ground that it is class legislation, and contravenes section 1 of article 14 of the amendments of the federal constitution, in that it abridges the privileges of the citizen and deprives him of liberty and property. Said section of the constitution provides, among other things, that ⁷³⁴ "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law." As to said ordinance being class legislation, it applies to all dealers in intoxicating liquors and applies equally to all of that class. That classification is natural, practical and reasonable; and where the classification is natural, practical and reasonable, the uniform holding of the supreme court of the United States and of the several state supreme courts is that such classification is valid and constitutional: *Magoun v. Illinois T. & S. Bank*, 170 U. S. 283, 18 Sup. Ct. Rep. 594, 42 L. ed. 1037. The court in that case held that the state may distinguish, select and classify objects of legislation, and necessarily the power must have a wide range of discretion. If the classification is practical, that is sufficient, and it is not reversible unless palpably arbitrary: *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 19 Sup. Ct. Rep. 281, 43 L. ed. 552. As the provisions of said ordinance apply equally to all liquor dealers, it does not discriminate, is a proper classification and does not come within the term "class legislation." It is contended that wholesale dealers should not be classed with retail dealers, but no valid reason is advanced for excepting them from the provisions of said ordinance, as the charter of Boise City authorized the regulation of wholesale as well as retail dealers.

In *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. Rep. 273, 31 L. ed. 205, it was held that legislation by a state prohibiting

the manufacture of intoxicating liquors within such state to be there sold for general use as a beverage, does not infringe any right, privilege or immunity secured by the constitution of the United States. If a total prohibition of the manufacture and sale of intoxicating liquors does not infringe any right, privilege or immunity secured to the citizen by the constitution, certainly a prohibition of the sale of such liquors for six hours out of twenty-four hours would not infringe such right, privilege or immunity.

⁷³⁵ The council of Boise City is empowered under the provisions of its charter, granted by the state legislature, to regulate the sale of intoxicating liquors within Boise City, and the provisions of said ordinance are not unreasonable nor do they infringe upon the right, privilege or immunity of any citizen. In *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. Rep. 273, 31 L. ed. 205, it was held that it belonged to the legislative department to exert what is known as the police powers of the state, and to determine primarily what measures are appropriate or needful for the protection of the public morals, the public health or the public safety; subject, however, to the power of the courts to adjudge whether any particular law is an invasion of a right secured by the constitution, and also holds that the legislature did not interfere with nor impair anyone's constitutional rights of liberty or of property by the enactment of said prohibition law. Yet it may determine that the manufacture and sale of intoxicating drinks for general or individual use as a beverage are or may become hurtful to society and constitute therefore a business in which no one may lawfully engage. But in the state of Idaho, the manufacture and sale of intoxicating liquors are not prohibited, but the legislative department has the authority to regulate its manufacture and sale. The provisions of said fourteenth amendment of the constitution of the United States does not take from the states the power to enact reasonable police regulations, and does not restrain the legislative power from enacting laws for the protection of the safety, health or morals of the community. Prohibition of the use of property for purposes that are declared by valid legislation to be injurious to the health, morals or safety of the community cannot in any just sense be deemed a taking or an appropriation of the property for public benefit or without due process of law. The above principles are amply supported by reason and by a long line of decisions. The busi-

ness of manufacturing and selling intoxicating liquors is one that history and experience show requires legislative restraint and supervision, and even after the manufacturers have erected large plants for the manufacture of such liquors in any state, the legislature of such state may enact a prohibition ⁷³⁶ law and make it unlawful to manufacture such liquors, as was held in the case of *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. Rep. 273, 31 L. ed. 205.

It was held in *Crowley v. Christenson*, 137 U. S. 86, 11 Sup. Ct. Rep. 13, 34 L. ed. 620, that "there is no inherent right in the citizen to sell intoxicating liquors by retail; it is not a privilege of a citizen of the state or of a citizen of the United States. It may be entirely prohibited by state legislation or be permitted under such conditions as will limit the evils. The possession and enjoyment of all such rights are subject to such reasonable conditions as may be determined by the governing authority of the country essential to the safety, health, peace, good order and morals of the community." In that case it is recognized and also is a well-known fact in history that much evil results from the sale of intoxicating liquors. Liquor dealers are not permitted to engage in that avocation without first obtaining licenses therefor, and such licenses are always issued with the understanding that the granting power may reasonably regulate such a business. That business is looked upon very differently from the ordinary avocations of life. It was said in *Adams v. Cronin*, 29 Colo. 488, 69 Pac. 590, 63 L. R. A. 61, that "these restraints are not like such as restrict the ordinary avocations of life, which advance human happiness, or trade and commerce—that neither produce immorality, suffering, nor want. This business is, on principle, within the police power of the state. and restrictions which may rightfully be imposed upon it might be obnoxious as an illegal restraint of trade when applied to other pursuits. That the right to sell liquor is not an inherent right of the citizen of the United States is beyond cavil. That plaintiff has not been deprived of any property or civil right without due process of law or denied any privilege belonging to a citizen of the United States, is equally clear": See, also, *Schwuchow v. City of Chicago*, 68 Ill. 444; *Ex parte Christensen*, 85 Cal. 208, 24 Pac. 747.

The business of selling intoxicating liquors is not considered as of equal dignity, respectability and necessity as that of the grocery, dry goods or clothing business or many other occu-

pations that might be mentioned, and from time immemorial ⁷³⁷ its prohibition or regulation has been held to be within legislative power under what is known as police power.

The case of *State v. Nelson*, 10 Idaho, 522, 109 Am. St. Rep. 226, 79 Pac. 79, 67 L. R. A. 808, is not in point in this case. The ordinance under consideration in that case prohibited the wife or mother of a recreant husband or wayward son from going into the saloon in search of such husband or son. This court there held that that provision was unreasonable, arbitrary and oppressive. It is contended that the ordinance under consideration prohibits, and does not regulate nor restrain. There is nothing in that contention. Under the decision of this court in *St. Anthony v. Brandon*, 10 Idaho, 205, 77 Pac. 322, the court there made some observations on the meaning of the words "regulate" and "license." While it is true the ordinance under consideration prohibits the conduct of the business therein referred to during certain hours, it is a regulation of that business, and not a prohibition of it. It was said by the court in *Re Grand Jury*, 62 Fed. 828, that "to prohibit, limit, confine or abridge a thing, the restraint may be permanent or temporary. It may be intended to prohibit, limit or abridge for all time or for a day only." Restraint does not contemplate an absolute destruction of business, but rather places it within certain bounds. The ordinance under consideration is simply a regulation and a restraint, but not a prohibition.

It is next contended that said ordinance is defective in form. There is nothing in this contention, as its objects and purposes are clearly shown from the language used therein. It is also contended that the title to said ordinance does not express the object or purpose of the ordinance. Said title is as follows: "An ordinance regulating the hours in which intoxicating liquors shall be sold in Boise City, and for Sunday closing, and providing for a penalty for the sale thereof during prohibited hours." The object and purpose of the title is to show the general character of the ordinance so that anyone may not be misled thereby. It is well settled that matters of detail need not be specified in the title, nor it need ⁷³⁸ not catalogue all of the powers intended to be bestowed: *McQuillan on Municipal Ordinances*, sec. 141; *St. Anthony v. Brandon*, 10 Idaho, 205, 77 Pac. 332; *Pioneer Irr. Dist. v. Bradley*, 8 Idaho, 310, 101 Am. St. Rep. 201, 68 Pac. 295;

State v. Coffin, 9 Idaho, 338, 74 Pac. 962. The title is sufficient. The judgment of the lower court is affirmed, with costs in favor of respondent.

Stockslager, C. J., and Ailshie, J., concur.

THE POWER OF MUNICIPAL CORPORATIONS TO REGULATE THE BUSINESS OF DEALING IN INTOXICATING LIQUORS.

I. General Nature of the Power, 298.

II. Origin of the Power.

- a. Delegation of Power from the State, 299.
- b. Method of Delegating Power to, 299.
- c. Limitations Upon Delegated Power, 299.

III. Judicial Control of Exercise of the Power.

- a. General Principles Applied, 300.
- b. Relation of Ordinances to Constitutional Provisions and General Laws, 300.
- c. Interpretation of Charter Provisions, 302.
- d. Reasonableness of Ordinances, 303.
- e. Effect of Invalidity of Parts of an Ordinance, 303.

I. General Nature of the Power.

As exercised by the state, the power to control the retail liquor traffic is an element of its "police" power. It has been so recognized from time immemorial: *Schwuchow v. City of Chicago*, 68 Ill. 444. The power was vested in the original states of the Union before the adoption of their constitutions, and still is so vested: *Commonwealth v. Kimball*, 24 Pick. 359, 35 Am. Dec. 326. There is no instance in which the power of the legislature to make such regulations as may destroy the value of property without compensation to the owner appears in a more striking light than in the case of statutes whereby the sale of intoxicating liquors is entirely prohibited: *State v. Bott*, 31 La. Ann. 663, 33 Am. Rep. 224. It is no longer regarded as a business in which one has a natural or a common-law right to engage: *People v. Cregier*, 138 Ill. 401, 28 N. E. 812; *Sherlock v. Stewart*, 96 Mich. 193, 55 N. W. 845, 21 L. R. A. 580. State constitutional provisions and general statutes dealing with this subject, being thus an exercise of the police power of the state, are not in conflict with the provisions of the United States constitution with reference to imposts, taxes on imports, interstate commerce, or rights of property: *Ex parte Campbell*, 74 Cal. 20, 5 Am. St. Rep. 418, 15 Pac. 318.

General statutes on the subject are not in violation of the state constitutional provisions forbidding the impairment of contracts and infringement on the rights of property, nor in violation of provisions insuring religious liberty: *Ex parte Campbell*, 74 Cal. 20, 5 Am. St. Rep. 814, 15 Pac. 318; *Ex parte Christensen*, 85 Cal. 208, 24 Pac. 747; *State v. Allmond*, 2 Houst. (Del.) 612; *Perdue v. Ellis*, 18 Ga. 586; *Mayson v. City of Atlanta*, 77 Ga. 662; *Goddard v. Town of Jacksonville*, 15 Ill. 583, 60 Am. Dec. 773; *Jones v. People*, 14 Ill. 196; *Kleizer*

v. State, 15 Ind. 449; State v. Shotts, 15 Ind. 449; State v. Bott, 31 La. Ann. 663, 33 Am. Rep. 224; Commonwealth v. Kimball, 24 Pick. 359, 35 Am. Dec. 326; Robison v. Haug, 71 Mich. 38, 38 N. W. 668; State v. Austin, 114 N. C. 855, 41 Am. St. Rep. 817, 19 S. E. 919, 25 L. R. A. 283; Woods v. Town of Prineville, 19 Or. 108, 23 Pac. 880; State v. Doyle, 15 R. I. 325, 4 Atl. 764. Of course, general statutes, municipal charters, and ordinances may be so found, in certain particulars, as to transcend the legitimate limits of this "police power" and to violate such constitutional provisions: Sullivan v. City of Oneida, 61 Ill. 242; Darst v. People, 51 Ill. 286, 2 Am. Rep. 301; Beebe v. State, 6 Ind. 501, 63 Am. Dec. 391.

II. Origin of the Power.

a. **Delegation of Power from the State.**—The state has the right to delegate what authority it has in this matter to municipal corporations: Ex parte Russellville, 95 Ala. 19, 11 South. 18; Ex parte Mayor of Florence, 78 Ala. 419; Harris v. Livingston, 28 Ala. 577; Harbough v. City of Monmouth, 74 Ill. 367; State v. Bott, 31 La. Ann. 663, 33 Am. Rep. 224; Sherlock v. Steuart, 96 Mich. 193, 55 N. W. 845, 21 L. R. A. 580; State v. Austin, 114 N. C. 855, 41 Am. St. Rep. 817, 19 S. E. 919, 25 L. R. A. 283; State v. City of Trenton, 51 N. J. L. 498, 18 Atl. 116, 5 L. R. A. 352; Woods v. Town of Prineville, 19 Or. 108, 23 Pac. 880; Hadlan v. City of Olympia, 2 Wash. Ter. 340, 6 Pac. 434. The authority that such corporations have is the authority that is delegated to them.

b. **Method of Delegating Power to.**—In the absence of controlling state legislation, such authority will be taken as a necessary incident of the creation of the corporation: 1 Dillon on Municipal Corporations, 4th ed., secs. 315, 316; City of Elk Point v. Vaughan, 1 Dak. 113, 46 N. W. 577. The authority may be conferred by general constitutional or statutory grants to provide for the general peace, happiness, and welfare of the community; or to pass such local police regulations as may be deemed advisable; that is, by what is commonly known as the "general welfare" clause in a city charter: Ex parte Campbell, 74 Cal. 20, 5 Am. St. Rep. 418, 15 Pac. 318; Ex parte Hayes, 98 Cal. 555, 33 Pac. 337, 20 L. R. A. 701; Ex parte Schmitz (Cal.), 33 Pac. 338; Ex parte Christensen, 85 Cal. 208, 24 Pac. 747; State v. Clark, 28 N. H. 176, 61 Am. Dec. 611; Markle v. Town Council, 14 Ohio St. 586; Crowley v. Christensen, 137 U. S. 86, 11 Sup. Ct. Rep. 13, 34 L. ed. 620. On the other hand, the power may be specifically conferred by special statutory provisions.

c. **Limitations Upon Delegated Power.**—The power may be delegated in such a way as to make the authority of the corporation exclusive and free from limitation by action of the state legislature. In such cases general state laws do not operate within the corporate limits: Cunningham v. People, 1 Colo. App. 155, 27 Pac. 949; Huff-

smith v. People, 8 Colo. 175, 54 Am. Rep. 550, 6 Pac. 157; State v. Wheeler, 27 Minn. 76, 6 N. W. 423.

A charter grant of power to control the liquor traffic does not, however, unless it is expressly so provided, repeal state laws on the subject or affect their application within corporate limits: Gardner v. People, 20 Ill. 430. Usually corporate powers are limited by the provision that ordinances must not be in conflict with constitutional provisions or general laws, and this limitation applies, even if not expressly stated in the grant of power, unless the contrary is so expressly stated: Rossel v. Garon, 50 N. J. L. 358, 13 Atl. 26; Thompson v. Mt. Vernon, 11 Ohio St. 688.

III. Judicial Control of Exercise of Power.

a. General Principles Applied.—Even when the grant to the corporation is one of exclusive authority, the powers of the municipality are open to judicial measurement and interpretation. The principle applied is: "Municipal corporations have such powers only as are conferred upon them by the act of the legislature creating them, and such incidental powers as are implied by their creation and as are essential for the accomplishment of the purposes of their creation and for their continued existence"; and the act of the legislature creating cities must not be in conflict with constitutional provisions: Champer v. City of Greencastle, 138 Ind. 339, 46 Am. St. Rep. 390, 35 N. E. 14, 24 L. R. A. 768; Werner v. Washington, 2 Hayw. & H. 175, Fed. Cas. No. 17,416a. Corporate action must not transcend these expressed or implied powers, with whatever limitations are thereto attached. The power delegated must be exercised by the officials to whom it is granted: State v. City of Lambertville (N. J.), 14 Atl. 599; nor can it be by them subdelegated to other officials: City of East St. Louis v. Wehrung, 50 Ill. 28; State v. Mayor of Bayonne, 44 N. J. L. 114.

b. Relation of Ordinances to Constitutional Provisions and General Laws.—In this judicial interpretation of corporate powers several principles of construction apply.

General laws passed subsequently to charter grants do not repeal the latter, nor ordinances enacted under them, unless it is so expressly provided: Gunnarssohn v. City of Sterling, 92 Ill. 569; State v. Harris, 50 Minn. 128, 52 N. W. 387, 531. General laws may, however, expressly repeal charter grants and city ordinances: People v. Furman, 85 Mich. 110, 48 N. W. 169.

In the absence of municipal action under granted power, this power still being dormant, general laws operate within municipalities: Sanders v. State, 34 Neb. 872, 52 N. W. 721; State v. Pfeifer, 26 Minn. 175, 2 N. W. 474. Municipal ordinances are not in conflict with constitutional provisions nor general laws, unless directly inconsistent therewith. If there is room for both to operate, each will be upheld, and the principle that one must not be exposed to two punishments,

or punishment by two different jurisdictions for the same offense, is not violated. The offense against the state law is not the same offense as that against the ordinance, though both arise from the same act: *Ex parte Campbell*, 74 Cal. 20, 5 Am. St. Rep. 418, 15 Pac. 318; *State v. Brady*, 41 Conn. 588; *State v. Welch*, 36 Conn. 215; *Hill v. Mayor of Dalton*, 72 Ga. 314; *Mayson v. City of Atlanta*, 77 Ga. 662; *Gardner v. People*, 20 Ill. 430; *City of Pelsin v. Smelzel*, 21 Ill. 464, 74 Am. Dec. 105; *City of Clinton v. Grusendorf*, 80 Iowa, 117, 45 N. W. 407; *Woods v. Town of Prineville*, 19 Or. 108, 23 Pac. 880.

Under proper grant of power, an ordinance prohibiting dealing in intoxicating liquors is not necessarily in conflict with general laws licensing such dealings. By licensing them the state does not express approval of the business nor make it property, the right to which is protected against impairment by constitutional provisions: *Ex parte Campbell*, 74 Cal. 20, 5 Am. St. Rep. 418, 15 Pac. 318. Ordinances compelling the closing at night of saloons or places where intoxicating liquors are sold are not in conflict with state laws that close such places on Sunday, nor vice versa: *Sanders v. State*, 34 Neb. 872, 52 N. W. 721. An ordinance may place a license upon such business greater than the license established by general law for unincorporated portions of the state: *Ex parte Felchlin*, 96 Cal. 360, 31 Am. St. Rep. 223, 31 Pac. 224; *Hadian v. City of Olympia*, 2 Wash. Ter. 340, 6 Pac. 434. But a liquor ordinance making a violation of its provisions a misdemeanor and assigning a possible penalty therefor greater than the maximum penalty fixed by general law for misdemeanors is in violation of such general law: *Ex parte Christensen*, 85 Cal. 208, 24 Pac. 747. An ordinance forbidding the employment of women in dance-halls and other places where liquors are sold is inimical to a constitutional provision forbidding the barring of any person from any lawful pursuit on account of sex: *In re Maguire*, 57 Cal. 604, 40 Am. Rep. 125. An ordinance levying a higher license upon places where women are employed than upon those where they are not is not inimical to such provision: *Ex parte Felchlin*, 96 Cal. 360, 31 Am. St. Rep. 223, 31 Pac. 224. An ordinance forbidding the employment of women in such places is not in conflict with the first section of article 1 of the constitution of Ohio: *Bergman v. Cleveland*, 39 Ohio St. 651. An ordinance prohibiting, without exception, opening of saloons on Sunday, is in conflict with a general state law forbidding common labor on Sunday, except works of necessity and charity, and excepting those who considered the seventh day of the week to be the Sabbath: *Thompson v. Mt. Vernon*, 11 Ohio St. 688.

Again, municipal action will be judicially construed as being within the expressed or implied power of the municipality, and therefore valid; or, on the other hand, as having transcended this power and therefore invalid: *Sullivan v. City of Oneida*, 61 Ill. 242; *Steffy v. Town of Monroe City*, 135 Ind. 466, 41 Am. St. Rep. 436, 35 N. E. 121. The power to license does not include power to regu-

late, except by means of license enactments, nor the power to restrain or prohibit: *Ex parte Burnett*, 30 Ala. 461; *Russell v. Garon*, 50 N. J. L. 358, 13 Atl. 26. Under such power a license that is intended to be or is in fact prohibitory transcends the power; and while circumstances determine the matter, and while what is prohibitory under one condition may not be so under other conditions, the court will determine the fact, in any given case, according to the circumstances: *Sweet v. City of Wabash*, 41 Ind. 7. A license, however, is not a contract; it is simply a permit to do that which it was unlawful to do without it. It is therefore subject to legislation enacted after it has been issued: *City of Elk Point v. Vaughn*, 1 Dak. 113, 46 N. W. 577; *Morris v. City Council of Rome*, 10 Ga. 532. Licenses may be granted upon conditions, and made revocable for a violation of any of these conditions. One accepting a license is bound by the conditions under which it was issued: *Sprayberry v. City of Atlanta*, 87 Ga. 120, 13 S. E. 197; *Schwuchow v. City of Chicago*, 68 Ill. 444.

Power to regulate, or power to license and regulate, does not include power to restrain or prohibit: *Ex parte Burnett*, 30 Ala. 461; *Ex parte Reynolds*, 87 Ala. 138, 6 South. 335; *Steffy v. Town of Monroe*, 135 Ind. 466, 41 Am. St. Rep. 436, 35 N. E. 121; *Bronson v. Oberlin*, 41 Ohio St. 476, 52 Am. Rep. 90; *Werner v. Washington*, 2 Hayw. & H. 175, Fed. Cas. No. 17,416a. The following are instances of valid regulation, closing at certain times: *Ex parte Peacock*, 25 Fla. 478, 6 South. 473. Removing the screens and obstructions to view from the outside at times when places are to be kept closed: *Decker v. Sargeant*, 125 Ind. 404, 25 N. E. 458. Restricting saloons to certain portions of the city: *Mayor of Town of Valverde v. Shattuck*, 19 Colo. 104, 41 Am. St. Rep. 208, 34 Pac. 947.

c. Interpretation of Charter Provisions.—“Restrain” is generally synonymous with “prohibit”: *Smith v. Town of Warrior*, 99 Ala. 481, 12 South. 418. Power to prohibit or restrain implies power to regulate in any way: *Ex parte Christensen*, 85 Cal. 208, 24 Pac. 747; *Gunnarssohn v. City of Sterling*, 92 Ill. 569; *People v. Cregier*, 138 Ill. 401, 28 N. E. 812. And under such power, town authorities who have passed an ordinance setting forth the conditions upon which a license will be granted, have the right to refuse a license to an applicant on the ground that the place in which he proposes to conduct a saloon is not a proper place: *Sherlock v. Stuart*, 96 Mich. 193, 55 N. W. 845, 21 L. R. A. 580. Town authorities cannot, however, refuse to accept a bond offered under a license ordinance without giving reasons for such refusal: *Petter v. Common Council of Village of Homer*, 59 Mich. 8, 26 N. W. 208. Power to prohibit the sale of intoxicating liquors does not include the power to prohibit the keeping of such liquors with intent to sell them: *Henke v. McCord*, 55 Iowa, 378, 7 N. W. 623. Power to pass an ordinance carries with it impliedly power to enforce the ordinance: *State v. Welch*, 36 Conn.

215; *Floyd v. Commissioners of Eatonton*, 14 Ga. 354, 38 Am. Dec. 559; *City of Pekin v. Smelzel*, 21 Ill. 464, 74 Am. Dec. 105. If the method of enforcement is expressly stated in the grant of power, that method must be exclusively employed: *City of Elk Point v. Vaughn*, 1 Dak. 113, 46 N. W. 577.

The corporation is not limited to suggest methods of enforcement nor to methods employed in the enforcement of general laws, unless such limitation is expressly stated: *Floyd v. Commissioners of Eatonton*, 14 Ga. 354, 38 Am. Dec. 559; *Martin v. People*, 88 Ill. 390.

d. **Reasonableness of Ordinances.**—When the authority of the municipality is expressly granted and the method of its exercise specifically provided, then the question of exercising the power, within the limits of the grant, is exclusively within the legislative discretion of the proper municipal authorities and their action is not reviewable by the court; but if the power is simply one implied as necessarily incident to the creation of the corporation, or is granted in "general welfare" clauses of the charter or general statutes, and the method of its exercise is not expressly pointed out, then ordinances must be reasonable. What is reasonable or unreasonable is a question of fact, according to circumstances; and it is the duty of the court to determine the question as a question of fact, in each case allowing for circumstances: *Champer v. City of Greencastle*, 138 Ind. 339, 46 Am. St. Rep. 390, 35 N. E. 14, 24 L. R. A. 768; *Staates v. Borough of Washington*, 44 N. J. L. 605, 43 Am. Rep. 402; *Burekholter v. McConnellsville*, 20 Ohio St. 308. Compare with *Thompson v. Mt. Vernon*, 11 Ohio St. 688.

An ordinance compelling closing at night is reasonable: *Morris v. City Council of Rome*, 10 Ga. 532. Likewise an ordinance forbidding using or keeping intoxicating liquors in a refreshment saloon or restaurant only: *State v. Clark*, 28 N. H. 176, 61 Am. Dec. 611. Likewise an ordinance forbidding chairs or seats of any kind in a saloon: *Brown v. Lutz*, 36 Neb. 527, 54 N. W. 860. Likewise an ordinance forbidding unmarried minors from entering saloons: *State v. Austin*, 114 N. C. 855, 41 Am. St. Rep. 817, 19 S. E. 919, 25 L. R. A. 283. An ordinance forbidding screens and obstructions to the view from the exterior during business hours is unreasonable: *Champer v. City of Greencastle*, 138 Ind. 339, 46 Am. St. Rep. 390, 35 N. E. 14, 24 L. R. A. 768. Likewise an ordinance giving city commissioners arbitrary power to refuse a license to conduct a saloon within four hundred and fifty feet of a church: *Ex parte Thieser*, 30 Fla. 529, 32 Am. St. Rep. 36, 11 South. 901. Likewise an ordinance forbidding a saloon-keeper to be in his place of business at times when it is required to be kept closed: *State v. Thomas*, 118 N. C. 1221, 24 S. E. 535.

e. **Effect of Invalidity of Parts of an Ordinance.**—As in the case of general laws and of ordinances dealing with other matters, so in

regard to ordinances concerning traffic in liquors, an entire ordinance is not necessarily invalid because some of its provisions are invalid. If the parts of an ordinance are separable and some are valid while others are not, the former will be sustained and enforced: *Ex parte Christensen*, 85 Cal. 208, 24 Pac. 747; *City of Elk Point v. Vaughn*, 1 Dak. 113, 46 N. W. 577; *Harbaugh v. City of Monmouth*, 74 Ill. 367. If one construction would render an ordinance invalid or its application to a certain set of facts make it unreasonable in its effects, the courts will not so construe nor apply it; but if it is capable of a construction or an application that will avoid these consequences, courts will give it such construction and such application as properly to sustain and enforce it. The fact that an ordinance covers matters which the city has not power to control is no reason why it should not be enforced as to those which it may control: *Ex parte Cowert*, 92 Ala. 94, 9 South. 225; *Kettering v. City of Jacksonville*, 50 Ill. 39; *Commonwealth v. Kimball*, 24 Pick. 359, 35 Am. Dec. 326; *State v. Harris*, 50 Minn. 128, 52 N. W. 387, 531. If the invalid portions of an ordinance are inseparably joined with its other provisions, or are the foundation and substance of the ordinance, the ordinance is entirely invalid: *City of East St. Louis v. Wehrung*, 50 Ill. 28.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

CROSSMAN v. KEISTER.

[223 Ill. 69, 79 N. E. 58.]

DEEDS—Effect of Redelivery.—The delivery back by the grantee to the grantor of an unrecorded deed does not affect the legal title to the land, but when done with the intention that the deed be destroyed for the purpose of revesting title in the grantor, passes an equitable title. (p. 308.)

TRUSTS.—Violation of Parol Promises made by the grantee to the grantor to hold land in trust, or to convey it to a person designated by the grantor, does not create a constructive trust in the grantee unless he is guilty of fraud in procuring the conveyance. (p. 308.)

STATUTE OF FRAUDS—Constructive Trusts.—The statute of frauds makes invalid an express trust created by parol, but has no application to cases where the law raises a constructive trust by reason of the fraudulent acts and purposes in procuring title to the land. What constitutes fraud in such cases, sufficient to take the case out of the statute of frauds, depends in a large measure on the relation to each other of the parties to the transaction. (p. 308.)

STATUTE OF FRAUDS—Constructive Trusts.—If a conveyance is made between parties standing in a fiduciary relation to each other, on a parol agreement of the grantee to hold the land in trust for, or to convey it to, some one else, when in fact the grantee has no intention of performing the agreement, but intends to retain the benefit of the conveyance for his own use, the law raises a constructive trust, and takes the case out of the operation of the statute of frauds, and equity will compel the performance of the trust. (p. 308.)

TRUSTS—Constructive Enforcement.—If a father, upon conveying certain land to his daughter in exchange for a deed to other land he had previously conveyed to her, tells her that he intends the land last conveyed to her to be in full of her share of his estate, and in the event that he should die before recording the first conveyance made to her she is to repossess herself of the deed, and convey the land therein described to her sister, and

she accepts the deed last executed upon such conditions, they may, after her father's death, be specifically enforced against her as a constructive trustee. (p. 310.)

PARENT AND CHILD—Contracts as to Inheritance.—The parol promise of an heir to accept a certain amount of property in lieu of his expected interest in his parent's estate, when followed by the execution and delivery of a deed and the possession of the property conveyed, is valid. (pp. 312, 313.)

Le Forgee & Vail and J. R. Fitzgerald, for the appellant.

Outen & Roby, I. A. Buckingham, B. F. Shipley and Walters & Latham, for the appellees.

THE FARMER, J. There is very little controversy as to the facts in this case. The proof on behalf of complainants in the amended bill was, that when Mrs. Crossman made and delivered the deed for the half section in controversy back to her father and received from him conveyance to the whole section, her father told her he could not very well divide the section on account of the way it was watered, and that he thought best to give her the section and Nancy Keister the half section; that at that time Samuel Weaver told Mrs. Crossman if he died without the deed having been recorded he wanted said deed given back to her and for her then to convey the half section to Nancy Keister, and Mrs. Crossman agreed to do ^{so} so. The proof for complainants in the amended bill further shows that Samuel Weaver gave the deed to Matilda Keister, who was employed by him as a housekeeper, and who appears to have been much trusted by him, and told her to put it with the other deeds, and if he died without having had it recorded she should give it back to Mrs. Crossman, who would convey the land to Mrs. Keister. At the time this occurred Samuel Weaver was in very feeble health and appeared to realize he could live but a short time. On the day of Samuel Weaver's death, and a few hours before he died, all his children except Mrs. Keister, who was not there, were called into his room and presence. He then directed Matilda Keister to get the deeds he had made to his children that had not been delivered, and by his direction they were then and there delivered. When this was done he directed Mrs. Crossman to make a deed to Nancy Keister for the half section. On account of his feeble condition he was unable to talk very plainly, and Mr. Crossler, who stood very near him, assisted him in making himself understood. To his request made to Mrs. Crossman she

then and there assented. The next morning after Samuel Weaver's death Mrs. Crossman asked Matilda Keister to give her "that deed that pap said I was to have to deed Mrs. Keister." She was not given the deed just at that time, and later, during the same forenoon, she asked for it again. It was then given her by Matilda Keister, who testified she said to Mrs. Crossman at the time, "You know pap wanted you to deed it over to Mrs. Keister, and she said yes." After the deed was given to Mrs. Crossman she said, "Now I have got it and I may do something mean." The proof further shows that on a number of occasions Mrs. Crossman stated she was to convey the land to Nancy Keister. It is also shown by the testimony that at the time Samuel Weaver conveyed to Mrs. Crossman the section of land he told her it was to be in full of her share of all his real estate. We say the proof shows these things because they were testified to by witnesses ⁸¹ who were apparently credible and were not denied by anyone.

The theory of the complainants in the amended bill, as stated by counsel, is, first, that the relations between Samuel Weaver and Mrs. Crossman were such, under all the circumstances, as would make her a trustee under a constructive trust, with the duty of conveying to her sister, Nancy Keister, said half section of land; second, the conveyance by Samuel Weaver to Mrs. Crossman of the whole of a section was made in full of her share of the real estate of her father.

Appellant contends that there is no proof of fraud on the part of Mrs. Crossman out of which a constructive trust arises that would take the case out of the operation of the statute of frauds, and that there was no agreement by Mrs. Crossman to release her interest and expectancy as an heir to the real estate of her father. It is argued by counsel for appellant that she had no title to the half section of land at any time after her agreement with her father to convey it to Nancy Keister, if any such agreement was ever made, and therefore could not become a trustee for its conveyance; also, that she did nothing to induce her father to retain the title to the land in himself or to prevent him from conveying it to Nancy Keister, had he so desired.

It is evident from the proof that Samuel Weaver and Mrs. Crossman were both of the impression that if the deed to him was not recorded but was delivered back to her the title would be in Mrs. Crossman, and she could then make a valid con-

veyance of it. The fact that this is not the law does not change the equitable rights and duties of the parties. The delivery back by the grantee to the grantor of an unrecorded deed could not affect the legal title to the land, but such a delivery with the intention that the deed be destroyed for the purpose of revesting title in the grantor passes an equitable title: *Sanford v. Finkle*, 112 Ill. 146; *Gillespie v. Gillespie*, 159 Ill. 84, 42 N. E. 305; *Happ v. Happ*, 156 Ill. 82 183, 41 N. E. 39. While the unrecorded deed from Mrs. Crossman to her father was not delivered back to her by him during his lifetime for the purpose of revesting title in her so that she could convey it to Nancy Keister, it was, in accordance with his directions and at Mrs. Crossman's request, delivered to her for that purpose immediately after his death. The violation of a parol promise made by the grantee to the grantor to hold the land in trust or to convey it to a person designated by the grantor would not create a constructive trust in the grantee unless he was guilty of fraud in procuring the conveyance. The statute of frauds makes invalid an express trust created by parol, but has no application to cases where the law raises a constructive trust by reason of the fraudulent acts and purposes in procuring title to the land. What constitutes fraud in such cases sufficient to take the case out of the operation of the statute of frauds depends in a large measure on the relation to each other of the parties to the transaction. Fraud is much more readily inferred where the parties occupy a confidential or fiduciary relation toward each other. It seems to be well settled that where a conveyance is made between parties standing in a fiduciary relation to each other, on a parol agreement of the grantee to hold the land in trust for or convey it to some one else, when in fact the grantee has no intention of performing the agreement but intends to retain the benefit of the conveyance for his own use, the law raises a constructive trust and takes the case out of the operation of the statute of frauds. In such cases equity will compel the performance of the trust: *Larmon v. Knight*, 140 Ill. 232, 33 Am. St. Rep. 229, 29 N. E. 1116; *Pope v. Dapray*, 176 Ill. 478, 52 N. E. 58. A large collection of authorities in support of this proposition will be found in *Brison v. Brison*, 7 Am. St. Rep. 189. It would hardly be denied that if, when Samuel Weaver conveyed the section of land to Mrs. Crossman, the agreement between them had been that in consideration of the con-

veyance to her of the six hundred and forty acres she would convey the half section to which she held title by a previous conveyance ⁸³ from her father, to her sister, Nancy Keister, without having any intention of performing the agreement while knowing her father relied upon and confided in her to do so, this would be such a fraud that the law would make her a constructive trustee and compel her to execute the trust.

In *Roby v. Colehour*, 135 Ill. 300, 25 N. E. 77, the court quote with approval from the opinion of Lord Chelmsford in *Tate v. Williamson*, L. R. 2 Ch. App. Cas. 55, as follows: "The jurisdiction exercised by courts of equity over the dealings of persons standing in certain fiduciary relations has always been regarded as one of a most salutary description. The principles applicable to the more familiar relations of this character have been long settled by many well-known decisions, but the courts have always been careful not to fetter this useful jurisdiction by defining the exact limits of its exercise. Whenever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no confidential relation had existed."

In *Larmon v. Knight*, 140 Ill. 232, 33 Am. St. Rep. 229, 29 N. E. 1116, the court quoted from *Hill on Trustees*, as follows: "Where a person by means of his promises, or otherwise by his general conduct, prevents the execution of a deed or will in favor of a third party with a view to his own benefit, that is clearly within the first head of frauds as distinguished by Lord Hardwicke, viz., that arising from facts or circumstances of imposition; and the person so acting will be decreed to be a trustee for the injured party, to the extent of the interest of which he has been thus defrauded."

The proof shows that at the time Samuel Weaver made Mrs. Crossman the deed for the section and she made him a deed back for the half section in controversy, he was eighty ⁸⁴ years old, very feeble in health and to all appearances could live but a short time. He was desirous of making disposition of the greater portion of his real estate among his children for that reason. When he made the deed to Mrs.

Crossman for the section he told her, as we have before stated, he intended it to be in full of her share in all his real estate. The evidence does not show that Mrs. Crossman made any reply to this statement of her father but she accepted the conveyance, which gave her the title to the land, with right to the possession of it at the expiration of a lease thereon which expired March 1, 1906. She must be held, therefore, to have acquiesced in and accepted the land upon the conditions made by her father. It is true, she did not retain title to the half section under an agreement to convey it to Nancy Keister, but the case, in principle, is much the same as if she had. On account of the advanced age and feeble health of Samuel Weaver it is natural he should desire to avoid engaging in business transactions as far as possible. It is reasonable to presume these considerations influenced him in requesting Mrs. Crossman, in the event of his failing to have the deed recorded and delivering it back to her, to make the conveyance to Nancy Keister. It is evident both of them thought this would make good title. That Mrs. Crossman thought the repossession by her of the unrecorded deed would revest the title in her clearly appears from the proof and from her answer to the original bill filed in this case. In that answer she claimed to own the entire half section, and that the deed from her to her father was not intended to be recorded or to pass title to the grantee, and avers that before her father's death he directed Matilda Keister to return the deed to her in pursuance of their agreement, intending thereby to revest the title in her.

But it is contended the proof does not show Mrs. Crossman had any fraudulent intent at the time of the agreement between her and her father, when the deeds were exchanged ⁸⁵ between them. The proof does not sustain this contention. It is shown by the evidence, as before stated, that on the day of Samuel Weaver's death, and some five or six hours prior thereto, he repeated to Mrs. Crossman his request and direction that she convey the land to Nancy Keister, and she assented thereto. It is further shown by the evidence she said, after she had stood at the bedside of her father and assented to his request and before his death, that she wanted to get the deed back, as she thought she ought to have the land because they had spent all they made on it; that her lawyer had advised her to steal it, and that it would be all right if she got it back without her father's knowledge. That

she made these statements Mrs. Crossman did not deny. Whether, therefore, she had the fraudulent purpose and design in her mind to refuse to comply with her agreement with her father at the time it was originally made, it is true she had such fraudulent purpose and design before his death and before he repeated his request to her and she again agreed to it on the day of his death. It thus appears that prior to her last agreement with her father to convey the land to Nancy Keister she had no intention of doing so, for she had previously consulted a lawyer with reference to getting the unrecorded deed back in her possession for the express purpose of claiming the land herself. Just how soon after the exchange of deeds between Mrs. Crossman and her father she consulted a lawyer with reference to getting the unrecorded deed back again does not appear from the evidence, but it could not have been very long after that transaction, for the deeds were exchanged February 16th, and Samuel Weaver died on the 9th of March following. Taking the proof altogether, it tends strongly to show that when Mrs. Crossman first agreed with her father to convey the half section of land to Nancy Keister she did not intend to do so, but made the agreement with a fraudulent intent and purpose in her mind to influence her father not to record the deed and convey the land to Nancy ⁸⁶ Keister, in order that she might profit thereby. The fact that Samuel Weaver died with the legal title in him and that Mrs. Crossman would by law inherit only the undivided one-fifth of the land does not alter her relations to whatever interest she succeeded to in the land, nor relieve her of the duty and obligation, as a constructive trustee, to convey it to Nancy Keister.

Much reliance is placed on *Lantry v. Lantry*, 51 Ill. 458. 2 Am. Rep. 310, by appellant, but we think that case is by no means conclusive of this case. In the *Lantry* case, John Lantry conveyed to Thomas Lantry, by absolute deed, eighty acres of land. John Lantry had a son born after he was divorced from his wife and who never lived with his father. When he made the deed to his brother he was ill and expected to be taken care of by the brother, who asked him at the time if his son was not to have something. John Lantry replied, "If the boy is worthy, give him what you please; if not, never look at him." The court held in that case there was no evidence that Thomas Lantry ever said or did anything to induce his brother to convey the land to him or to prevent him

from conveying it to his son. Such is not the case under this evidence. It cannot be said that Mrs. Crossman's promise to convey the land to Nancy Keister did not induce her father to withhold the deed from record and not himself convey the land to said daughter. If Mrs. Crossman had refused to agree to comply with her father's wishes, it is reasonable to infer that he would in that case have attended to the matter himself. Even on the day of his death, if she had repudiated the trust reposed in her by her father when he again told her to make the deed to Nancy Keister, there would then have been time enough for him to have made it himself, for the proof shows, though very weak, his mind was clear, and he lived some five or six hours after that promise was made by Mrs. Crossman.

Our conclusion from the evidence is, that Mrs. Crossman, by her fraudulent undertaking and promise after she ⁸⁷ had received what was intended by her father and accepted by her as her full share of his real estate, induced her said father not to convey the land in controversy to her sister, Nancy Keister, for the purpose and intention of profiting thereby herself. If we are correct in these conclusions, whatever of interest she succeeded to in the land as a result of her fraudulent conduct she cannot be permitted to retain, but is in equity bound to convey to Nancy Keister. A trust thus created need not be in writing. It was aptly said in *Brown v. Doane*, 86 Ga. 32, 12 S. E. 179, 11 L. R. A. 381: "There is no law which requires a fraudulent undertaking to be manifested by writing. Those who use promises which they make deceitfully, for the purpose of accomplishing fraudulent designs, are generally careful not to furnish written evidence of their turpitude. Such promises, whatever may be their terms, do not, unless reduced to writing, raise express trusts, but the law, acting upon them according to their nature, makes them a basis upon which to build up in favor of the defrauded party an implied or constructive trust." We have examined the large number of cases cited in the exhaustive brief of appellant, but deem it unnecessary to comment on them or attempt to distinguish them from this case. It is sufficient to say that the weight of authority is as we have herein stated.

Whether the acceptance by Mrs. Crossman of the section of land in full of all her interest in and to her father's real estate was of itself sufficient to deprive her of any interest

in the land in controversy, in the view we take of the case is not necessary here to be decided, though it has been repeatedly held in this state that the parol promise of an heir to accept a certain amount of property in lieu of his expected interest in his father's estate, when followed by the execution and delivery of a deed and the possession of the property conveyed, is valid: *Gary v. Newton*, 201 Ill. 170, 66 N. E. 267; *Kershaw v. Kershaw*, 102 Ill. 307; *Galbraith v. McLain*, 84 Ill. 379. Whatever may have been the legal effect ^{as} of this agreement standing alone, considered in connection with the other proof in this case it clearly establishes such fraudulent conduct on the part of Mrs. Crossman that equity cannot permit her to profit thereby.

The decree of the circuit court is affirmed.

A Conveyance of Land Under an Oral Agreement between the grantor and the grantee that the latter will convey the property to another person upon the happening of a certain event creates a trust which may be enforced in equity as not affected by the statute of frauds: *Collins v. Collins*, 98 Md. 473, 103 Am. St. Rep. 408, and see the cases cited in the cross-reference note thereto. A grantee is guilty of actual fraud if he obtains an absolute deed without consideration by means by a parol promise to reconvey, made without any intention of performing it, and cannot interpose the statute of frauds as a defense to an action to declare a constructive trust in the land: *Brisson v. Brisson*, 75 Cal. 525, 7 Am. St. Rep. 189. See, too, *Stahl v. Stahl*, 214 Ill. 131, 105 Am. St. Rep. 101.

What Constitutes a Delivery of a Deed is the subject of a monographic note to *Brown v. Westerfeld*, 53 Am. St. Rep. 537-556.

CHICAGO TERMINAL TRANSFER RAILWAY COMPANY v. GREER.

[223 Ill. 104, 79 N. E. 46.]

LOCAL OPTION LAWS.—A provision in a statute that the final operation thereof may be made to depend upon some contingency, as the vote of the electors of a given territory, within which the law is to operate, or some like contingency, is not the delegation of legislative functions to electors or to corporate officials of the territory or municipality. (p. 315.)

CONSTITUTIONAL LAW—Local Option Laws—Delegation of Legislative Power.—A statute providing that city courts may be organized and established in any city which contains at least three thousand inhabitants whenever the city council shall adopt an ordinance or resolution to submit the question whether such court shall

be established to the qualified voters of such city, and two-thirds of the votes cast at such election shall be in favor of the establishment of such court, is not unconstitutional as an illegal delegation to city councils of legislative power, nor is it invalid as local or special legislation. (p. 315.)

CONSTITUTIONAL LAW—Local and Special Laws.—When Classification on the basis of population has reasonable relation to the purposes and objects of the legislation, the statute providing for such classification is not within the constitutional prohibition against special or local laws. (p. 315.)

CONSTITUTIONAL LAW—Power to Create City Courts.—Constitutional provisions that all judicial powers shall be vested in one supreme court, circuit courts, county courts, justices of the peace, police magistrates, and such courts as may be created by law in and for cities and incorporated towns, confer ample power upon the legislature to provide for the establishment of city courts. (pp. 316, 317.)

J. B. Barton, for the plaintiff in error.

Lindhout & Lindhout, for the defendant in error.

¹⁰⁵ VICKERS, J. This writ of error challenges the constitutionality of the act of the General Assembly adopted March 26, 1874, entitled "An act in relation to courts of record" (1 Starr & Curtis' Stats. 1200), and also the constitutionality of section 21 of the original act as amended by the act of May 10, 1901: Hurd's Stats. 1905, p. 631.

Section 21 of the act provides: "A city court consisting of one or more judges, not exceeding five, and not exceeding one judge for every fifty thousand inhabitants, may be organized and established under this act in any city which contains at least three thousand inhabitants, whenever the common or city council shall adopt an ordinance or resolution to submit the question whether such court shall be established, consisting of one or more judges, not exceeding five, as may be specified in such ordinance or resolution, to the qualified voters of such city, and two-thirds of the votes cast at such election shall be in favor of the establishment of such court."

It is contended that the act delegates to city councils the power (1) to ascertain whether the city contains at least three thousand inhabitants; (2) to determine as to the advisability or necessity of the establishment of a city court in the municipality; (3) to determine how many judges shall be in the city court; and that the powers so attempted to be delegated are legislative in character and must be exercised only by the legislature.

The population of a city may be ascertained by the exercise of ministerial acts alone; hence that objection is groundless. This court is committed to the view that the provision in an enactment that the final operation thereof may be made to depend upon some contingency, as the vote of electors of a given territory within which the law is to operate, or some like contingency, is not the delegation of legislative functions to electors or to corporate officials of the territory or municipality: *Home Ins. Co. v. Swigert*, 104 Ill. 653. ¹⁰⁸ The courts of sister states have declared the same doctrine: *State v. Sullivan*, 67 Minn. 379, 69 N. W. 1094; *Moers v. City of Reading*, 21 Pa. 188.

The contention that this doctrine has application only when the enactments are local in their operation and directly affect the people, only, to whom they are referred for approval or rejection, if conceded, would not render the enactments under consideration unconstitutional, for the reason the direct operation of the subject of the act is restricted to the inhabitants of the city or those voluntarily within its territorial limits. The act is not local or special legislation because the cities in which city courts are created are restricted to those having not less than three thousand inhabitants. The classification of municipalities, for purposes of legislation, on the basis of population was considered and approved in *Cummings v. City of Chicago*, 144 Ill. 563, 33 N. E. 854, and the subject was there fully discussed and the discussion need not be here repeated. The necessity for additional courts may arise because of the number of inhabitants in a city, and thus the classification be justified. When the classification on the basis of population has reasonable relation to the purposes and objects of the legislation, the act is not within the constitutional prohibition against local or special laws: *People v. Knopf*, 183 Ill. 410, 76 N. E. 155; *L'Hote v. Village of Milford*, 212 Ill. 418, 103 Am. St. Rep. 234, 72 N. E. 399.

The argument that city courts, under the act now being considered, are created by the officials and voters of the municipality is not sound. It is the act of the legislature that creates the city court—not the act of the city council or the vote of the electors. The action of the city council, and the election held in pursuance thereof, are but the contingencies upon which the enactment comes into operation in any given city.

Section 39 of article 6 of the constitution, which provides that all laws relating to courts shall be of general and uniform operation, is not infringed by the act under consideration. ¹⁰⁷ The act provides for courts of the same jurisdiction and authority in all cities in the state of the same population. The operation of the act is uniform and general in all cities in which its provisions come into operation. There is but one mode of determining the number of judges in the different city courts, and no lack of uniformity or generality of provisions appears in this respect.

Nor do we think there is any force in the contention that the General Assembly was wanting in power to establish city courts in any city of Cook county. The argument of counsel for plaintiff in error seems to be based on expressions in the opinion of this court in *Missouri River Tel. Co. v. First Nat. Bank of Sioux City*, 74 Ill. 217, in which we declared that the judicial power of the state was to be found expressed in section 1 of article 6 of the constitution, and that this section exhausted the judicial power of the people of the state, fully disposing of such power and leaving no residuum. Section 23 and to and including section 28 of said article 6 of the constitution are grouped under the heading "Courts of Cook County." Following the reasoning in *Missouri River Tel. Co. v. First Nat. Bank*, 74 Ill. 217, it is insisted these sections expressed the judicial power of the people of the state as to Cook county. Section 26 of said article 6 relates to the then existing "recorder's court of the city of Chicago," changes the name of that court to the "criminal court of Cook county," and continues the court in existence under such last-mentioned name, with powers and jurisdiction identical with the powers and jurisdiction granted to city courts under the act under consideration.

It is argued that sections 23 to 26 exhausted the judicial power as to courts in Cook county, and that the provisions with relation to "recorder's court of the city of Chicago," whereby the same was merged into the "criminal court of Cook county" and given power and jurisdiction throughout the county, forbade the creation by the legislature of any other court in Cook county having like power and jurisdiction ¹⁰⁸ as given the criminal court of Cook county by section 26 of article 6. Section 1 of article 6 of the constitution is as follows: "The judicial powers, except as in this article is otherwise provided, shall be vested in one supreme court,

circuit courts, county courts, justices of the peace, police magistrates and such courts as may be created by law in and for cities and incorporated towns." Here is ample power for the creation of city courts by the legislature. Section 26 of the same article 6 does not intend, or by fair implication create, any restriction or limitation on the power expressed in said section 1. The two sections construed together may both be given operation. We see no difficulty in so considering the two sections and giving them both full effect.

The judgment appealed from must be and is affirmed.

CONSTITUTIONALITY OF LOCAL OPTION LAWS.

I. Generally, 317.

II. Laws Relating to Schools, 319.

III. County Division, 320.

IV. Establishment and Removal of County Seats, 321.

V. Municipal Affairs, 321.

VI. Bond Issues, 323.

VII. Stock and Fence Law, 323.

VIII. Liquor Laws, 324.

I. Generally.

Although there is some conflict of authority, the great weight thereof tends to firmly establish the doctrine that though the legislature cannot delegate its power to enact laws, yet whether or not an enacted law shall become operative may be made to depend upon the popular will of the citizens of the place or locality where the statute is intended to operate, and, generally speaking, an act of the legislature affecting the people of a certain locality or of the whole state is not unconstitutional or invalid, simply because, by its terms, it is to take effect only after it shall have been approved by a majority of the popular vote of the people of the locality where it may take effect. Such a statute, says the great majority of the cases, is not an unlawful delegation by the legislature of its power to enact laws: *Hobart v. Butte Co. Supervisors*, 17 Cal. 23; *Robinson v. Bidwell*, 22 Cal. 379; *People v. Salomon*, 51 Ill. 37; *Erlinger v. Boneau*, 51 Ill. 94; *Clarke v. Rogers*, 81 Ky. 43; *State v. Pond*, 93 Mo. 606; *State v. Hoagland*, 51 N. J. L. 62, 16 Atl. 166; *Noonan v. Freeholders*, 51 N. J. L. 454, 18 Atl. 117; *State v. County of Hudson*, 52 N. J. L. 398, 20 Atl. 255; *Clarke v. City of Rochester*, 5 Abb. Pr. 107; *Smith v. McCarthy*, 56 Pa. 359; *State v. Copeland*, 3 B. I. 33; *Louisville etc. R. R. Co. v. Davidson County Court*, 1 Sneed, 637, 62 Am. Dec. 424; *State v. Parker*, 26 Vt. 357; *Rutter v. Sullivan*, 25 W. Va. 427; *State v. O'Neill*, 24 Wis. 149; *State v. City of Janesville*, 26 Wis. 291. The legislature has power to pass a conditional statute and to make its taking effect depend upon some subsequent event, and it may also provide within what

time an act may be done, if done at all. Making certain provisions of an act depend upon a vote of the people of a county does not delegate to the people the power to pass or repeal the act, which is a valid statute from the time of its passage and approval, especially where the legislature itself provides that if the provisions of the act be not accepted within the period named therein, they shall not thereafter be carried into effect: *People v. McFadden*, 81 Cal. 489, 15 Am. St. Rep. 66, 22 Pac. 851. The reasons for the rule are well stated in *State v. Pond*, 93 Mo. 606, 6 S. W. 469, to be that while the rule that the legislature is alone invested with the power to make laws and cannot delegate its authority to the people does not admit of question or doubt, yet another rule is as firmly established; namely, that the legislature may enact a law to take effect or go into operation, on the happening of a future event or contingency, and such contingency may be a vote of the people; and a local option act providing that any county, or town, or city of a class named may, by a majority vote, place such county, town or city under the operation of the law, it does not refer to them the question of passing a law. The legislature has already done this, and only called upon them to decide by a vote whether they will accept the provisions of a law regularly enacted by both houses of the legislature and approved by the governor. It is the law itself which authorizes the vote to be taken, and when taken, the law, and not the vote, declares the result which shall follow the vote. The vote is the means provided to ascertain the will of the people, not as to the enactment of the law, but whether it shall take effect, and if the majority vote against it, the law and not the vote, declares the result. The vote springs from the law, and not the law from the vote. In an early California case it was decided that where a law is passed providing that certain acts shall be done upon the contingency of the vote of the electors of a certain district, the vote upon such proposition is not an act of legislation, but simply an event upon the happening of which the law is to take effect: *Robinson v. Bidwell*, 22 Cal. 379.

The power to enact laws necessarily includes the right in the law-making power to determine and prescribe the conditions upon which the law in a given case shall come into operation or be defeated, and this contingency may as well be the result of the vote of the people of the locality to be affected by the law as any other: *People v. Salomon*, 51 Ill. 37. Hence, it is fairly within the scope of legislative power to prescribe, as one of the conditions upon which the law in a given case shall come into operation or be defeated, that it shall depend upon a vote of the people of the locality to be affected by its provisions: *Erlinger v. Boneau*, 51 Ill. 94.

There are a number of authorities which maintain the general proposition that with certain exceptions no legislative act can be so framed as that it must derive efficacy from a popular vote, and

that a statute providing that it shall be effective only in such counties, municipalities, or localities as may adopt it by a majority vote of the legal voters thereof is unconstitutional and void as an illegal delegation of legislative power. Among the cases which maintain this doctrine may be cited *Ex parte Wall*, 48 Cal. 279, 17 Am. Rep. 425; *Santo v. State*, 2 Iowa, 165, 63 Am. Dec. 487; *State v. Beneke*, 9 Iowa, 203; *Weir v. Cram*, 37 Iowa, 649; *Opinion of Justices*, 160 Mass. 586, 38 N. E. 488, 23 L. R. A. 113; *Wright v. Cunningham*, 115 Tenn. 445, 91 S. W. 293; *Winters v. Hughes*, 3 Utah, 443, 24 Pac. 759.

Some of these cases, while they adhere to the principle announced on the ground that it is founded on the better reasoning, admit, as was admitted in *Wright v. Cunningham*, 115 Tenn. 445, 91 S. W. 293, that "the great majority of the cases seem to favor the constitutionality of what are termed 'local option laws,' under which the people of a county, city, or town, are permitted to decide by a popular vote whether a given statute . . . shall be operative in such county, city, or town." Although in *Opinion of Justices*, 160 Mass. 586, 38 N. E. 488, 23 L. R. A. 113, a majority opinion decided that an act granting to women the right to vote in town and city elections and providing that it should take effect in a city or town only upon its acceptance by a majority vote of the voters of such city or town, was unconstitutional on the ground of an unlawful delegation of legislative power, yet in such majority opinion it was admitted that "there has been some conflict of authority upon the constitutionality of what are called local option laws, but they have been held constitutional by a majority of the courts which have considered them."

II. Laws Relating to Schools.

It is an almost universal rule that statutes relating to the establishment and control of public schools, and which leave it to the popular will of the people of a certain locality whether or not the law shall become effective in that district, are deemed constitutional, and not an unauthorized delegation of legislative power. Thus, the ascertainment of the will of the people of a district in relation to a tax proposed to be levied for school purposes as authorized by statute is merely the action of the agency selected by the legislature to determine when and to what extent such conditional statute shall become operative in such district, and such statute is constitutional, though it depends for its final effect upon the discretionary acts of individuals: *Marshall v. Donovan*, 10 Bush, 681.

Or a statute which provides that three or more towns in any county may require the county commissioners to establish a truant school in such county is constitutional, and does not delegate legislative power: *City of Lynn v. County Commissioners*, 148 Mass. 148, 19 N. E. 171.

A statute providing for the dissolution of independent school districts, dependent upon the vote of the electors thereof, is not unconstitutional as being a delegation of legislative powers: *State v. Cooley*, 65 Minn. 406, 68 N. W. 66. The legislature cannot propose a law relating to public schools, and submit it to the people to pass or reject it by a popular vote: *State v. Wilcox*, 45 Mo. 458; *Thorne v. Cramer*, 15 Barb. 112; *Bradley v. Baxter*, 8 How. Pr. 18; *Barto v. Himrod*, 8 N. Y. 483, 59 Am. Dec. 506; but a statute authorizing cities to organize for school purposes becomes valid on its passage, and if the people, as authorized by it, by vote, elect not to avail themselves of its privileges, their action does not in the least impair its force, and it cannot be held unconstitutional merely because it depends for its efficacy upon the vote of the people of a particular district: *State v. Wilcox*, 45 Mo. 458. An act of the legislature authorizing municipal corporations to take control of their public schools, by a majority vote of their electors, is not unconstitutional as being a delegation of legislative functions to such electors: *Werner v. Galveston (Tex.)*, 7 S. W. 726, 12 S. W. 159. A statute passed providing for the establishment of a system of free schools in a particular district, and providing that it shall not be carried into effect until the people of the district shall, by a vote taken for the purpose, approve it, is valid and constitutional: *Bull v. Read*, 13 Gratt. 78.

III. County Division.

Statutes which submit to a popular vote of the electors of a county the question whether a portion of the territory of an adjoining county shall be annexed to it, and providing that if a majority of the votes are for annexation, that the organization of the adjoining county shall be abandoned, and its territory shall be divided and annexed in part to the county in which the vote is taken and in part to another adjoining county, are constitutional and valid: *People v. Nalby*, 49 Cal. 478. A statute which provides for the formation of a new county out of part of another county, upon the assent of two-thirds of the qualified electors of the proposed new county voting at an election to be held for that purpose at a time fixed in the act, is constitutional and not a delegation of legislative power: *People v. McFadden*, 81 Cal. 489, 15 Am. St. Rep. 66, 22 Pac. 851. Or a statute passed authorizing a change of boundaries between two counties is not rendered invalid as a delegation of legislative powers by reason of provisions therein that the change of boundaries provided for should not become operative until approved by a two-thirds vote of the qualified electors in the affected district in its favor at an election to be held at a time fixed by the act: *Jackson v. State*, 131 Ala. 21, 31 South. 380. And a law passed providing for the division of a county and the formation of a new county from the same territory, to take effect on the majority of the votes of the affected district being cast for such division, is constitutional and

valid: *People v. Reynolds*, 10 Ill. 1. A statute was passed providing that a certain county should be divided, but that the statute should be submitted to a vote of the people for their approval, and it was held that it was the division of the county, and not the enactment of the statute, which the statute required should be decided by the popular vote, and that it was therefore constitutional, and not a delegation of the enacting power by the legislature: *State v. Elwood*, 11 Wis. 17.

IV. Establishment and Removal of County Seats.

The legislature has the constitutional power to enact a law to submit to the voters of a county the selection of a county seat, and a statute authorizing the people of a county to vote on the question of the selection and establishment of a county seat and providing that the same shall be permanently located according to their vote, is not an improper delegation of legislative functions to the people, nor violative of any constitutional provision: *Ex parte Hill*, 40 Ala. 121; *Territory v. Mohave County (Ariz.)*, 12 Pac. 730; *Upham v. Sutter Co. Supervisors*, 8 Cal. 378; *Lake County Commissioners v. State*, 24 Fla. 263, 4 South. 795; *Barnes v. Pike Co. Supervisors*, 51 Miss. 305; *Commonwealth v. Painter*, 10 Pa. 214; *Walker v. Tarrant Co.*, 20 Tex. 16.

The same rule applies as to the removal of the county seat, as the question of such removal is one of local concern, which the legislature has power, by statute, to refer to the voters of the county: *Clark v. Jack*, 60 Ala. 271; *Edwards v. Police Jury*, 39 La. Ann. 855, 2 South. 804; *Hamilton v. Carroll*, 82 Md. 326, 33 Atl. 648.

It has been said, as a reason for the rule, that since the legislature may lawfully delegate to others those powers which it cannot understandingly or advantageously do itself, it may delegate to the voters of a county the power of selecting or removing the county seat: *Upham v. Sutter Co. Supervisors*, 8 Cal. 378. The legislature may locate or remove county seats, either directly or indirectly, by making it depend upon a contingency and by appointing an agent, such as an election, to determine upon such contingency: *Walker v. Tarrant County*, 20 Tex. 16.

V. Municipal Affairs.

It is now the established doctrine that statutes relating to municipal corporations, imposing liabilities upon them, or authorizing them to incur obligations or make improvements, may be referred to the people of the districts immediately affected, to decide by their votes whether they will assume the burdens. But the legislature must enact a complete and valid law according to the prescribed usages, and it must derive its whole vigor and vitality from the legislature, and no additional efficacy from the popular vote: *In re Madera Irr. Dist.*, 92 Cal. 296, 27 Am. St. Rep. 106, 28 Pac. 272, 14 L. R. A. 675, 755; *State v. District Court*, 33 Minn. 235, 22 N. W. 625; *Lammert*

v. Lidwell, 62 Mo. 188, 21 Am. Rep. 411; Bank of Rome v. Village of Rome, 18 N. Y. 38. Though the General Assembly cannot delegate its power to enact laws, it may provide that a new charter for a city shall depend upon the popular vote of such city: Clark v. Rogers, 81 Ky. 43. It is not an unlawful delegation of legislative power to make the taking effect of an act for chartering a city dependent on its acceptance by vote of the resident taxpayers of the territory to be included: People v. City of Butte, 4 Mont. 174, 47 Am. Rep. 346, 1 Pac. 414. A charter granted by the legislature to a municipal corporation may constitutionally be submitted to the corporators for their acceptance before it goes into operation, and a vote of acceptance by the corporators of the charter as tendered is not an act of legislation: City of Paterson v. Society for Establishing Useful Manufactories, 24 N. J. L. 385. And the legislature may pass an act revising a city charter to take effect only when assented to by a vote of the people of the city: City of Brunswick v. Finney, 54 Ga. 317. But an act passed amending the charter of a city and providing that it should be submitted to the electors thereof, and if a majority voted for an approval of it, it should become a law, is unconstitutional and void, as an unlawful delegation of legislative power to the voters of such city to say whether the act should become a law or not: People v. Stout, 23 Barb. 349, 13 How. Pr. 314, 4 Abb. Pr. 22. While the General Assembly cannot delegate its powers to the people, it may provide that the authority of a city shall not be extended over new territory, but upon the expressed consent of the people of the city: Morford v. Unger, 8 Iowa, 82; Manly v. City of Raleigh, 4 Jones Eq. (57 N. C.) 370. So a statute providing that it shall not become operative until the proposition to annex the territory shall be approved by a majority vote of the qualified electors voting thereon, is not an unconstitutional delegation of legislative power: City of Little Rock v. Town of North Little Rock, 72 Ark. 198, 79 S. W. 785; Attorney General v. Springwells Township, 143 Mich. 527, 107 N. W. 87. A statute uniting two municipalities and providing that the act shall not take full effect unless accepted by the voters of the respective municipalities, is not unconstitutional as a delegation of legislative power: Stone v. City of Charlestown, 114 Mass. 214. A statute providing for the consolidation of a city is not unconstitutional merely because it provides that the people of the affected districts may decide by an election whether or not they will accept or reject the consolidation: Smith v. McCarthy, 56 Pa. 359.

A statute authorizing electors of an incorporated village to determine by vote what sections of the general law for the incorporation of villages shall apply to their village is not a delegation of legislative power, but merely a provision permitting the electors of the village to accept powers already granted: Bank of Chenango v. Brown, 26 N. Y. 467. A law leaving it to a majority vote of each county

whether it will organize townships thereunder or not does not delegate legislative powers to the counties: Opinion of Judges, 55 Mo. 295. So a statute giving electors power to decide by ballot whether a new township shall be carved out of an old one is constitutional: Commonwealth v. Judges of Quarter Sessions, 8 Pa. 391. So a statute authorizing incorporated villages to terminate their existence by popular vote is not unconstitutional as an unauthorized delegation of legislative authority: Blauvelt v. Village of Nyack, 9 Hun, 153.

VI. Bond Issues.

A statute authorizing the issue and donation of bonds, if approved by a popular vote of a district, is a mere grant of power upon conditions, coupled with a prescription of the mode in which the power granted may be exercised, and is not an unconstitutional exertion of legislative power: Chicago etc. R. R. Co. v. Otoo County, 16 Wall. 667, 21 L. ed. 375; Olcott v. Supervisors, 16 Wall. 78, 21 L. ed. 382; Town of Queensbury v. Culver, 19 Wall. 83, 22 L. ed. 100. It is not an unauthorized delegation of legislative power to authorize a county by statute to aid in the construction of a railroad by a bond issue, provided a majority of the voters assent thereto: Hobart v. Supervisors of Butte Co., 17 Cal. 23; Starin v. Town of Genoa, 23 N. Y. 439; Gould v. Town of Sterling, 23 N. Y. 439. A statute authorizing a county to subscribe to capital stock of a railroad and issue bonds for the payment thereof does not delegate legislative power in providing that the subscription shall not be made until the assent of a majority of the electors of the county is first obtained at an election held for that purpose: Lafayette etc. R. R. Co. v. Geiger, 34 Ind. 185; Clarke v. City of Rochester, 28 N. Y. 605; Cincinnati etc. R. R. Co. v. County Commissioners, 1 Ohio St. 77; Moers v. City of Reading, 21 Pa. 188.

The charter of a railroad company authorizing the submission to the voters of a city of the question whether such city should subscribe for its stock is not void as conferring legislative power upon the city: City of San Antonio v. Jones, 28 Tex. 19. A statute authorizing the people of a county, city, or certain district, to vote a tax in aid of a railroad with which to purchase its bonds is not legislation by the people, and is valid: Dubuque County v. Dubuque etc. R. R. Co., 4 G. Greene, 1; Slack v. Maysville etc. R. R. Co., 13 B. Mon. 1. A provision in the charter of a turnpike company authorizing a subscription to its capital stock, if the majority of the electors of a certain township assent thereto, is constitutional and valid: Loomis v. Spencer, 1 Ohio St. 153.

VII. Stock and Fence Law.

It is competent for the legislature to pass a law regulating the running at large of livestock which shall be applicable only to any county or subdivision of a county on a majority vote of the freehold-

ers thereof: *Davis v. State*, 141 Ala. 84, 109 Am. St. Rep. 19, 37 South. 454; *Wright v. Cunningham*, 115 Tenn. 445, 91 S. W. 293; *Armstrong v. Traylor*, 87 Tex. 598, 30 S. W. 440. But an act to prevent domestic animals from running at large in those counties which, by a majority vote, decide to agree thereto, and providing that if, on a submission to a popular vote, a majority favor their restraint, it shall be unlawful for animals to run at large, and prohibiting the county court from ordering a special election determining the adoption of the law, more than once per year, is a delegation to the people of the law-making power, and unconstitutional on the ground that such act has no existence without the special election: *Lammert v. Lidwell*, 62 Mo. 188, 21 Am. Rep. 411.

A provision of a fence law that it should take effect upon the happening of a contingent event, namely, upon its being approved by the necessary number of voters of a particular district, is not a transfer of legislative power to the voters: *Cain v. Davie County Commrs.*, 86 N. C. 8.

VIII. Liquor Laws.

A local option liquor law authorizing the municipal divisions of the state to decide by popular vote whether a prohibitive or restrictive liquor law shall be in force within their limits, if it is a complete enactment in itself, requiring nothing further to give it validity, and depending upon the popular vote only for a determination of the territorial limits of its operation, is a valid and constitutional exercise of the legislative power. To this effect the authorities are numerous and uniform: *Boyd v. Bryant*, 35 Ark. 69, 37 Am. Rep. 6; *State v. Wilcox*, 42 Conn. 364, 19 Am. Rep. 536. Territory v. O'Connor, 5 Dak. 397, 41 N. W. 746, 3 L. R. A. 355; *Caldwell v. Barrett*, 73 Ga. 604; *Groesch v. State*, 42 Ind. 547 (in effect overruling *Meshmeier v. State*, 11 Ind. 482; *Maize v. State*, 4 Ind. 342); *State v. Forkner*, 94 Iowa, 1, 62 N. W. 772, 28 L. R. A. 206; *Commonwealth v. Weller*, 14 Bush, 218, 29 Am. Rep. 407; *Guyle v. Owen County Court*, 83 Ky. 61; *Fell v. State*, 42 Md. 71, 20 Am. Rep. 83; *Slymer v. State*, 62 Md. 237; *Commonwealth v. Dean*, 110 Mass. 357; *Feek v. Bloomington*, 82 Mich. 393, 47 N. W. 37, 10 L. R. A. 69; *State v. Cooke*, 24 Minn. 247, 31 Am. Rep. 344; *Lemon v. Peyton*, 64 Miss. 161, 8 South. 235; *Schulherr v. Bordeaux*, 64 Miss. 59, 8 South. 201; *State v. Pond*, 93 Mo. 606, 6 S. W. 469; *Ex parte Handler*, 176 Mo. 383, 75 S. W. 920; *In re O'Brien*, 29 Mont. 530, 75 Pac. 196; *State v. Judge of Circuit Court*, 50 N. J. L. 585, 15 Atl. 272, 1 L. R. A. 86; *Gloversville v. Hewell*, 70 N. Y. 287; *State v. Rouch*, 47 Ohio, St. 478; *Stevens v. State*, 61 Ohio St. 597, 56 N. E. 478; *Fouts v. City of Hood River*, 46 Or. 492, 81 Pac. 370, 1 L. R. A., N. S., 483; *Locke's Appeal*, 72 Pa. 491, 13 Am. Rep. 716; *State v. Barber* (S. Dak.), 101 N. W. 1078; *Ex parte Lynn*, 19 Tex. App. 293; *Ray v. State* (Tex. Cr. App.), 83 S. W. 112; *Hoover v. Thomas*, 35 Tex.

Civ. App. 535, 80 S. W. 859; *State v. Parker*, 26 Vt. 357; *State v. Scampini*, 77 Vt. 92, 59 Atl. 201; *Savage v. Rase*, 84 Va. 619, 5 S. E. 565. The above-cited cases generally maintain that such a local option liquor law is not unconstitutional as a delegation of legislative power to the people, since the reference to the voters is not for the purpose of enabling them to make a law, but simply and merely to accept or reject by their votes its provisions in their particular district or locality: *Caldwell v. Barrett*, 73 Ga. 604; *Groesch v. State*, 42 Ind. 547; *Santo v. State*, 2 Iowa, 165, 63 Am. Dec. 487; *Sparks v. Commonwealth*, 13 Bush, 485; *Schulherr v. Bordeaux*, 64 Miss. 59, 8 South. 201; *In re O'Brien*, 29 Mont. 530, 75 Pac. 196; *Savage's Case*, 84 Va. 619, 5 S. E. 565; *Weil v. Calhoun*, 25 Fed. 865.

Such a statute must, however, be complete and perfect when it leaves the legislature, because its terms and details cannot be left to the popular vote. It is not competent, nor constitutional, for the legislature to delegate to the people to decide what kind of a liquor law they will choose to have in their district. The only question that can be left to them to decide by vote is as to whether or not they will adopt a particular statute as enacted: *Ex parte Wall*, 48 Cal. 279, 17 Am. Rep. 425; *Rice v. Foster*, 4 Harr. 479; *State v. Weir*, 33 Iowa, 134, 11 Am. Rep. 115; *Geebrick v. State*, 5 Iowa, 491. Although a general local option liquor law may be adopted in some parts of the state and rejected in others, it is not for that reason unconstitutional, as lacking in uniformity, provided it is submitted in the same way to all the counties or other political divisions of the state; nor is such a law unconstitutional as constituting a private local or special law: *Territory v. O'Connor*, 5 Dak. 397, 41 N. W. 476, 3 L. R. A. 355; *State v. Forkner*, 94 Iowa, 1, 62 N. W. 772, 28 L. R. A. 206; *Groesch v. State*, 42 Ind. 547; *State v. Pond*, 93 Mo. 606, 6 S. W. 469; *Ex parte Swann*, 96 Mo. 44, 9 S. W. 10; *In re O'Brien*, 29 Mont. 530, 75 Pac. 196; *State v. Judge of Circuit Court*, 50 N. J. L. 585, 15 Atl. 272, 1 L. R. A. 86; *Gordon v. State*, 46 Ohio St. 607, 23 N. E. 63, 6 L. R. A. 749; *Lloyd v. Dollisin*, 23 Ohio C. C. 571; *State v. Barber* (S. Dak.), 101 N. W. 1078. In the absence of constitutional prohibition, there is no underlying principle of natural right and justice which forbids the legislature to enact laws for a certain locality different from those applicable to other portions of the state, or which prevents it from suspending the operation of general laws as to any particular locality. Hence, in the absence of such constitutional restraint, a local option liquor law cannot be declared invalid on any such ground: *Feek v. Township Board of Bloomingdale*, 82 Mich. 393, 47 N. W. 37, 10 L. R. A. 69.

ELSER v. VILLAGE OF GROSS POINT.

[223 Ill. 230, 79 N. E. 27.]

INJUNCTION—Dissolution of.—If, upon the face of a bill for injunction and no other relief, no sufficient ground for equitable relief is shown, the court may, on motion, dissolve the injunction and dismiss the bill. (p. 327.)

CHAMPERTY—Evidence of.—In a case where a common right is involved, the participation of any party having an interest in the result of the litigation is not evidence of champerty or maintenance. (p. 327.)

CHAMPERTY—Collateral Attack.—The fact that litigation grows out of a champertous contract is no defense in a collateral proceeding, and the question can only be raised between the parties to the alleged champertous contract and their privies. (p. 327.)

EASEMENTS—Increase of Burden of.—An owner of an easement of drainage over the lands of another cannot materially increase the burden of it upon the servient estate. (p. 328.)

WATERS—Injunction—Judicial Notice of Rainfall.—A court of equity will take judicial notice of the fact that, in certain seasons of the year, in certain localities, there are heavy rainfalls and consequent liability, to freshets and excessive accumulation of water, and if a wrongful act is threatened which, in connection with this fact, will injuriously affect the property rights of a citizen, equity will interfere by injunction to anticipate and prevent such threatened injury. (p. 328.)

WATERS—Drainage.—No one has the right to collect water in an artificial channel and cast it upon the land of another in undue and unnatural quantities, contrary to its natural course, and if he attempts to do so, a court of equity will interpose to prevent the act. (p. 328.)

WATERS—Right of Municipality to Divert.—A municipal corporation has no greater right than a natural person to divert surface water in large quantities by an artificial channel upon the land of another, except that it may do this in the exercise of the right of eminent domain, upon making just compensation as required by the constitution. (p. 330.)

INJUNCTION—Threatened Appropriation of Property.—Though a court of equity will not entertain jurisdiction at the suit of a person whose property is not actually taken, to enjoin the making of a public improvement, yet, if the threatened act involves an actual taking, the expropriation will be enjoined until the damages are ascertained and paid in the manner provided by law. (p. 330.)

Bill for an injunction restraining the town of Gross Point and Joseph Braum from making certain contemplated changes in a culvert or waterway, which it is alleged would injure and damage the complainant's land. Temporary injunction dissolved and complainant's bill dismissed, and he appealed.

Pease, Smietanky & Polkey, G. Gillette and F. Laetner, for the appellant.

H. S. Robbins and F. A. Brown, for the appellees.

²³⁹ VICKERS, J. Two grounds are urged in support of the decree of the circuit court: 1. That there is no equity on the face of the bill; 2. That there is sufficient evidence of champerty, collusion and imposition to warrant the court in dismissing the bill on that ground.

This being a bill for an injunction and no other relief, if upon the face of the bill no sufficient ground for equitable relief is shown, the court may, on motion, dissolve the injunction and dismiss the bill: *Edwards v. Beaird*, Breese, 70; *State Bank v. Stanton*, 2 Gilm. 352; *Puterbaugh v. Elliott*, 22 Ill. 157; *Winkler v. Winkler*, 40 Ill. 179; *March v. Mayers*, 85 Ill. 177; *Heinroth v. Kochersperger*, 173 Ill. 205, 50 N. E. 171; *Canal Commrs. v. Village of East Peoria*, 179 Ill. 214, 53 N. E. 633. If it be conceded that, upon sufficient evidence to show that the court and its processes are being used in bad faith and for fraudulent purposes, the court may dismiss the action, certainly it cannot be seriously contended that the evidence in this record would warrant such course. Here was a matter in dispute involving a large number of people on both sides of the controversy, and it is but reasonable to expect that the property owners on both sides of the dividing ridge would take an interest in any litigation the result of which would affect their interests. In a case where a common right is involved, the participation of any party having an interest in the result of the litigation cannot be held to be evidence ²⁴⁰ of champerty or maintenance. It is said that any interest whatever in the subject matter of the litigation is sufficient to exempt one who gives aid from the charge of illegal maintenance: 5 Am. & Eng. Ency. of Law, 2d ed., 820, and cases there cited. Aside from this, the law is well settled in this state that the fact that the litigation grows out of a champertous contract is no defense in a collateral proceeding, and the question can only be raised between the parties to the alleged champertous contract and their privies: *Torrence v. Shedd*, 112 Ill. 466; *Gage v. DuPuy*, 137 Ill. 652, 24 N. E. 541; *Burton v. Perry*, 146 Ill. 71, 34 N. E. 60; *Boone v. Chiles*, 10 Pet. 177, 9 L. ed. 388. The dismissal of the bill cannot be sustained on the alleged ground that the litigation

resulted from a champertous contract or that Sears is guilty of illegal maintenance in rendering aid to appellant. The decree, therefore, must stand or fall on the sole ground that there is no equity shown on the face of the bill.

We think the utmost that can be claimed for the village of Gross Point is, that it has an easement to discharge the water through the culvert and down through the ditch to Lake Michigan. If such easement exists (which is not now decided), we do not consider it necessary to determine, under the issues as now presented, how or when it originated. If it commenced with the original construction in 1867 and by some sort of succession it is now claimed by the village, the voluntary reduction in 1883 from the larger to the smaller opening would be evidence tending to show an abandonment of the prior right to the larger flowage. Assuming the existence of the easement as now enjoyed, it is contended that the village authorities, in the discharge of statutory duties, may, in their discretion, enlarge the culvert and thus increase the burdens on the servient estates. To this contention we cannot assent. The owner of an easement cannot materially increase the burden of it upon the servient estate: Jones on Easements, sec. 827. For the purpose of this decision it must be assumed that the proposed change in the culvert ²⁴¹ will increase the burdens upon the lands of appellant. It is charged in the bill that such result will follow, and we think the facts stated support the charge. If, as appellees contend, no more water will pass through the proposed culvert than the present one, why should the village expend five thousand dollars to build the new one? It is not suggested that the present culvert is worn out or out of repair.

It is contended that the bill does not show a cause of immediate, irreparable and certain damages to the appellant. While the damages will depend, to some extent, on heavy rainfalls and freshets and the consequent accumulation of water in Skokie swamp, still courts take cognizance of such well-known facts as that in certain seasons of the year in certain localities there is a heavy rainfall, and that in consequence there is a liability to freshets and excessive accumulations of water, and when a wrongful act is threatened which, in connection with this fact, will injuriously affect the property rights of a citizen, it is one of the valuable features of equity jurisdiction to anticipate and prevent such threatened injury. In such case the exercise of such jurisdiction is for

the benefit of both parties—in disclosing to the wrongdoer that he is proceeding without authority of law, and in protecting the innocent from injuries which, if inflicted, would wholly destroy his rights: *Vicksburg Waterworks Co. v. Vicksburg*, 185 U. S. 66, 22 Sup. Ct. Rep. 585, 46 L. ed. 808; 202 U. S. 453, 26 Sup. Ct. Rep. 600, 50 L. ed. 1102. In a state of nature none of the water falling west of the dividing watershed ever went upon appellant's land. There is no watercourse carrying the waters to Lake Michigan except this artificial ditch. Under the law no one has the right to collect water in an artificial channel and cast it upon the land of another in undue and unnatural quantities, contrary to its natural course, and if he attempts to do so a court of equity will interpose to prevent the act: *Hicks v. Silliman*, 93 Ill. 255.

The doctrine of *Peck v. Herrington*, 109 Ill. 611, 50 Am. Rep. 627, is not in any way in conflict with the *Hicks* case (93 Ill. 255). In the *Peck-Herrington* ²⁴² case (109 Ill. 611, 50 Am. Rep. 627), the water was carried by artificial drains to the channel where it would go in a state of nature, and through this natural channel to the lower land, while in the *Hicks* case (93 Ill. 255) and in the case at bar the water is conveyed by an artificial ditch where, in a state of nature, it did not and could not go. The cases are in entire harmony.

It is strenuously contended that the village of Gross Point has a right, under the powers conferred upon it by the statute, to make this proposed improvement, and that a court of equity should not interfere with it in the discharge of its duties to the public. This contention cannot be sustained. Section 13 of article 2 of the constitution provides: "Private property shall not be taken or damaged for public use without just compensation. Such compensation, when not made by the state, shall be ascertained by a jury, as shall be prescribed by law." This provision of the constitution is not self-executing. Chapter 47 of Hurd's Revised Statutes, entitled "Eminent Domain," makes provision for the exercise of the right by all corporations or bodies politic to which the state has delegated the power of eminent domain. Cities, towns and villages are authorized by paragraph 89 of section 62 of the city and village act to exercise the right for certain enumerated purposes. Still there is nothing in the eminent

domain law or in the chapter on cities and villages authorizing municipal corporations to take or damage private property for public use except in the same manner and subject to the same restrictions as other agencies through which the right may be exercised. A municipal corporation has no greater right than a natural person to divert surface waters in large quantities by an artificial channel upon the land of another, except it may do this in the exercise of eminent domain, upon making just compensation as required by the constitution: *Jones on Easements*, sec. 775; *City of Aurora v. Love*, 93 Ill. 521; *City of Elgin v. Kimball*, 90 Ill. 356; *Nevins v. City of Peoria*, 41 Ill. 502, 89 Am. Dec. 392; *Stack v. City* ²⁴³ *of East St. Louis*, 85 Ill. 377, 28 Am. Rep. 619; *Young v. Highway Commrs.*, 134 Ill. 569, 25 N. E. 689.

Nor can this municipality proceed with this proposed improvement and relegate appellant to his action at law for the damages sustained. While equity will not take jurisdiction, at the suit of one whose property, or some part of it, is not actually taken, to restrain the making of an improvement or building a railroad, still where, as here, the threatened act involves an actual taking, the expropriation will be enjoined until the damages are ascertained and paid in the manner provided by the law: *Stetson v. Chicago etc. R. R. Co.*, 75 Ill. 74; *Patterson v. Chicago etc. R. R. Co.*, 75 Ill. 588; *Chicago etc. R. R. Co. v. McGinnis*, 79 Ill. 269; *White v. Metropolitan Elevated R. R. Co.*, 154 Ill. 620, 39 N. E. 270; *Doane v. Lake Street Elevated R. R. Co.*, 165 Ill. 510, 56 Am. St. Rep. 265, 46 N. E. 520, 36 L. R. A. 97; *Parker v. Catholic Bishop*, 146 Ill. 158. In the last case above cited it is said: "It seems to be well settled in this state that where no part of the land or property of the complaining owner is physically taken for or in making the proposed public improvement, and the damages claimed to result are therefore consequential only, this provision of the constitution does not require the ascertainment and payment of such damages as a condition precedent to the exercise of the right or power." The converse of this proposition is equally well settled.

It follows from what has been said that the court erred in dissolving the injunction and dismissing the bill, in consequence of which the decree of the circuit court of Cook county is reversed and the cause remanded to that court for further proceedings not inconsistent with this opinion.

If the Owner of Lands Collects Surface Waters in a body, he is bound to provide a means of discharge by drainage. If he fails to do so, the owner of the lower lands has a cause of action: Baltimore etc. R. R. Co. v. Quillen, 34 Ind. App. 330, 107 Am. St. Rep. 183; Noyes v. Cosselman, 29 Wash. 635, 92 Am. St. Rep. 937; Ginter v. St. Mark's Church, 95 Minn. 14, 111 Am. St. Rep. 438. See the discussion of this question in the monographic note to Mizell v. McGowan, 85 Am. St. Rep. 707-735, and in the recent case of Fenton etc. R. R. Co. v. Adams, 221 Ill. 201, 112 Am. St. Rep. 171.

An Injunction Will Lie to restrain a continuing injury to land caused from an unlawful discharge of surface water by an adjoining proprietor: Jacobson v. Van Boening, 48 Neb. 80, 58 Am. St. Rep. 684; Carlson v. St. Louis River Dam etc. Co., 73 Minn. 128, 72 Am. St. Rep. 610.

BARNES v. BANKS.

[223 Ill. 352, 79 N. E. 117.]

EQUITABLE GIFT of Real Property.—A conveyance of land, to be good at law, must be by deed under seal; but in equity a good title may be conveyed by a writing not under seal, or without any writing whatever. (p. 334.)

PARENT AND CHILD—Gifts Between.—A gift of property, real or personal, made by a parent to a child, is valid, where no creditors intervene, who, by the gift, are subjected to loss. (p. 334.)

EQUITABLE GIFT of Real Property from Parent to Child.—A letter from a father to his daughter reciting that "I present you, on this your thirty-third birthday, with the house and premises now occupied by you, which includes the garden and orchard back of the house, and the pasture north of the house, more fully described in my last will, in the forty-acre tract," followed by the subsequent absolute possession by such daughter, constitutes a valid equitable gift of the fee in the premises described, but not of the entire forty-acre tract, in the remainder of which the daughter is given by the will of her father an estate for life only in trust. (p. 335.)

J. C. and W. B. McBride, for the appellants.

Hogan & Wallace, for the appellee.

³⁵⁸ **FARMER, J.** We are unable to agree with the construction sought to be placed upon the writing of A. G. Barnes of date June 4, 1902, by counsel for appellee. It does not by any of its language or terms purport to give appellee an interest in the forty-acre tract, except certain designated portions. As we read and understand it, instead of purporting to be a gift of the whole forty acres, it was of the "house and premises now occupied by you, which includes the garden and orchard back of the house and the pasture north of the house." At the time this paper was written and delivered,

appellee, with her husband, was living in the house, but the evidence shows her father was in possession and control of almost the entire forty, and always had been. He was a breeder of fine horses on another farm, called Oak Lawn farm, and the forty in controversy was equipped with barns and track for training them, and was used and known as the "training farm." The appellee's husband had some interest, with her father, in some horses and assisted in their training and care. His interest appears from the evidence to have been in the profits, if any were made. Mr. Barnes did not deliver to appellee the possession of the whole forty when he gave her the writing, for the proof shows he had possession and control of the track, meadow land and barns where the horses were kept, which included all the property, except the grounds occupied by the residence and outbuildings, where appellee resided, and the orchard and garden, and the pasture north of the house. The orchard and garden were west of the house. A sister of appellee testified the pasture was separated ³⁵⁹ from the other part of the tract by fences. The evidence shows that after the date of the instrument Mr. Barnes controlled the use of all the tract except the premises mentioned in the writing, directed what crops should be planted, and disposed of them after they were harvested. Even after his death appellee bought from and paid the executors of her father's will for hay and straw raised on the land the season before he died. These things tend to show how the parties themselves understood and construed the instrument. If appellee's father had intended to give her the whole forty acres, why did he limit the gift to "the house and premises now occupied by you, which includes the garden and orchard back of the house and the pasture north of the house"? According to the evidence these portions of the tract, from the manner in which they were fenced and the uses to which they were put, could easily be located from the description given of them. Barnes was the owner of a large amount of real estate and appears to have been a man of fair intelligence. He must have known, if he desired to give his daughter the whole forty, that in doing so it would not be necessary to designate particular portions of it. It seems clear to us that, whatever of estate he intended to give appellee by the instrument, he intended to limit it to particular portions of the forty mentioned. After saying he presented her the house and premises occupied by her, to make it plain

that he did not mean the buildings only, he was particular to say what he meant by that and what he intended it to embrace. The clause, "more fully described in my last will, in the forty-acre tract with other lands," does not enlarge the description preceding it. He had nowhere in the instrument described the forty by giving its subdivision of the section, and evidently the reference to the will was for a better description of the forty-acre tract, part of which, the instrument recited, the maker presented to appellee.

Having determined the instrument must be confined to the particular portions of the tract mentioned therein, it now ³⁸⁰ remains to be determined what, if any, estate or title in these portions it conveyed to appellee.

The will, to which reference is made in the instrument, was executed November 16, 1900. The paragraph in which appellee is provided for gives to the executors, as trustees, "for the purposes hereinafter named, the following described stocks, moneys and real estate." Then follows the description of several tracts of land, including the forty in controversy, and certain money, and it then proceeds to give appellee the annual income from the land during her life, to be paid to her by the trustees named in the will. Said trustees were given the possession, management and control of it, with the discretion of allowing her to live on and farm it and receive the rents and profits therefrom, if she would in proper time pay all taxes, charges and encumbrances against the land, keep up repairs thereon and not commit or suffer any waste. At the time the will was made and at the time the written instrument of June 4, 1902, was delivered to appellee she was in possession of the premises therein described and had been for several years, receiving the proceeds therefrom and paying no rent. It cannot be presumed that her father meant the writing to be a meaningless and useless paper. He must have intended to give his daughter some right and interest in the land she had not possessed and enjoyed before, and it must have been an interest or estate different from that given her by the will. There can, we think, be no doubt he intended the interest and estate given her by the writing to take effect upon the delivery of the paper to her. The language used would not justify the conclusion that he intended merely to inform appellee he had made provision for her in his will with reference to this land. The writing says: "I present you on this your thirty-third birthday with the house

and premises," etc. This is equivalent to saying, "I now give you the house and premises." It was not a promise that he would give her the land nor information that he had given her some rights in it by the ³⁶¹ will. The interest devised by the will included the whole forty, while the writing of June 4, 1902, only embraced certain designated portions of it.

A conveyance of land, to be good at law, must be by deed under seal, but in equity a good title may be conveyed by a writing not under seal, or without any writing whatever: *Ashelford v. Willis*, 194 Ill. 492, 62 N. E. 817. This case does not fall within that line of verbal gifts or conveyances from parent to child which have been sustained because, upon the faith of the verbal conveyance or gift, the donee entered into possession and made lasting and valuable improvements. It does not appear from the evidence that appellee has done more than paper three rooms in the house. The validity of this instrument and the nature and extent of the estate conveyed by it depend upon whether the father of appellee intended it as a gift to her. A parent has the right to make a gift to his child, and when fully executed it is irrevocable: *Eckert v. Gridley*, 104 Ill. 306; *Finucan v. Kendig*, 109 Ill. 198; *Dugan v. Gittings*, 3 Gill, 138, 43 Am. Dec. 306; 14 Am. & Eng. Ency. of Law, 2d ed., 1034. "A gift of property, real or personal, made by a parent to a child, is a valid gift, where no creditors intervene, and who, by the gift, are subjected to no loss": *Bay v. Cook*, 31 Ill. 336; *Patterson v. McKinney*, 97 Ill. 41. By the language of the writing the gift took effect and was complete immediately upon the delivery of the paper. The fact that appellee was in possession at the time the gift was made does not make the case different from what it would have been if she had not been in possession at that time but had been given the possession in pursuance of the gift: 14 Am. & Eng. Ency. of Law, 2d ed., 1019. There was proof that appellee's father had said to certain parties he had given her "the place where she lived"; that he had given "the place to Hallie," or that he was going to "deed it to Hallie." Some of these statements were made before the delivery of the writing of June 4, 1902, and as to others the time when they were made ³⁶² was not shown by the evidence and is uncertain. Nor could the witnesses say whether he meant the whole forty or the premises where the house was. The more reasonable conclusion to be drawn from these statements is, that Mr. Barnes had reference to his will when he spoke of having

given or intending to give the land to appellee. His acts of dominion and control over all the tract after the making and delivery of the written instrument, except those portions designated therein, are inconsistent with the theory that he referred to it as a conveyance by which he had given appellee the land. There is evidence tending to show that prior to June 4, 1902, Barnes had paid for repairs made on the premises occupied by appellee, and after that date appellee paid for such repairs as were made. We think it apparent from the evidence that the relations of Barnes toward the premises mentioned in the written instrument ended with the delivery of that paper. As to the residue of the forty-acre tract, he continued to possess and control it until his death. We conclude, therefore, that the premises described in the written instrument were a gift to appellee from her father; that the gift was absolute and irrevocable, and passed to her the title in fee simple to the premises designated in the instrument dated June 4, 1902.

It is also to be observed that appellee's father never attempted to revoke the gift. After making his will one of the beneficiaries died, and he also sold some of the property disposed of by the will. He made three codicils to his will after June 4, 1902, but in none of them does he make any change in the provision originally made for appellee.

The exact boundaries of the premises should be measured and determined from the fences and other boundaries separating them from the rest of the forty-acre tract as they existed June 4, 1902, and to those premises the fee be decreed to be in appellee, with the right to control and manage it without interference from the trustees. The remainder of the forty acres passes by the will of appellee's father, and ~~363~~ is therefore under the control and management of the trustees named in the will.

The decree of the circuit court is reversed and the cause remanded, with directions to further proceed in accordance with the views herein expressed.

Though an Unsealed Instrument may not convey the legal title to land, it at least conveys the equitable title: *Frost v. Wolf*, 77 Tex. 455, 19 Am. St. Rep. 761; *Barrett v. Hinckley*, 124 Ill. 32, 7 Am. St. Rep. 331.

A Gift from a Father to His Child, though improvident, may be valid and irrevocable: *James v. Allen*, 68 N. J. Eq. 666, 111 Am. St. Rep. 654; *Second Nat. Bank v. Merrill*, 81 Wis. 142, 29 Am. St. Rep. 870.

URE v. URE.

[223 Ill. 454, 79 N. E. 153.]

JUDGMENTS—Effect of Reversal.—A reversal of a decree or judgment abrogates it, and, in effect, expunges it from the records, and the parties to the litigation are restored to their original rights. (p. 342.)

JUDGMENTS—Effect of Reversal.—A party to a suit is presumed to know of all errors in the record, and cannot acquire any rights under the erroneous decree that will not be abrogated by a subsequent reversal thereof; and if such party has received benefits from such decree or judgment, he must, after reversal, make restitution, and if he has sold property erroneously adjudged to belong to him, he must account to the true owner for its value. (p. 342.)

JUDGMENTS—Effect of Reversal.—Innocent third persons have a right to rely upon the judgment or decree of a court having jurisdiction both as to the subject matter and the parties, and interests acquired by them under it will be protected notwithstanding its subsequent reversal. (p. 342.)

JUDGMENTS—Effect of Reversal—Partition.—Upon reversal of a decree in partition a sale between the parties to the suit covering property involved therein must be annulled and the grantor must restore to the grantee the net proceeds of the sale. (p. 342.)

JUDGMENT—Effect of Reversal—Partition.—A party to a partition suit who sells the property set off to him to an innocent third person must, upon the reversal of the partition decree, account to the other interested parties for the value of the property at the time that a new partition is had, excluding improvements made by the purchaser. (pp. 342, 343.)

JUDGMENTS—Effect of Reversal—Partition—Innocent Purchasers.—A third person taking a mortgage upon land to which the mortgagor has an apparent valid title under a partition decree is protected as an innocent purchaser upon the reversal of such decree, if it was rendered by a court having jurisdiction of the parties and of the subject matter, and such mortgagee is entitled to have the property sold to satisfy his mortgage. (p. 343.)

COURTS OF PROBATE—Jurisdiction.—A probate court has original jurisdiction to declare a person a drunkard and spendthrift and to appoint a conservator for him, although the statute provides that where there has been a trial in the county court of an issue as to whether a person is a lunatic, drunkard or spendthrift, the record of the verdict and judgment shall be certified to the probate court, and the issue need not be tried again. (p. 344.)

DEEDS—Conveyance by Spendthrift.—A deed made by a vendor after he has been adjudged a spendthrift by the probate court and a conservator appointed for him is void, and his grantee is chargeable with notice, by the record, of such fact and is not entitled to be repaid money expended for taxes, as a condition precedent to setting aside such deed. (p. 344.)

JUDGMENTS—Effect of Reversal—Partition—Claim for Purchase Money.—If a judgment decreeing that a will devises land to heirs in fee is reversed after they have partitioned the land and one of them has conveyed the portion allotted to him to a third

person whose vendor is adjudged to have but a life interest, the claim of such vendee against his vendor for the purchase money paid is not a lien on the interest of the latter in the land so as to make it superior to a lien of the mortgagee in a mortgage executed by such vendor after the land was awarded to him in partition. (p. 345.)

S. C. Spitzer, for the appellants.

R. Zaleski, for the appellees.

•⁴⁵⁷ VICKERS, J. 1. This is an appeal from a final decree in the same case which was formerly reviewed upon a writ of error: *Ure v. Ure*, 185 Ill. 216, 56 N. E. 1087. The will of Margaret Ure was then construed, the decree of the circuit court giving a different construction to the same was reversed, and the cause was remanded for further proceedings in accordance with the views expressed in the opinion then filed.

⁴⁵⁸ 2. Margaret Ure was the owner of lots 1 to 7 and an undivided one-half of lot 8, in John C. Ure's subdivision of certain real estate in Rogers Park, in Cook county, a plat of which subdivision will be found in the statement of the case of *Henderson v. Hatterman*, 146 Ill. 555, 34 N. E. 1041; she also had a life estate in the other undivided one-half of said lot 8 with remainder to her two sons, Robert A. Ure and John F. Ure, in equal parts. By her last will she devised her real estate to her said sons, who survived her, devising to John F. Ure the absolute title in fee to one-half and to Robert A. Ure the life estate in the other one-half with remainder to his heirs, and created a trust for the management and control of the share devised to Robert and his heirs. After the death of their mother John had title in fee to one-half of all the lots in the subdivision, and Robert had a life estate in one-half of lots 1 to 7 and in one-fourth of lot 8, and the fee in the remaining one-fourth of said lot 8. By the decree of the circuit court, which was reversed on the writ of error, it was decreed that the trust had been executed by the statute of uses so as to vest the legal title in fee in Robert, and that the trustee and the minor daughter, Margaret Agnes Ure, had no right, title or interest in the property; but we held that the trust was an active one, not executed by the statute of uses, and that Robert took a life estate with remainder to his heirs: *Ure v. Ure*, 185 Ill. 216, 56 N. E. 1087.

3. The decree of the circuit court, which practically dismissed the trustee and minor child from the suit, was entered

on January 4, 1892, and commissioners were afterward appointed, who made partition, allotting to John the north seven acres, being lots 1 to 7, and to Robert the south five acres, being lot 8, subject to a right of occupancy of a cottage by Charles and Anne Condry, which right has terminated, and subject to \$531 owelty to be paid to John. The reversal of that decree by this court was on April 17, 1900, and in the meantime, while the decree was in full force, not appealed from and unreversed, there were a number of ⁴⁵⁹ changes in the title, out of which numerous complications have arisen. Both parties have made resubdivisions and Robert also executed trust deeds on part of the lands set off to him.

4. On December 23, 1892, John made a resubdivision of lots 1 to 7 in a different manner from the original subdivision, and sold lots 1 to 6 in his resubdivision, as follows: On October 15, 1892, lots 1 and 2 to Augusta C. O. Becker for \$4,000; on June 5, 1893, lot 5 to Johann C. Roessler for \$2,000; on October 19, 1893, lot 6 to Robert Zaleski for \$2,000, and on November 17, 1893, lots 3 and 4 to Henry Koeber for \$1,700. Lots 1, 2 and 6 afterward passed to Pauline F. Hatterman, the present owner. John retained lot 7, on which he resides, and made improvements at a total cost of \$7,000.

5. On April 5, 1893, Robert borrowed of William E. Hatterman \$1,400, and secured the loan by a trust deed on a tract one hundred and fifty by one hundred and fifty feet, in the northwest corner of lot 8. On October 19, 1893, he conveyed to John lot J, in the southeast corner of lot 8, for \$3,750, of which \$531 was the owelty awarded in the partition, \$200 for a team of horses and the balance in cash. In June, 1896, Robert made his resubdivision, excepting lot J, into seventeen lots, numbered 1 to 17. On November 1, 1896, he borrowed from Hatterman the further sum of \$2,600, secured by a trust deed on lots 1 to 17 of the resubdivision. Out of the first Hatterman loan Robert received \$571.25 cash, \$617.55 was paid for special assessments, and the balance went for commissions, abstracts of title and other expenses. Of the second loan he received \$599.26 in cash, \$1,680.24 was paid for taxes and special assessments, and the balance represented back interest on the first loan, commissions, abstract, and releasing two trust deeds on which other parties had refused to loan on account of the condition of the title.

6. On January 6, 1897, the wife of Robert petitioned the probate court of Cook county to appoint a conservator for

460 him, and afterward, upon a trial by jury, he was found to be a drunkard and a spendthrift, incapable of managing or caring for his estate. On March 19, 1897, there was a judgment to that effect, and Alexander Glanz was appointed conservator and qualified. Afterward, on March 3, 1898, Eugene W. Yeomans exchanged three practically worthless equities in Chicago real estate with Robert for his interest in lots 1 to 4 and 6 to 17 of the resubdivision. Lot 5 was occupied by Robert as a homestead. At the time of the conveyance by Robert to Yeomans application was made to a title and trust company for a guaranty policy on the property conveyed by Robert, but the company refused to guarantee the title until the decree of 1892 should be affirmed by this court. The title and trust company having refused to pass the title except upon that condition, Yeomans agreed to bring the case to this court and secure an affirmance of the decree declaring the legal title to be in Robert, and that his minor daughter, Margaret Agnes Ure, and the trustee, had no interest in the property. Yeomans thereupon sued out a writ of error from this court in the name of said Margaret Agnes Ure, by L. H. Jennings, her next friend, who also appeared and filed a brief for her as plaintiff in error. Gilbert & Ripley, who were attorneys for Yeomans, appeared and filed a brief for defendants in error. The sole object of the writ of error was, not to secure a reversal of the decree, but, on the contrary, to obtain an affirmance of it, which was shown by the investigation in the circuit court after the cause was reinstated there. Mr. Jennings testified before the master that he did not write the brief for plaintiff in error; that it was brought to him by Mr. Gilbert, one of the attorneys on the other side, and Jennings signed it and it went in his name; that Yeomans was to be at the expense of taking the case up and having it affirmed by this court; that it was a question of fixing up the title, and the expectation was that a decision affirming the decree would be obtained from this court. According to his testimony the 461 same attorneys wrote the briefs on both sides, and the attorneys used the name of a minor child in a fraudulent attempt to secure an affirmance of a judgment against her interest. The scheme was not successful, but the interests of the parties were declared by this court under fixed rules of law, in accordance with the terms of the will and the intent of the testatrix. The difficulties now in the case grew out of the

transactions before the decree was reversed, and raise peculiar questions not easy of adjustment.

7. The remanding order was filed in the circuit court and the cause was redocketed, whereupon an order was entered vacating the decree of January 4, 1892, and all subsequent proceedings thereunder, including the partition of the premises. Supplemental pleadings were filed, setting up the facts which occurred after the entry of the original decree before the reversal. During that time three children had been born to Robert, and they were brought in with the necessary additional parties. Issues having been joined, the cause was referred to a master in chancery to take proofs, with his conclusions as to the facts and the law. The master reported the evidence with conclusions that the resubdivisions made by John and Robert of the parts set off to them, respectively, should stand on account of conveyances thereunder; that the title to the streets and alleys had vested in the city of Chicago; that as to lots 1 to 6 of John's resubdivision, Pauline F. Hatterman was the owner of lots 1, 2 and 6, Henry Koeber of lots 3 and 4, and Johann C. Roessler of lot 5; that Hatterman had valid liens on lots in the part set off to Robert under his two trust deeds; that the conveyance from Robert to Yeomans should be set aside for fraud and because it was void under the statute, but that Yeomans should be reimbursed for taxes and interest paid by him; that there should be another partition between John and the trustee for Robert and his children, or if the premises were incapable of partition they should be sold and the proceeds divided according to the rights of the parties as found by him,⁴⁶² and that on account of the premises yielding no income and the heavy burden of taxes and special assessments, interest and other carrying charges, the interests of the trust estate demanded the sale of the same and the investment of the proceeds. He found that the only use for which the premises were adapted was for subdivision into residence lots; that Robert or his children had no other means or property except such as was involved in the suit; that while John had expended about \$7,000 on lot 7, to which he retained title, and the improvements were worth about \$5,000 to him, they did not enhance the value of the property. He stated at length the accounts between the parties, which it is impracticable to repeat here. Louis D. Glanz had been appointed guardian for the minor

children of Robert, and under an order of the probate court, made in 1901, had borrowed from Chris Hafner \$1,500, secured by a mortgage on lots 1 to 7 of John C. Ure's subdivision. Hafner became a defendant by leave of the court on February 1, 1905, and set up his rights under his mortgage. The master reported that said guardian received the proceeds of the loan and paid taxes on lots 1 to 17 of \$160, and that Hafner's mortgage was a lien upon any property of the wards of said guardian.

8. The cause was heard on exceptions to the report, and a decree was entered confirming the titles of the parties to whom the conveyances had been made by John, as before stated, in accordance with the report of the master. The court refused to adopt the finding of the master with respect to the conveyance from Robert to Yeomans, and found the probate court was without jurisdiction to adjudge Robert a drunkard or a spendthrift or appoint a conservator; that Yeomans was a bona fide purchaser and took title to the property conveyed to him, which was confirmed subject only to the lien created by the Hatterman trust deeds. The court also refused to follow the findings of the master with reference to another partition, but set aside and vacated the order previously entered vacating the partition made under the reversed ⁴⁶³ decree, and approved and confirmed the same. The decree set aside the deed of lot J from Robert to John, and awarded a personal decree against Robert, in favor of John, for the purchase price, \$3,750. Hafner's mortgage from the guardian was set aside as a cloud upon the title of John and his grantees, but was declared a valid lien on all of lot 8 of the original subdivision not conveyed to Yeomans. The title of the trustee to lot 5 of Robert's resubdivision was established and confirmed subject to the lien of the several trust deeds or mortgages. The Hatterman trust deeds were foreclosed, and it was ordered that the premises to which they were subject be sold for the payment of the same, with costs and attorneys' fees, and that said lot 5 be sold for one-half cash and the balance on one and two years' time at five per cent, and the proceeds, after the payment of costs, fees and expenses, be applied toward the payment of the Hafner mortgage, and if there should be a surplus it should be paid to the trustee. The accounts between the various parties were adjusted.

9. The effect of reversing the decree of January 4, 1892, was to abrogate it, and the cause stood in the circuit court precisely as it did before the entry of the decree. The decree was, in effect, expunged from the records and the parties to the litigation were restored to their original rights: *McJilton v. Love*, 13 Ill. 486, 54 Am. Dec. 449; *Chickering v. Failes*, 29 Ill. 294; *Cable v. Ellis*, 120 Ill. 136, 11 N. E. 188; *Aurora etc. Ry. Co. v. Harvey*, 178 Ill. 477, 53 N. E. 331; *Freeman on Judgments*, sec. 481. A party to a suit is presumed to know of all the errors in the record, and such party cannot require any rights or interests based on such erroneous decree that will not be abrogated by a subsequent reversal thereof. If such party has received benefits from the erroneous decree or judgment, he must, after reversal, make restitution, and if he has sold property erroneously adjudged to belong to him he must account to the true owner for the value. Titles acquired by parties to the record under an erroneous decree ⁴⁶⁴ or judgment will be divested by the subsequent reversal of such decree or judgment, but a different rule applies where a stranger to the proceeding, without notice, acquires rights under the decree before reversal. His title will not be affected. Innocent third parties have a right to rely upon a judgment or decree of a court having jurisdiction to pronounce it. They are not required to look beyond the question of jurisdiction, and if the decree is one which the court has jurisdiction to render both as to the subject matter and the parties, innocent purchasers acting in good faith will be protected, notwithstanding the subsequent reversal of the decree or judgment: *Montanye v. Wallahan*, 84 Ill. 355; *Thompson v. Frew*, 107 Ill. 478; *Crawford v. Thompson*, 161 Ill. 161, 43 N. E. 617.

10. It follows from the rules above announced that the sale of lot J by Robert to John, being a transaction between the parties to the erroneous decree, must be set aside and the grantor must restore to the grantee the net proceeds received from such sale.

11. It also follows from this same principle that the several conveyances made by John, enumerated in the fourth paragraph of this opinion, must be held to be valid and binding and the title of the several grantees confirmed, for the manifest reason that these several purchasers were not parties to the erroneous decree, and appear to have purchased in good faith, for a valuable consideration, without any notice of

the defects for which the decree was subsequently reversed. John F. Ure having sold and conveyed these several lots and received the purchase money, will be required to account for the value of the property so sold at the time when the partition is made, excluding any improvements that may have been made by the purchasers or their grantees. In other words, this estate is entitled to have the value of the lots sold as they would have been had they remained a part of the estate until the time of the final partition, and John F. Ure having deprived the owners of this property by ⁴⁶⁵ his voluntary act in selling it, will, upon final accounting, be charged with the value thereof.

12. The mortgages made by Robert to Hatterman, dated April, 5, 1893, for \$1,400, and November 1, 1896, for \$2,600, being valid mortgages, executed by the mortgagor upon real estate of which he was the apparent owner, as declared by the decree of January 4, 1892, must be paid out of the proceeds arising from the sale of the lots included in the mortgages, respectively. Hatterman occupies the position of an innocent third party, and is entitled to have his mortgages paid out of the property upon which he made his loans.

13. The conveyance of Robert Ure and his wife to Eugene W. Yeomans, described in paragraph 6 of this opinion, cannot be upheld. Yeomans does not occupy the position of an innocent purchaser. The fact that Robert Ure had been adjudged a drunkard and a spendthrift, and that a conservator had been appointed for him, was all a matter of record, of which Yeomans is conclusively presumed to have had notice. The decree of the circuit court finding that Yeomans was an innocent purchaser and entitled to be protected cannot be sustained. It was contended in the court below that the probate court had no jurisdiction to entertain the petition of Robert Ure's wife to have him adjudged a drunkard or a spendthrift or to appoint a conservator for him. Section 20 of article 6 of the constitution provides that probate courts, when established, shall have original jurisdiction in all probate matters, the settlement of estates of deceased persons, the appointment of guardians and conservators and settlement of their accounts. A probate court having been established in Cook county, it had original jurisdiction, by virtue of the constitution, to appoint a conservator for Robert. The act providing for the establishment of probate courts also provides that they shall have original jurisdiction in the same

matters specified in the constitution: Hurd's Stats. 1899, p. 547. It was held in the case of *Snyder v. Snyder*, 142 Ill. 60, 31 N. E. 303, that under the constitution and said act providing ⁴⁶⁶ for probate courts the original jurisdiction vested in those courts. The provisions of the statute that where there has been a trial in the county court of an issue whether a person is a lunatic, drunkard or spendthrift, the record of the verdict and judgment shall be certified to the probate court and the issue need not be tried again, does not affect the original jurisdiction of the probate court. By the statute the conveyance to Yeomans, made long after the finding that Robert was a drunkard and a spendthrift, and the appointment of a conservator for him, is declared to be void, and the court erred in not setting it aside. Yeomans paid some taxes, but he had notice by the record, which must have appeared upon any abstract of title, that his grantor could not make a conveyance, and there is no evidence which shows any equities in his favor. We do not think he is entitled to repayment as a condition of setting aside the conveyance.

14. The mortgage of Louis D. Glanz, as guardian for the children of Robert Ure, to Chris Hafner for \$1,500, dated on the fifteenth day of February, 1901, was executed by order of the probate court, and has the character of a valid lien upon the interests of his wards in lots 1 to 7 in John C. Ure's subdivision, as set out in paragraph 7 of this opinion, and it should be paid out of the proceeds arising from the sale of the interests of the minors in said lots, but the minors are entitled to reimbursement out of Robert's interests for the amount expended for taxes, which should have been paid by the life tenant: *Huston v. Tribbetts*, 171 Ill. 547, 63 Am. St. Rep. 275, 49 N. E. 711.

15. The claim which John Ure has against Robert for the purchase money paid him for lot J is not a lien on any interest that Robert has in the real estate. It was not paid for the purpose of removing an encumbrance from the common property or for permanent improvements, but was paid as the purchase money for the title which Robert was supposed to have to lot J under the erroneous partition. This sale being void as between these parties to the record, the ⁴⁶⁷ same will be set aside and disregarded by the court in making a final decree herein. In the statement of account between Robert and John, Robert should account to John for the \$3,750, less the amount of owelty which he was adjudged

to pay John under this erroneous decree. But this claim of John is subordinate to the Hatterman mortgages, and if Robert's interest in the estate is not sufficient to pay it, the court should render a personal money decree against him for the deficiency.

16. In stating the account between Robert and the remaindermen, the Hatterman mortgages should be charged to Robert's interest and paid by him, with nothing charged to the estate in remainder unless it is made to appear that some portion of the proceeds of these loans was used to pay special assessments of such a character as to be of permanent benefit to the property as an estate of inheritance. If the court should find that some portion of the proceeds of the Hatterman mortgages was used for such special assessments, then the amounts should be apportioned ratably between the life tenant and the remaindermen under the rule announced in *Huston v. Tribbetts*, 171 Ill. 547, 63 Am. St. Rep. 275, 49 N. E. 711.

17. If, after John has discharged his liability to the estate, he shall have an interest equal to the value of lot 7, exclusive of the improvements put thereon by him, or if his interest is less than a fair cash value of said lot, and he desires to accept it and pay owelty, then, in view of the expenditures John has made on lot 7, the court may direct that lot 7 be set off to John at a fair valuation and exclude it from the sale, if it can be done without prejudice to the other interests involved: *Dean v. O'Meara*, 47 Ill. 120.

18. The decree of the circuit court is reversed and the cause is remanded, with directions to the court to proceed with a repartition of said premises in accordance with the views herein expressed.

The Effect of the Reversal of a Judgment is the subject of a monographic note to *Cowdery v. London etc. Bank*, 96 Am. St. Rep. 124-146.

The Effect of Compulsory Partition is the subject of a monographic note to *Carter v. White*, 101 Am. St. Rep. 864-877.

LLOYD v. MATTHEWS.

[223 Ill. 477, 79 N. E. 172.]

CORPORATIONS—Contracts of—Power of Officer.—The President of a corporation, as its agent and corporate representative, has the power, in the ordinary course of business and in furtherance of the corporate interests, to execute contracts binding on the corporation. (pp. 347, 348.)

CORPORATIONS—Contracts of—Presumed Authority of Officers.—Any contract pertaining to the corporate affairs and within the general powers of the corporation, executed by its president on behalf of the corporation, is presumed to have been executed by authority of the corporation. (p. 348.)

CORPORATIONS—Contracts of—Power of President.—If a contract is properly executed for a corporation by its president, and is such a contract as the corporation may lawfully make, proof of its execution by such president is all that is required to show his authority to make it, in the absence of evidence showing that the contract was not made by authority of the corporation. (p. 348.)

CORPORATIONS—Contracts of—Power of President.—The powers of the president of a corporation to bind it by contracts executed by him are limited to those matters concerning which the charter, by-laws and statutes authorize it to make contracts. (p. 349.)

CORPORATIONS—Contract of Guaranty of—Power of President.—A contract of guaranty executed for a corporation by its president upon a note payable to its order, discounted for its benefit and the proceeds received by it, is valid and binding upon the corporation without proof of special authority delegated to such president. (p. 349.)

BILLS AND NOTES—Distinction Between Indorsement and Guaranty.—The liability of an unconditional guarantor of commercial paper becomes independent and fixed upon the failure of the principal to pay the money or perform the act guaranteed, while that of an indorser is conditional until the statutory diligence has been shown. (p. 350.)

BILLS AND NOTES—Blank Indorsement—Authority to Convert into Guaranty.—The holder of a note indorsed in blank by the payee is not authorized to write out a special guaranty over the signature of the indorser and rely upon parol proof to establish that such was the agreement and understanding at the time of the indorsement. (p. 350.)

BILLS AND NOTES—Contract of Guaranty—Ratification.—Whether a special contract of guaranty was written at the time the signature thereto was signed or afterward is immaterial, when there was an express subsequent ratification of the contract of guaranty by the indorser. (p. 351.)

Bangs, Wood & Bangs, for the appellant.

Peckham, Smith, Packard Ap. Madoc, for the appellees.

479 VICKERS, J. Nelson E. Matthews and Clark H. Rice, banking partners, doing business at Ottawa, Ohio, brought an action of assumpsit against George E. Lloyd & Co., a corporation, on the indorsement and guaranty on the following promissory note:

“\$1500.00

Ottawa, Ohio, July 25, 1902.

“Sixty days after date, we, or either of us, promise to pay to the order of George E. Lloyd & Co., fifteen hundred dollars. Payable at the banking house of Matthews & Rice, Ottawa, Ohio. Value received. If not paid at maturity to bear eight per cent interest from maturity.

“COLUMBIA TELEPHONE MANF. CO. [Seal.]

“By G. M. RISSER, Prest. [Seal.]

“W. M. REES, Secy. [Seal.]”

On the back of the note appears the following:

“Payment guaranteed; protest, demand and notice of non-payment waived.

“GEO. E. LLOYD & CO.

“By E. C. WILLIAMS, President.”

To the declaration, which contained two special counts (one on the indorsement and one on the guaranty) and the common counts, appellees pleaded the general issue and a special plea, verified by affidavit, denying the execution of the guaranty. From a judgment for the face of the note in the circuit court of Cook county an appeal was prosecuted to the appellate court for the first district, where the judgment below was affirmed, and appellant prosecutes a further appeal to this court.

Since the judgment of the appellate court settles all the controverted questions of fact adversely to the contention of the appellant, we need only to consider the questions of law raised.

1. It is contended that even though it be conceded that George E. Lloyd & Co., by E. C. Williams, its president, signed the guaranty, still, as a matter of law, the corporation cannot be held liable without proof of special authority **480** from the corporation to its president to execute the contract of guaranty. A corporation can act only through its agents, and the president of a corporation, as the agent and corporate representative, has the power, in the ordinary course of business and in furtherance of the corporate interests, to

execute contracts and to bind the company in so doing. He is, by virtue of his office, recognized as the business head of the company, and any contract pertaining to the corporate affairs, within the general powers of such officer, executed by the president on behalf of his corporation, will, in the absence of proof to the contrary, be presumed to have been done by authority of the corporation: *Atwater v. American Exchange Nat. Bank*, 152 Ill. 605, 38 N. E. 1017; *Bank of Minneapolis v. Griffin*, 168 Ill. 314, 48 N. E. 154; *Anderson v. South Chicago Brewing Co.*, 173 Ill. 213, 50 N. E. 655; *Anderson Transfer Co. v. Fuller*, 174 Ill. 221, 51 N. E. 251; *Williams v. Harris*, 198 Ill. 501, 64 N. E. 988. If the contract in question had been executed by some agent who ordinarily does not have the power to sign such instruments, and the execution had been put in issue by properly verified plea, as is the case here, then it would be necessary to go beyond the mere fact of the execution of the instrument and prove the authority of the agent to execute the same; but when the contract is properly executed for the corporation by its president, and it is such a contract as the corporation might lawfully make, the proof of the execution by the president is all that is required, in the absence of any evidence to the contrary showing that the contract was not made by the authority of the corporation.

In support of its contention that special authority in the president to sign this guaranty must be shown, the appellant cites and relies upon *Dobson v. More*, 164 Ill. 110, 56 Am. St. Rep. 184, 45 N. E. 430, *Park Hotel Co. v. Fourth Nat. Bank*, 86 Fed. 742, *National Park Bank v. German-American Mutual etc. Security Co.*, 116 N. Y. 281, 22 N. E. 567, 5 L. R. A. 673, and some other cases of like character. Language can be found in these cases, and perhaps in others, which, when considered alone and disconnected ⁴⁸¹ from the facts of the case wherein it is employed, seems to sustain the contention of appellant that in order to make a contract binding upon a corporation which has been executed by the company through its president, a resolution of the board of directors or a vote of the stockholders, or other special authority, must be shown where the execution of the instrument is put in issue by a verified plea. Upon a careful examination of these cases it will be found that they are clearly distinguishable from the case at bar, in that the president, in the execution of the contracts, was using the credit

of the corporation to serve his own private interests or that of some third party. Thus, in *Dobson v. More*, 164 Ill. 110, 56 Am. St. Rep. 184, 45 N. E. 430, where the president and general manager had express authority "to sign notes, drafts and acceptances in the name of the company, and to make checks upon the company funds in bank for the payment of any proper indebtedness of the company," and the president, merely to aid another company to raise money, executed in behalf of his company a written guaranty on the note of another corporation, it was held, as against the holder of such note with notice of the facts, that the company could not be held liable on such guaranty, there being no authority whatever shown for the president to bind the company, as guarantor, for the indebtedness of another. The powers of a president to bind a corporation by contracts are limited to those matters concerning which the charters and by-laws and the statutes of the state authorize it to make contracts. In *Park Hotel Co. v. Fourth Nat. Bank*, 86 Fed. 742, where the president discounted a note for his own private benefit and indorsed by him in the name of the Park Hotel Company, of which he was president, and payable to himself, it was held that the corporation was not liable, and that the bank had notice, by the face of the note, that the president was exceeding his usual and ordinary powers in making a note to himself, and that in the absence of special authority from the corporation no recovery could be had. *National Park Bank v. Warehousing Co.*, 116 N. Y. 482 281, 22 N. E. 567, 5 L. R. A. 673, is a case in all essential features like *Dobson v. More*, 164 Ill. 110, 56 Am. St. Rep. 184, 45 N. E. 430, and the same rule is applied.

Many other cases are to be found illustrating the doctrine announced in the decisions above referred to, but since this court in *Dobson v. More*, 164 Ill. 110, 56 Am. St. Rep. 184, 45 N. E. 430, has reviewed many of these cases and approved them, no necessity exists to discuss them further. The case at bar does not fall within the exception to the general rule recognized in these cases, but since the guaranty sued on was placed on the note of appellant and the note was discounted for its benefit and the proceeds thereof were remitted to appellant, the plainest principles of justice require that the company should be held bound by the act of its president without any proof of authority beyond that which must be presumed from the fact that the president in

execute contracts and to bind the company in so doing. He is, by virtue of his office, recognized as the business head of the company, and any contract pertaining to the corporate affairs, within the general powers of such officer, executed by the president on behalf of his corporation, will, in the absence of proof to the contrary, be presumed to have been done by authority of the corporation: *Atwater v. American Exchange Nat. Bank*, 152 Ill. 605, 38 N. E. 1017; *Bank of Minneapolis v. Griffin*, 168 Ill. 314, 48 N. E. 154; *Anderson v. South Chicago Brewing Co.*, 173 Ill. 213, 50 N. E. 655; *Anderson Transfer Co. v. Fuller*, 174 Ill. 221, 51 N. E. 251; *Williams v. Harris*, 198 Ill. 501, 64 N. E. 988. If the contract in question had been executed by some agent who ordinarily does not have the power to sign such instruments, and the execution had been put in issue by properly verified plea, as is the case here, then it would be necessary to go beyond the mere fact of the execution of the instrument and prove the authority of the agent to execute the same; but when the contract is properly executed for the corporation by its president, and it is such a contract as the corporation might lawfully make, the proof of the execution by the president is all that is required, in the absence of any evidence to the contrary showing that the contract was not made by the authority of the corporation.

In support of its contention that special authority in the president to sign this guaranty must be shown, the appellant cites and relies upon *Dobson v. More*, 164 Ill. 110, 56 Am. St. Rep. 184, 45 N. E. 430, *Park Hotel Co. v. Fourth Nat. Bank*, 86 Fed. 742, *National Park Bank v. German-American Mutual etc. Security Co.*, 116 N. Y. 281, 22 N. E. 567, 5 L. R. A. 673, and some other cases of like character. Language can be found in these cases, and perhaps in others, which, when considered alone and disconnected ⁴⁸¹ from the facts of the case wherein it is employed, seems to sustain the contention of appellant that in order to make a contract binding upon a corporation which has been executed by the company through its president, a resolution of the board of directors or a vote of the stockholders, or other special authority, must be shown where the execution of the instrument is put in issue by a verified plea. Upon a careful examination of these cases it will be found that they are clearly distinguishable from the case at bar, in that the president, in the execution of the contracts, was using the credit

of the corporation to serve his own private interests or that of some third party. Thus, in *Dobson v. More*, 164 Ill. 110, 56 Am. St. Rep. 184, 45 N. E. 430, where the president and general manager had express authority "to sign notes, drafts and acceptances in the name of the company, and to make checks upon the company funds in bank for the payment of any proper indebtedness of the company," and the president, merely to aid another company to raise money, executed in behalf of his company a written guaranty on the note of another corporation, it was held, as against the holder of such note with notice of the facts, that the company could not be held liable on such guaranty, there being no authority whatever shown for the president to bind the company, as guarantor, for the indebtedness of another. The powers of a president to bind a corporation by contracts are limited to those matters concerning which the charters and by-laws and the statutes of the state authorize it to make contracts. In *Park Hotel Co. v. Fourth Nat. Bank*, 86 Fed. 742, where the president discounted a note for his own private benefit and indorsed by him in the name of the Park Hotel Company, of which he was president, and payable to himself, it was held that the corporation was not liable, and that the bank had notice, by the face of the note, that the president was exceeding his usual and ordinary powers in making a note to himself, and that in the absence of special authority from the corporation no recovery could be had. *National Park Bank v. Warehousing Co.*, 116 N. Y. 482 281, 22 N. E. 567, 5 L. R. A. 673, is a case in all essential features like *Dobson v. More*, 164 Ill. 110, 56 Am. St. Rep. 184, 45 N. E. 430, and the same rule is applied.

Many other cases are to be found illustrating the doctrine announced in the decisions above referred to, but since this court in *Dobson v. More*, 164 Ill. 110, 56 Am. St. Rep. 184, 45 N. E. 430, has reviewed many of these cases and approved them, no necessity exists to discuss them further. The case at bar does not fall within the exception to the general rule recognized in these cases, but since the guaranty sued on was placed on the note of appellant and the note was discounted for its benefit and the proceeds thereof were remitted to appellant, the plainest principles of justice require that the company should be held bound by the act of its president without any proof of authority beyond that which must be presumed from the fact that the president in

good faith and in the regular course of corporate business, and for the benefit of the corporation, executed the instrument sued on.

2. It is next contended by appellant that the court erred in giving instructions for the appellee. Instruction No. 2 is as follows: "The court instructs the jury, as a matter of law, that it is immaterial whether the words of special guaranty are stamped or written on the back of a note above the signature of a guarantor at the time its signature is placed thereon, or afterward, provided you believe from the evidence that the signature was in fact placed there for the purpose of guaranteeing the payment of the note, and the words as stamped or written are in accordance with such purpose."

The objection pointed out to this instruction is, that it ignores the question whether the contract of guaranty is *ultra vires*, and that it impliedly tells the jury that parol evidence can be heard to vary or alter an indorsement by the payee of a promissory note. There is no question in this case to which the doctrine of *ultra vires* can have any application. This objection needs no further consideration. The second objection is equally frivolous. The instruction says ⁴⁸³ nothing about the admissibility of parol evidence to alter or vary the terms of a blank indorsement by the payee of a promissory note. If this instruction is to be understood as laying down the law that the holder of a promissory note indorsed in blank by the payee can write out a contract of special guaranty over the signature of the indorser and rely on parol proof to establish that such was the agreement and understanding at the time of the indorsement, then the instruction is erroneous. There is a well-defined distinction between the contract of an indorser and that of a guarantor of commercial paper. The liability of an unconditional guarantor becomes independent and fixed upon the failure of the principal party to pay the money or perform the act guaranteed (*Holm v. Jamieson*, 173 Ill. 295, 50 N. E. 702, 45 L. R. A. 846), while that of an indorser is conditional until the statutory diligence has been shown: *Bledsoe v. Graves*, 4 Scam. 382; *Schuttler v. Piatt*, 12 Ill. 417; *Clayes v. White*, 83 Ill. 540. In cases of a blank indorsement the owner of the note may fill out the formal assignment at any time before or at the trial; but this rule has never been so extended as to authorize the holder to write words of a special guaranty above a blank indorsement, thereby chang-

ing the contract from one of indorsement to one of guaranty. The instruction under consideration is inartificially drawn, but as applied to the facts in this case we do not think it was misleading. There was some conflict in the testimony as to whether the words above appellant's signature were placed there before it was signed or afterward, but the evidence shows that after the signature was placed on the back of the note appellees wrote a letter to appellant, and also sent a telegram, asking if the indorsement on the note was satisfactory. In this correspondence appellees quoted the language of the guaranty, and received a reply from appellant that it was "perfectly satisfactory." This is an express ratification of the guaranty contract, and therefore it was, under the facts of this case, immaterial whether the words constituting the guaranty ⁴⁸⁴ were on the note at the time of the signing or were placed there afterward, since the appellant fully ratified the guaranty contract after it had a copy of it. Under these circumstances instruction No. 2 was harmless.

Errors complained of in giving other instructions and in refusing instructions asked by appellant have been carefully considered, and we see no error in any of the rulings of the court for which judgment should be reversed.

The judgment of the appellate court is therefore affirmed.

On the Authority of the President of a Corporation to execute or indorse negotiable paper, see the recent cases of *Iowa Nat. Bank v. Sherman*, 17 S. Dak. 396, 106 Am. St. Rep. 778; *Gould v. Gould*, 134 Mich. 515, 104 Am. St. Rep. 624; *Curtin v. Salmon River etc. Ditch Co.*, 141 Cal. 308, 99 Am. St. Rep. 75; *Pelton v. Spider Lake etc. Lumber Co.*, 117 Wis. 569, 98 Am. St. Rep. 946. By virtue of his office merely he has very little authority to act for the corporation: *St. Clair v. Rutledge*, 115 Wis. 583, 95 Am. St. Rep. 964; *Trepnagen v. South Omaha*, 69 Neb. 577, 111 Am. St. Rep. 570. However, a corporation may be bound by the acts of its officer, if it allows him to so conduct himself as to induce those dealing with him in good faith to believe he possesses certain powers, the same as though the authority were expressly granted: *Kocher v. Supreme Council*, 65 N. J. L. 649, 86 Am. St. Rep. 687; *Jones v. Williams*, 139 Mo. 1, 61 Am. St. Rep. 436; *Ford v. Hill*, 92 Wis. 188, 53 Am. St. Rep. 902; *Garmany v. Lawton*, 124 Ga. 876, 110 Am. St. Rep. 207. A corporation cannot accept and ratify contracts in so far as they are beneficial to it, and repudiate them in so far as they impose any liability on it, on the ground of want of authority in its officers to make such contracts: *Wisconsin Lumber Co. v. Greene etc. Tel. Co.*, 127 Iowa, 350, 109 Am. St. Rep. 387.

The Distinction Between Contracts of Guaranty and contracts of indorsement is pointed out in the monographic note to *Pearsell Mfg. Co. v. Jeffreys*, 105 Am. St. Rep. 507.

**CHICAGO UNION TRACTION COMPANY v. BRET-
HAUER.**

{223 Ill. 521, 79 N. E. 287.]

APPEAL—Claim of Variance.—If a motion to direct a verdict on the ground that there is a material variance between the declaration and the proof is denied, the only question preserved for the consideration of the supreme court on appeal is whether the evidence, when considered together with all the reasonable inferences to be drawn therefrom, fairly supports the cause of action as set out in the declaration. (p. 353.)

STREET RAILWAYS—Negligent Expulsion of Passenger—Rate of Speed.—If a passenger on a street-car is wrongfully and forcibly ejected therefrom, the speed of the car need not be proved as alleged in order for plaintiff to recover damages. The rate of speed is important only as bearing upon the dangers which would attend a violent expulsion from the car, and thereby characterize the act of ejection and the motive of the conductor at the time. (p. 356.)

STREET RAILWAYS—Refusal to Accept Transfer—Evidence. If the validity of a municipal ordinance relating to transfers on street-car lines is being contested in the courts at the time plaintiff is forcibly ejected from a car on the conductor's refusal to accept a regular transfer, and the validity of such ordinance is afterward sustained, testimony is admissible that when plaintiff obtained the transfer from another conductor the latter stated that it was good on the car from which plaintiff was ejected. (p. 356.)

STREET RAILWAYS.—Violation of Law by a street-car company cannot be excused on the ground that the violator believes the law unconstitutional, and if the validity of the law is established by judicial decision, the duty of the company and its servants, and their relation to passengers, must be determined by such law, and not by the instructions given by the company to its servants. The law in such case must be taken to be valid from the time of its passage, and not merely from the time it was adjudged to be valid. (pp. 356, 357.)

STREET RAILWAYS—Duty as to Transfers.—It is the duty of a street-car conductor in issuing transfers to other lines to comply with the ordinances governing his line of duty in that respect, without regard to the instructions of his company to the contrary, and in so acting he acts for the company. (p. 357.)

STREET RAILWAYS—Issuance of Transfers—Relation of Conductor to Passenger.—A street-car conductor, supplied with blank transfers and authorized to punch and deliver them to passengers upon request in consideration of a cash fare previously paid, stands in the same relation to the street-car company and its passengers as one of its ticket sellers. He is the direct representative of the company, and what he says to passengers in relation to the transfer given them and the privileges conferred thereby is admissible as part of the res gestae and as characterizing the subsequent conduct of the transfer holder. (p. 357.)

STREET RAILWAYS—Forcible Expulsion of Passenger—Damages—Evidence.—In an action by a passenger to recover for injuries in being forcibly ejected from a street-car, under a declaration alleging that plaintiff, by reason of his injuries thus received, was prevented from carrying on his business and was deprived of the profits therefrom which he otherwise would have received, where it appears that he was a jewelry jobber practically without capital, it is proper to permit him to testify as to the amount he realized out of his business per month prior to his injury, and as to the amount realized by him per month in his business since that time. (p. 359.)

STREET RAILWAYS—Forcible Expulsion of Passenger—Evidence.—If a passenger is forcibly ejected from a street-car on the refusal of the conductor to honor a transfer from another line, a municipal ordinance showing the validity of the transfer is admissible in evidence to establish notice to the street-car company and as bearing upon the animus of the conductor in ejecting the passenger from the car. (pp. 361, 362.)

J. A. Rose, A. M. Cross and W. W. Gurley, for the appellant.

L. A. Heile and W. M. Fletcher, for the appellee.

524 VICKERS, J. At the close of all the evidence appellant offered an instruction as to each count directing a verdict for appellant and asked the court to give them to the jury, which was refused, 525 and the exceptions preserved to this ruling present the first question for our determination.

Appellant contends that there was a material variance between the proofs and the declaration. This is only another way of saying that the proof does not support the declaration, and presents no other question for our consideration than would be raised by the usual contention that the declaration is not sustained by the evidence: *Libby, McNeil & Libby v. Scherman*, 146 Ill. 540, 37 Am. St. Rep. 191, 34 N. E. 801; *Harris v. Shebek*, 151 Ill. 287, 37 N. E. 1015. When the charge is one cause of action and the proof is another and different cause, there is a variance within the ordinary acceptance of that term. There is, in such case, also a literal failure of the proof to sustain the allegations of the declaration. We have often held that where a motion to direct a verdict has been denied, the only question preserved for our consideration is whether the evidence, when considered together with all the reasonable inferences to be drawn therefrom, fairly tends to support the cause of action as set out in the declaration: *Blakeslee's Exp. Co. v. Ford*, 215

Ill. 230, 74 N. E. 135, and cases there cited. Where, as in the case at bar, the question is treated as one of variance, the rule in the above cases applies, and we are only permitted to examine the evidence within the limitations of the above rule.

In our consideration of this case we have given the evidence much more attention than was necessary to determine the question presented to this court. Irene Maitre, a witness for appellee, testified, in substance, as follows: "I was sitting about three seats from the front of the car, on the west side. There were people standing where we were, in the front part of the car. All the seats were taken. My attention was first called to Mr. Brethauer when the conductor said the transfers were not any good. Mr. Brethauer answered that he had just got them from the other car for the Halsted street car, and the next was, he took him by the shoulders and pushed him out of the front door. He did not demand any fare. The conductor spoke in a loud ⁵²⁸ tone of voice and attracted our attention. Mr. Brethauer spoke in a common tone. He said: 'Are they not any good?' like anybody would say. They were standing up when they were speaking about the transfers. They were talking in a loud voice about the transfers. That attracted our attention, and I looked up and saw that he had given him the transfers. The conductor had the transfers in his hand and he said they were not any good, and Mr. Brethauer said he had just got them from the other car, and the next thing he was taken on through the car, on past us onto the front platform and pushed off. The conductor had hold of him by the shoulder. He pushed him right forward and threw him off the car. The door was open. It moved swiftly. Mr. Brethauer started to hold on to something—on the railing, it looked, on the front platform. Coming through the car Mr. Brethauer was facing the north and then the east. I judge the whole thing happened in about three seconds. The man was shoved right off of the car into the street, and that was all that happened on the front platform. The conductor's hands were on his shoulders. He was pushing him forward. It seemed to be with force. I could not see Mr. Brethauer after he was pushed, but I stood up in the car and saw him lying in the street, about the center of the car. We looked slanting south from where we were sitting in the front. He was lying on his back and his head was on the curb. He was lying

there unconscious. We thought he was dead. He did not do anything. We watched him there, I should judge, about half an hour—close on to it.”

Six other passengers besides the appellee, who were on this car, testify in substantial corroboration of the witness whose testimony we have set out at length. The variations in their statements are only with respect to the minor details of the occurrence. Their accounts are not so much alike as to suggest collusion or so unlike as to discredit either of them. In addition to these witnesses the attending physician testified as to finding appellee in an unconscious condition, ⁵²⁷ with wounds in the back of his head, and said that appellee remained unconscious for about a week, and he attributes his unconsciousness to concussion of the brain. All of the witnesses who saw the transaction agree in the statement that appellee fell backward and that he struck the curb with the back part of his head.

The conductor and motorman and three passengers testify for the appellant. These witnesses give a somewhat different version of the transaction from that given by appellee's witnesses. The conductor testified that after appellee had been put off the car he assaulted the conductor by striking him over the shoulders with a cane, and that when appellee was in the act of delivering a second blow with the cane the conductor put his hand on appellee's breast and pushed him backward, causing him to fall on his back on the curb. The motorman testified that “after he [appellee] got out on the platform the man stepped off the car, and when he got on the street he turned around and raised his cane and struck the conductor across the shoulders. The conductor stood there and the man came back again with his cane to strike the conductor with the cane, and the conductor put his hand up to ward off the blow and the man fell back in the street. He fell between the curb and the car—on his back, I believe. I don't know where his head was—I would not say. I did not get off the car. He was lying on the street—I should judge probably two or three feet back of the body of the car and three or four feet east of the car. I didn't see anything until the conductor got off. I believe he raised him up.” Neither one of the three passengers who testified for appellant gives any details of what occurred after the conductor and appellee were out of the car on the platform. With this evi-

dence in the record the court below did not err in submitting the case to the jury.

It is also suggested that the evidence fails to establish the averment in the declaration as to the speed of the car, and that there was a variance in this respect. It was not ⁵²⁸ necessary to prove that the car was moving at the rate of speed alleged, or any other rate of speed. The rate of speed was only important as bearing upon the dangers which would attend a violent expulsion from the car, and thereby characterize the act of ejection and the motive of the conductor at the time: *Illinois Cent. R. R. Co. v. Davenport*, 177 Ill. 110, 52 N. E. 266.

It is next contended by appellant that the court erred in the admission of evidence over appellant's objection. Under this contention objection is made to the ruling of the court below upon three matters of evidence which require separate consideration.

1. Over the objection of appellant the court below permitted witnesses to testify that at the time appellee obtained the transfers the conductor on the Lincoln avenue car told appellee that the transfers were good on the northbound Halsted street car. At the time of the transaction in question the validity of the ordinance of the city of Chicago relating to transfers was being contested in the courts. The position assumed by appellant was that the ordinance was invalid, and accordingly instructions had been issued to conductors on the Halsted street line not to receive transfers at this point from the Lincoln avenue line, and the refusal of the conductor to honor appellee's transfer was in accordance with instructions he had from his superiors. October 25, 1902, this court handed down an opinion sustaining the validity of the ordinance in question, and the case is reported as *Chicago Union Traction Co. v. City of Chicago*, 199 Ill. 484, 579, 65 N. E. 451, 470, 59 L. R. A. 631. The effect of this decision was to establish and declare the validity of the ordinance, not as of the date of the opinion, but as of the date it took effect by its terms. The ordinance was as valid before the rendition of this decision as it was afterward, and if appellant chose to regard it as invalid and instructed its employes accordingly, it did so at the risk of having its contention set at naught and its acts in violation ⁵²⁹ of the ordinance pronounced illegal. A violation of the law cannot be excused on the grounds that the violator believed the law un-

constitutional. The validity of the ordinance having been established, the duty of the appellant and its servants, and their relations to appellee, must be determined by the ordinance rather than by the instructions of appellant to its servants based on the assumption that the ordinance was invalid. Under the provisions of the ordinance the conductor of the Lincoln avenue car was required to give appellee a transfer to the Halsted street car, and it was the legal duty of the conductor of the Halsted street car to accept said transfer and carry appellee to any regular stopping place within the city of Chicago where he desired to leave the car. The evidence shows that the conductor on the Lincoln avenue car furnished appellee with the transfer and explained to him at the time that it was good on the Halsted street line. In so doing the conductor was in the direct line of his duty imposed by the ordinance. He was the only person on the car having the transfers and authorized to deliver them. It was his duty, as a servant of appellant, to issue transfers regardless of any instructions he may have had to the contrary from his superiors, and in carrying out this duty he must be held to have been acting for and on behalf of the company.

In the view we take of this question the conductor of a street-car line who is placed in charge of a car, supplied with blank transfers and authorized to punch and deliver them to passengers upon request, in consideration of cash fare previously paid, stands in the relation to the street-car company and its passengers very much like a ticket seller who has been chosen for the purpose of supplying the public, for a consideration, with tickets entitling the holder to certain rights and privileges. In such case the ticket seller, for the purpose of that transaction, is the direct representative of the company for which the tickets are sold, and what such agent says in connection with the sale of tickets and as to ⁵²⁰ the extent of the privileges thereby secured has often been held admissible as part of the *res gestae* and as characterizing the subsequent conduct of the purchaser of such ticket. *New York R. R. Co. v. Winter*, 143 U. S. 60, 12 Sup. Ct. Rep. 356, 36 L. ed. 71, is a case where the conductor of a railroad train punched a passenger's ticket in such a way as to allow passenger, as he said, "a stopover" at a station not then reached on the railroad line. Upon reaching the station at which the passenger desired to stop over the passenger left the train, and the next day took a train on the same road

intending to use the unused portion of his ticket. The conductor on the latter train refused to honor the ticket, demanded cash fare, and upon his refusal to pay the passenger was forcibly ejected. One of the questions in the case was whether it was competent to show what the first conductor said with respect to the ticket being good in the form he returned it to the passenger. Evidence was also admitted in this case that the ticket agent who sold the passenger the ticket in Boston told the passenger that the ticket was good for stopover privileges, and it was held that it was entirely proper for the passenger to make inquiries of the ticket agent and to rely upon what the latter told him with respect to his stopover privileges: See, also, *Hufford v. Grand Rapids R. R. Co.*, 64 Mich. 631, 8 Am. St. Rep. 859, 31 N. W. 544; *Burnham v. Grand Trunk Ry. Co.*, 63 Me. 298, 18 Am. Rep. 220; *Murdock v. Boston etc. R. R. Co.*, 137 Mass. 293, 50 Am. Rep. 307. In these cases evidence of what the ticket seller said to the purchaser at the time of the sale was admitted. In *Illinois Cent. R. R. Co. v. Davenport*, 177 Ill. 110, 52 N. E. 266, where the ticket agent informed the purchaser that the ticket sold by such agent was good on a certain train, the court held that the plaintiff did not enter upon the train as a trespasser. It is there said: "The ticket agent informed the appellee the ticket entitled him to ride on that train. . . . The appellee having entered the train by direction of the station agent of the company, and without notice that passengers were not carried upon it, did not go upon the train as a trespasser." ⁵³¹ Such evidence has been held admissible with respect to ticket agents by the courts of many other states of the Union, and we see no reason why a conductor of a street-car, in delivering transfers to passengers when it is his legal duty to do so, should not be governed by the same rules. There was no error in the admission of this evidence.

2. It is next objected that the court erred in permitting appellee to state that he was making an average of five hundred dollars per month out of his business during the year preceding the accident, and that he had only been able to make from fifty dollars to seventy-five dollars profit per month since the accident. The declaration and the proof showed that appellee was engaged in the business of jewelry jobber. He maintained an office and place of business at 84 State

street, Chicago. As well as we can gather it from the evidence, appellee's method of doing business was to go out personally and solicit orders, and in the evening he would personally take the goods sold to his customers and deliver them. He had no clerks or assistants except his daughter. He was not working for others, but running a business for himself. Appellant, in discussing this assignment of error, construes what the witness said as "profits" in his business, and argues from this assumption that future profits of a commercial business are too uncertain and speculative to form the basis of a verdict in a personal injury case. We have read appellee's evidence from the record upon this point, and upon a careful consideration of it we think appellant's assumption that appellee stated that he had made five hundred dollars "profit," in the usual commercial sense in which the word "profit" is understood, is not a fair construction of appellee's evidence. He was asked what he was making in his business, on an average, per month the year preceding the accident. His answer was five hundred dollars. After some discussion as to the admissibility of the evidence, and after the court had refused to strike out the answer, the court suggested that he did not understand what he meant—whether he made that much or took in ⁵³² that much—and in answer to a question propounded by counsel for the purpose of bringing out the information which the court wanted, witness said that he made that much profit.

Much reliance is placed upon the case of *Fisher v. Jansen*, 128 Ill. 549, 21 N. E. 598, and a quotation from that case is made which counsel insist supports appellant's contention. The language there used by the court must be understood with reference to the facts of the case then being considered. From a statement of the facts in the *Jansen* case (128 Ill. 549, 21 N. E. 598), it appears that Jansen had been in the book business as a member of the firm of Jansen, McClurg & Co.; that his health had broken down from overwork, and that he had retired from business and was not at the time of the accident engaged in any business whatever. Under this state of facts it is said: "It is manifest that it would have been incompetent to have proved what he had made in business prior to his injuries, since that was the result of circumstances that might never be repeated." It is true, it would not do to speculate on the probability that Jansen

would re-embark in business, and if he did so that his profits would be what they had been in former years when engaged with others in that line of business.

The distinction between the Jansen case (128 Ill. 549, 21 N. E. 598) and the one at bar is very clear. Here appellee was engaged in a business at the time of the accident, from which his income was dependent largely, if not entirely, on his personal labor and supervision. How much capital he had invested, or whether any at all, is not shown. From the fact, disclosed by the record, that appellee had recently gone through bankruptcy and all his real estate had been sold under foreclosure, we infer that he was probably engaged in the well-known line of jewelry jobbing that requires little or no capital. Appellee's daughter describes his business as "wholesale jobber," which, as is well known, is a name assumed by a large class of dealers who transact a sort of brokerage business in jewelry ⁵³³ practically without capital. Manifestly, in this line of business the income derived therefrom is as much the personal earnings as would be the salary or commissions of a traveling salesman. Such evidence is clearly admissible under proper averments in the declaration, and in the cases where it has been held inadmissible the judgment has usually been rested on the ground that the declaration did not specifically allege such special damages.

In the case of Wabash Western Ry. Co. v. Friedman, 146 Ill. 583, 30 N. E. 353, 34 N. E. 1111, evidence that the plaintiff was receiving three thousand dollars per year was held erroneous, not, however, because his loss in that regard was not a proper element of damage, but, to use the language of the court on page 593, because "the declaration contained no allegation of any special contract or engagement of the plaintiff with any person under which he might earn money for his services." In this case a number of decisions from this and other states are reviewed, an examination of which will show that they turned on the question of the sufficiency of the declaration to warrant the proffered testimony.

In Chicago etc. R. R. Co. v. Meech, 163 Ill. 305, 45 N. E. 290, the plaintiff was permitted to state how much he earned in his business as a painter for a year anterior to the accident. He answered, three thousand dollars, approximately. It was shown in the case that the plaintiff was a contracting painter, and that his mode of doing business was to obtain contracts and employ others to assist him in doing the work.

The averment in the declaration was as follows: "And [the plaintiff] has been prevented from attending to his usual business and avocation and earning and receiving large emoluments which he otherwise would have received." The evidence was held admissible, and after a careful review of the cases in this state, including *Fisher v. Jansen*, 128 Ill. 549, 21 N. E. 598, the general rule deducible from all the cases is there formulated, as follows (page 314): "The rule deducible from the cases in this state is, that in order to recover compensation for inability ⁵³⁴ to work at the plaintiff's ordinary and usual employment or business, all that is necessary in the declaration is the general averment of such inability, caused by the injury, and consequent loss and damage, and that proof of his particular employment or business and of his ordinary wages or earnings therein is admissible in evidence under such general averments, but that when it is sought to recover for loss of profits or earnings that depend upon the performance of a special contract or engagement, then the special and particular damages, and the facts on which they are based, must be set out in the declaration. The distinction we have noted may be a relaxation of the common-law rule, but it is founded upon the precedents to be found in our reports." Under the rule above laid down and the averments of appellee's declaration, we think the evidence was competent, and there was therefore no error committed in admitting it. This case is very similar, upon this point, to *Chicago Union Traction Co. v. May*, 221 Ill. 530, 77 N. E. 933, where testimony of this character was held competent.

3. It is further contended by appellant that the court erred in admitting the ordinance in evidence. The objection is that the ordinance was immaterial, since under the law it was the duty of appellee, when he presented a transfer which was refused by the conductor, to either pay fare or leave the car at the request of the conductor, and if he refused and sustained injuries while resisting ejection, he could not recover, unless it be for the use of excessive and unnecessary force. Conceding the correctness of the above rule in its application to street-cars as well as to other carriers of passengers, we do not think there was any error in the admission of the ordinance. The ordinance proves the validity of the transfer. It also established appellee's legal right to be carried on that transfer, of which appellant is conclusively presumed to have had notice, and logically has a direct bearing

on the animus of the conductor in ejecting him from the car.

535 The foregoing discussion substantially covers all of the points that we deem it necessary to discuss. While there are some other matters discussed in appellant's brief, we do not believe we would be justified in extending this opinion by their discussion. We have reached the conclusion that the verdict of the jury may well rest upon the grounds of excessive and unnecessary force used by appellant's conductor in forcibly ejecting appellee from its car.

There being no reversible error in the case, the judgment is affirmed.

The Power of Municipal Corporations to Make and Enforce Regulations respecting street railways for the protection of the public is discussed in the monographic note to *People v. Detroit United Railway*, 104 Am. St. Rep. 636-664.

If a Street-car Conductor Makes a Mistake in issuing a transfer, and the passenger in presenting it to a second conductor makes a reasonable explanation of the mistake, the latter conductor must, according to the better rule, determine at his peril whether the passenger is entitled to the transfer, notwithstanding it does not show upon its face such right: See *Georgia Ry. etc. Co. v. Baker*, 125 Ga. 562, ante, p. 246, and cases cited in the cross-reference note thereto.

As to the Admissibility of the Statements of an Employé of a railway company of whom a passenger purchases a ticket, in an action to recover damages by the passenger for a wrongful expulsion from a train because without proper evidence of the right to transportation, see *Illinois Cent. R. R. Co. v. Harper*, 83 Miss. 569, 102 Am. St. Rep. 469; *Ames v. Southern Pac. Co.*, 141 Cal. 728, 99 Am. St. Rep. 98.

KISTNER v. PETERS.

[223 Ill. 607, 79 N. E. 311.]

BILLS AND NOTES—Joint Makers—Position of Signature.—

One may become liable as a joint maker of a note without reference to the position of his signature, whether upon the face or back of the note, when it is shown by satisfactory evidence that the parties signing did so as joint makers. (p. 363.)

BILLS AND NOTES.—Legal Effect of Indorsement upon the back of a note includes a transfer of the title of the instrument indorsed, and, unless otherwise limited, an additional promise to pay it. (p. 364.)

BILLS AND NOTES—Indorsement in Blank—What Constitutes.—The name of the payee indorsed upon the back of a note

transfers the legal title, and must be treated as an indorsement in blank, although there is written over such name the words, "I hereby acknowledge myself a principal maker of this note with" another named, "and my liability as such principal jointly with him." (p. 364.)

BILLS AND NOTES—Effect of Indorsement.—The name of the payee upon the back of a negotiable note transfers the legal title, and it makes no difference that there is written above it language enlarging the liability of the indorser, such as a guaranty of the payment of the note. (p. 365.)

BILLS AND NOTES—Indorsement in Blank—Additional Contract.—If a note is indorsed in blank, the assignee has a legal right to write any words over the signature consistent with the contract of indorsement at any time before or at the time of the trial in an action on the note. (p. 365.)

J. Zimmerman and Wright Brothers, for the appellant.

R. C. Harrah and S. F. Gilmore, for the appellee.

608 WILKIN, J. The appellant claims that the trial court erred, first, in overruling his demurrer; and second, in allowing the additional indorsement to be made. As we understand his counsel, his contention is that the allegation of the declaration that the note was assigned to appellee is at variance with the legal effect of the indorsement on the back of the instrument, in that the indorsement was not legally an assignment, but by its terms Rosa M. Rinehart became a joint maker. The decision of this question will turn upon the legal effect, if any, to be given to the writing first indorsed on the note.

It is earnestly contended that by the indorsement Rosa M. Rinehart became a joint maker of the instrument. With this contention we cannot agree. It is undoubtedly true that one may become liable as a joint maker of a promissory note without reference to the position of his signature, whether it be found upon the face or back of the note, if it be shown by satisfactory evidence that the parties signing did so as joint makers. In other words, it is immaterial ⁶¹⁰ upon what part of the paper the signature of a party may appear, provided it be shown by satisfactory evidence that in signing it he did so intending to become a joint maker. *Lincoln v. Hinzey*, 51 Ill. 435, goes to this extent but no further. Ordinarily, the signatures of parties to negotiable instruments have a well-understood position on the paper. The payee is named in the body of the note, the makers sign it upon its face below the body of the instrument, and the indorser or

guarantor signs his or her name upon the back. Under the foregoing rule, however, the position of the names is not of controlling importance if an intention be satisfactorily shown to bind the parties as makers or guarantors. In this case the note was made and signed in conformity with the usual and ordinary custom. It was made payable to Rosa M. Rinehart and signed at the bottom by E. N. Rinehart, Philip Kistner and Ph. Wiwi. The name of Rosa M. Rinehart was signed upon the back, which made her an indorser in blank unless the words preceding her signature show a different intention, and the person to whom she delivered it, so indorsed, become the legal owner, authorized to maintain an action upon it: Hurd's Stats. 1903, c. 98, p. 1278, sec. 4. "In its most general and literal signification an indorsement is an incidental or subsidiary writing upon the back of the paper or document to the contents of which it relates or pertains": 4 Am. & Eng. Ency. of Law, 2d ed., 256. "It may consist merely of the name, commonly called an indorsement in blank, or it may be limited or specific; but under the law-merchant its legal effect includes properly, first, a transfer of title to the instrument indorsed; and secondly, unless otherwise limited, an additional promise to pay the same": 4 Am. & Eng. Ency. of Law, 2d ed., 257.

In determining what, if any, legal effect can be given to the words, "I hereby acknowledge myself a principal," etc., it must be borne in mind that Rosa M. Rinehart was, at the time of the indorsement, the payee of the note, and not a stranger or third party. The contention that she became a joint maker of the note payable to herself, under the well-settled rule, also insisted upon by counsel for appellant, that a note payable to the maker is without legal effect until assigned, renders the whole transaction a nullity, which we cannot presume was intended. An attempt to become the principal maker of a negotiable instrument with one of several makers is an anomaly in the law. Of course it may be done, but the evidence of that intention must clearly appear, and to give the indorsement in this case that effect would destroy the negotiability of the instrument and do violence to the intention of Mrs. Rinehart. She manifestly intended to assign the note to Hettie J. Peters. What purpose she may have had in the use of the language preceding her signature can only be a matter of conjecture. Probably it was with

some idea of enlarging her liability as indorser. But however this may be, we will not attribute to that language the intention of relieving the makers of all legal liability. The name of the payee upon the back of a negotiable instrument will transfer the legal title to the same, and it makes no difference that there is written about it language enlarging the liability of the indorser, such as a guaranty of the payment of the note: *Heaton v. Hulbert*, 3 Scam. 489; *Herring v. Woodhull*, 29 Ill. 92, 81 Am. Dec. 296; *Judson v. Goodwin*, 37 Ill. 286.

Our conclusion is that the language, "I hereby acknowledge myself a principal maker," etc., may be stricken out as surplusage, without legal meaning or effect, and that under the allegations of the declaration the signature of Rosa M. Rinehart makes her an indorser. In other words, the indorsement, unexplained, does not show an intention other than to assign and transfer the legal title of the instrument to the appellee.

As to the correctness of the ruling of the trial court in permitting the indorsement, "for value received," etc., preceding the writing first placed on the note, little need be said. If the indorsement was, in legal effect, in blank, as ⁶¹² we think it was, the assignee had the authority to write any words over the signature consistent with the contract of indorsement, and she might do that at any time before or during the trial of the case: *Vansant v. Allmon*, 23 Ill. 30; *Maxwell v. Vansant*, 46 Ill. 58; *Boynton v. Pierce*, 79 Ill. 145. Furthermore, the defendant having demurred to the declaration and elected to stand by his demurrer, was in no position to object to that indorsement. He was in no way injured by it.

We concur in the judgment of the appellate court, and it will accordingly be affirmed.

Mr. Justice Farmer having heard this case in the circuit court took no part in its decision here.

One Who Signs His Name on the Back of a Note, in blank, is regarded by some authorities as *prima facie* a maker, and assumes the same obligations as if he wrote his name on the face of the instrument: *Lyndon Sav. Bank v. International Co.*, 78 Vt. 169, 112 Am. St. Rep. 900; *Nashua Sav. Bank v. Sayles*, 184 Mass. 520, 100 Am. St. Rep. 573. Many authorities affirm that one who indorses his name on the back of a note before its delivery, whether or not it is negotiable, is a maker: *Young v. Schon*, 53 W. Va. 127,

97 Am. St. Rep. 970; *Dow Law Bank v. Goldfrey*, 126 Mich. 521, 86 Am. St. Rep. 559; *Merchants' Trust etc. Co. v. Jones*, 95 Me. 335, 85 Am. St. Rep. 412. See, however, *Davis v. Bly*, 164 N. Y. 527, 79 Am. St. Rep. 670, and consult the monographic note on this subject to *Cadwallader v. Hirschfeld*, 72 Am. St. Rep. 676.

CASES
IN THE
APPELLATE COURT
OF
INDIANA.

WESTERN INDIANA COAL COMPANY v. BROWN.

[36 Ind. App. 44, 74 N. E. 1027.]

APPEAL AND ERROR—Demurrer—Conclusions of Law.—A demurrer to the complaint and an exception to the conclusions of law present the same question when the facts found are the same as those alleged in the complaint. (p. 368.)

MINES AND MINING—Duty to Support Surface.—If the surface of land is owned by one person and the minerals beneath by another, the owner of the minerals cannot, without liability, remove them without leaving sufficient natural or artificial support to sustain the surface. (p. 371.)

MINES AND MINING—Subsidence of Surface—Burden of Proof.—The act of a mine owner in removing all surface support is prima facie the cause of the subsidence of such surface, and the burden of proof is on the mine owner to show that the subsidence was caused by the additional weight of buildings subsequently erected thereon. (p. 371.)

MINES AND MINING—Surface Subsidence—Negligence—Contract Limiting Liability.—A contract between the owner of a mine and the owner of the surface above it, that the mine owner shall have the right to mine without liability, does not relieve the latter from his negligence in failing to leave support for the surface. (pp. 371, 372.)

MINES AND MINING—Surface Support—Evidence.—If it is sought to recover damages for a mine owner's negligence in failing to provide proper surface support to the injury of the surface owner, subsequent leases, assignments and plats made by the mine owner to which the surface owner was not a party, and purporting to relieve the mine owner from liability, are not admissible in evidence. (p. 372.)

J. S. Bays, L. F. Bays and F. F. Bays, for the appellant.

J. A. Riddle and W. T. Douthitt, for the appellee.

⁴⁵ WILEY, C. J. Appellant is a corporation engaged in mining and selling coal. It was operating under a lease ex-

(367)

cuted by appellee Rose to one Templeton, and by Templeton assigned to appellant. It was mining coal under lots owned by appellee Brown and adjacent territory. After it had taken out the coal under the lots owned by appellee Brown, the surface of the soil subsided and materially injured said appellee's dwelling-house, etc., situated thereon. She commenced this action against the appellant to recover damages, alleging that after it had taken out the coal under the surface of her property it negligently failed to place and leave therein sufficient props, etc., to sustain and hold the surface. Upon appellant's motion, appellee Rose was made a party defendant. Appellant's demurrer to each paragraph of the complaint was overruled. Appellant answered in two paragraphs, the second of which was a ⁴⁶ general denial. To the first paragraph of answer appellee Brown demurred, and such demurrer was sustained. Appellant filed a cross-complaint making appellees Brown and Rose defendants thereto, and their separate demurrers to such cross-complaint were sustained. Upon a request, timely made, the court made a special finding of facts, and stated its conclusion of law thereon, to which conclusion of law the appellant excepted. Its motion for a new trial was overruled, and the several rulings here referred to are assigned as errors.

Under the rule so firmly established by the authorities in this state, it is unnecessary for us to consider the complaint, for the same questions are presented by the special finding of facts and conclusion of law as were raised by the demurrers to the complaint, and if there was any error in such ruling, it will be treated as harmless: *Scanlin v. Stewart*, 138 Ind. 574, 37 N. E. 401, 38 N. E. 401; *Woodward v. Mitchell*, 140 Ind. 406, 39 N. E. 437; *Smith v. Wells Mfg. Co.*, 148 Ind. 333, 46 N. E. 1000; *Runner v. Scott*, 150 Ind. 441, 50 N. E. 479; *Gunder v. Tibbits*, 153 Ind. 591, 55 N. E. 762; *Gas Light etc. Co. v. City of New Albany*, 158 Ind. 268, 63 N. E. 458; *Louisville etc. R. Co. v. Downey*, 18 Ind. App. 140, 47 N. E. 494; *Tulley v. Citizens' State Bank*, 18 Ind. App. 240, 47 N. E. 850.

All material facts averred in the complaint are substantially stated and found in the special findings and covered by the conclusion of law. The substance of the facts specially found is as follows: Appellant was and is a corporation, and was on the 19th of April, 1902, and for a long time prior thereto

had been, engaged in mining coal near the city of Linton, Indiana; appellee Anna Brown was on said day, and still is, the owner in fee simple of lots numbered 14, 15, 16 and 17 in Rose's third addition to the city of Linton; there was at said time situated on said lots a four-room frame dwelling-house, fronting upon Marco street, in said city; the appellant was on said ⁴⁷ day the owner of the coal and other minerals underlying said lots, and on or before said day had mined and taken the coal from under said lots and building, and had negligently and carelessly failed properly to secure the roof of said mine under said lots and dwelling by props and timbers, or otherwise to keep the same safe from caving in under said lots and dwelling; by reason of appellant's negligent failure so to prop and to secure the roof of the mine, a portion of said lots, including the part upon which was situated said building, without any fault on the part of appellee, fell and caved in, and wrecked and damaged said dwelling, and made sink holes and excavations in said lots, destroyed the well upon said lots, used in connection with said dwelling-house, wrecked and injured the smokehouse, and injured and damaged certain trees situated on the lots; the damage to said lots and building and the improvements thereon was eight hundred dollars. As a conclusion of law, the court stated that appellee Brown was entitled to recover from the appellant, as damages, the sum of eight hundred dollars and the costs of suit. In its motion for a new trial the appellant assigned as one of its reasons therefor that the several findings were not supported by sufficient evidence. Without referring to or reciting the evidence pertaining thereto, we find upon a careful examination of the record that there is an abundance of evidence to sustain every material finding of the court, and hence we cannot disturb the judgment upon the evidence.

It is earnestly contended by counsel for appellant that the court erred in sustaining the demurrer to its first paragraph of answer and to its cross-complaint. The facts set up and relied upon in each of these pleadings are substantially the same, and the consideration of one may serve for both.

The sum and substance of the first paragraph of answer is that on the seventeenth day of July, 1895, appellee Rose was the owner of certain described real estate, which em-

braced the lots now owned by appellee Brown and other tracts of ⁴⁸ land; that on said day he executed a lease to John A. Templeton, for a term of twenty-one years, for all the coal underlying the real estate therein described, with the right to said Templeton, his assigns, etc., to mine such coal; that on the second day of March, 1896, said Templeton, for a valuable consideration, assigned all his right and interest in said lease to appellant; that said lease was duly recorded in the miscellaneous records of Greene county on the fourteenth day of October, 1895. It is further averred that said lease contained a stipulation that the lessee had the right to mine the coal from under said real estate without any liability for damages to said surface or any part thereof, and that said lease also provided that in all future transfers of said real estate it should be stipulated in the deed that there should be no liability whatever to the owner of the surface of the land for any damage that might accrue by reason of said lessee or its assigns mining the coal out from under said premises. It is further charged that appellee Brown had full knowledge that said lease had been made as herein alleged, and that said Rose had stipulated and covenanted in said lease that in any transfers, subsequent to the execution of said lease, of any part of the surface, it should be stipulated in the deed conveying the same that the minerals should be reserved from said subsequent transfers, and the right to mine the same should be without any liability to the lessee or his assigns, and that appellee Brown took and accepted said conveyance with said understanding, and with full knowledge of all the rights of appellant herein with reference to said surface. It is further charged that, in making said conveyance to appellee Brown by said Rose, there was a mutual mistake, and by error and neglect of the scrivener such deed failed to stipulate that said Templeton or his assigns should have the right to mine said coal without any liability whatever for damages that might in any manner accrue to the owners of the surface thereof.

⁴⁹ The clause or provision of the lease pertaining to the question under consideration is as follows: "All transfers of the surface of the realty herein described that have been made by the party of the first part for reserved minerals, and the right to mine the same without liability and all future transfers by party of the first part, are to be made with the same reservations."

The deed from Rose to Brown was executed on the sixth day of October, 1893, being nearly two years before the lease of Rose to Templeton. This being true, the subsequent leasing to Templeton of the right to mine coal thereunder could in no legal sense affect the rights of appellee Brown. It would be utterly impossible for her to know two years before the execution of the lease what its terms and provisions would be. Her rights in the property vested when she took the conveyance.

During the year 1901 Rose brought an action against appellee Brown to have his deed made to her in 1893 reformed, so as to include the following clause: "Reserving the coal underlying said lands, together with the right to mine and remove the same." But said deed was not reformed so as to exempt from liability the lessee or his assigns from damages accruing to the surface of the real estate by reason of the mining of the coal. It seems clear to us, therefore, that there was no error in sustaining the demurrer to either the first paragraph of answer or the cross-complaint.

The law seems to be well settled that, when the surface of land is owned by one person and the minerals beneath are owned by another, the owner of the minerals cannot without liability remove them without leaving sufficient natural or artificial support to sustain the surface: 18 Am. & Eng. Ency. of Law, 2d ed., 556, and cases cited. See, also, *Yandes v. Wright*, 66 Ind. 319, 32 Am. Rep. 109.

⁵⁰ It is contended by appellant that it was necessary for appellee Brown to show affirmatively that the subsidence of the surface did not occur by reason of the weight of the dwelling-house over the place where the collapse occurred. In this proposition appellant is in error, for it has been held that the act of a lessee of a coal mine in removing all support from the superincumbent soil is *prima facie* the cause of the subsequent subsidence thereof, and the burden is on the lessee to show that it would not have subsided but for the additional weight of buildings erected subsequently to the lease: *Wilms v. Jess*, 94 Ill. 464, 34 Am. Rep. 242.

In this case, however, the building that was wrecked was placed upon the real estate prior to the execution of the lease. But even if there had been a grant by appellee Brown to the appellant by express stipulation that there should be no liability, the same would not relieve the appellant from

the liability for injury caused by its own negligence: 18 Am. & Eng. Ency. of Law, 2d ed. 557; *Livingston v. Moin-gona Coal Co.*, 49 Iowa, 369, 31 Am. Rep. 150.

It is urged by appellant, and the question is raised by the motion for a new trial, that the court erred in excluding certain offered evidence on its part, to wit, the lease by Rose to Templeton, and the assignment thereof to appellant; also in excluding the admission as evidence of the plat of Rose's third addition to the town of Linton, showing lots 14, 15, 16 and 17 owned by plaintiff; also in refusing to admit in evidence an order-book entry in the case of *Bishop A. Rose v. Anna Brown*, in the Greene circuit court, wherein a decree was entered reforming the deed of Rose to Brown in the particular already referred to; and for refusing to admit in evidence the deed as thus reformed.

We are unable to see where there is any reversible error in any of these rulings. As the facts thus relied upon all⁵¹ occurred after appellee had received her title from Rose, she was in nowise bound by any subsequent agreement or contract entered into by her grantor with third parties. Considering the whole record, our conclusion is that the trial court arrived at a correct result, and that there is no error in the record for which a reversal should be ordered.

The judgment is affirmed.

Myers, P. J., Black, Robinson and Comstock, JJ., con-cur; Roby, J., absent.

In the Case of a Homestead Division of Land, the owner of the subjacent estate, coal, or other mineral, owes to the superincumbent owner an absolute right of support, arising out of the ownership of the surface. Good or bad mining in no way affects the respon-sibility; what the surface owner has a right to demand is sufficient support, even if it is necessary to that end to leave every particle of the mineral untouched: *Noonan v. Pardée*, 200 Pa. 474, 86 Am. St. Rep. 722; *Williams v. Hay*, 120 Pa. 485, 6 Am. St. Rep. 719.

SHAVER v. HOME TELEPHONE COMPANY.

[36 Ind. App. 233, 75 N. E. 288.]

MASTER AND SERVANT.—A servant asking damages for an injury must have been in the exercise of due care and diligence at the time of his injury. (pp. 375, 376.)

MASTER AND SERVANT.—**Servants Assume Such Risks** as are naturally and reasonably incident to work within the scope of their employment so far as the hazards are obvious and within the apprehension of persons of their experience and understanding. (p. 376.)

MASTER AND SERVANT—Obvious Risks—Orders of Foreman.—Although a servant has the right to presume, in the absence of warning and notice, that in acting under the order of a foreman he will not be subjected to injury, this rule has no application where the danger is obvious and the servant has ample time to see and apprehend the danger. (p. 376.)

MASTER AND SERVANT—Assumption of Risks.—If a servant twenty years of age and of average intelligence is ordered by his master, in unloading a carload of telephone poles, to cut the stay wire of a standard holding the poles to the car, and he knows the purpose thereof, and there is nothing to prevent him from seeing the dangers connected with such act, he assumes the risk of injury arising therefrom. (p. 377.)

Crane & McCabe, for the appellant.

F. P. Mount, for the appellee.

²³³ **ROBINSON, J.** Appellant appeals from a judgment against him on a demurrer to his complaint asking damages for a personal injury. Appellant was working under the direction of a foreman, and was injured while unloading a carload of telephone poles. It is averred that the poles, from twenty-five to thirty-five feet long and ten to fifteen inches in diameter, were loaded lengthwise on a flat-car, piled up about eight feet high and held in place by wooden ²³⁴ standards at the sides of the car. These standards were placed three on each side of the car, one at the middle and one near each end, and were stayed in pairs with wires extending transversely across the car; one of such wires being near the top and the other near the middle of the standards. The wires attached to the middle of the standards had been fastened when the car was about half loaded, and the remainder of the load was placed on top of these wires, so that the weight of the poles drew the middle and upper part of the standards inward, tightly binding the load together. Appellant was employed as one of a number of

men to assist in unloading the poles, and he and the other laborers were at all times subject to, and were bound to conform to, the order and direction of one Ramsey, who was employed by appellee for the purpose of having charge and control of, and who had charge and control of, the laborers, and who was appellee's only representative present at and in charge of the work of unloading the car. Ramsey ordered certain laborers to, and they did, cut all the wire stays, except the lower stay across the middle of the car, and also cut near the floor of the car all the standards on the west side of the car except the center standard. Thereupon three or four of the men, in obedience to Ramsey's order and direction, attached a wire to the top of this remaining standard, and, by pulling thereon, attempted, but were unable, to break the same, and were unable to break the standard after one of the men had cut into and weakened it near the floor of the car. After several unsuccessful efforts had been so made to break the standard, Ramsey negligently ordered appellant to take an ax and go in by the side of the car and cut the stay wire. At that time the poles remained on the car in exactly the same position they were in when the work of preparation for unloading the same began, without any shifting or change resulting from the cutting of the other stay wires or removal of the other standards, but that the poles appeared to be sufficiently and safely maintained ²³⁵ in position by the remaining standard on the west side of the car. Acting in obedience to Ramsey's order, appellant went to the standard and cut the stay wire. The standard immediately broke, letting the poles fall, striking appellant and injuring him. It is also averred that the appellant was twenty years of age, and had no knowledge or experience in handling telephone poles, did not know how they were loaded nor by what means they were held together on the car, nor of their liability to burst apart and break the standards as soon as the stay wires were cut, nor that the weight of a large number of them rested upon the stay wire and drew the middle standard inward with great force, nor that when the wire should be cut the standard would not be strong enough to support them, nor the manner in which they were loaded on the car, "nor the means by which the same were held together thereon, if any, other than said standards and said stays across the top of said load, but he did not and could not see the wire stays which passed through said

load of poles, and between the poles from standard to standard, about the middle thereof, and did not know that the same passed through the load to the opposite standard." He knew nothing as to the danger involved in cutting the wire, and his inexperience and want of knowledge in all such respects were known to appellee and Ramsey. There are also averments that Ramsey had experience and knowledge of all present conditions, that under his direction the work was done in a negligent and careless manner, that he failed to warn appellant of the danger, and an averment as to the manner in which the work might have been done without danger.

The pleading shows that appellant was employed to do the particular work in which he was engaged when injured, and that nothing had been done toward unloading the poles until after appellant and the other men arrived at the car, and that appellant knew all that had been done in the way of preparing to unload the poles. It does not appear that any machinery or appliances were used in the ²³⁶ work, and that the work of beginning the unloading consisted in loosening the stay wires and removing the standards from one side of the car and permitting the poles to roll off the car onto the ground. It is averred that Ramsey omitted to do certain things, which, if they had been done, would have made the work less dangerous; but it does not appear that appellant was relying upon the work's being done in any manner other than that pursued.

Section 1 of the employers' liability act (Burns' Rev. Stats. 1901, sec. 7083; Acts 1893, p. 294) requires that an employé, asking damages for an injury, must have been in the exercise of due care and diligence. It is true appellant avers that he was ignorant of the danger; but can this general averment stand in the face of the specific averments showing the actual conditions surrounding him immediately before and at the time he was injured? He was twenty years of age, of average intelligence, and in possession of all his faculties. He must have known that the sole purpose in view in removing the end standards and cutting the stay wires was to permit the poles to roll from the car to the ground; that if all the standards were removed and the wires cut, the poles, piled eight feet high against the standards, would fall. He knew that the end standards on the west side of the car had been removed, and that the stay wires had all been cut except the

one at the middle of the center standards. He knew that the men with the pull wire had tried to break the middle standard and failed; that this standard was cut into, and that the men were still unable to break it. He must have known that if that standard was removed the poles would fall. It is true he avers he did not know that the middle stay wires extended through to the opposite standard, but he knew there was a stay wire fastened to the middle of the standard the men were trying to remove, and he does not negative knowledge of the fact that this wire, no matter to what the other end was fastened, was helping to hold the standard, and that the purpose in ²³⁷ cutting the wire was to release the standard. There was nothing to prevent his looking and seeing the actual conditions as they then existed. He was not required to do the act hurriedly before another act, apparently disastrous, might happen.

Appellant was employed to do the particular work in which he was engaged when injured. He assumed such risks as were naturally and reasonably incident to the work, so far as the hazards of the work were obvious and within the apprehension of a person of his experience and understanding: Republic Iron etc. Co. v. Ohler, 161 Ind. 393, 68 N. E. 901; Jenney Electric etc. Co. v. Murphy, 115 Ind. 566, 18 N. E. 30. The process of unloading the poles was a very simple one. There is nothing to show that anything prevented appellant from seeing the actual conditions existing at the time. The danger arose as the unloading progressed. It is not shown that he did not have ample time and opportunity to see and understand each step taken in the process. He cannot be heard to say that he was ignorant of a danger which the use of his senses would have disclosed.

It is well settled that the servant has the right to presume, in the absence of warning and notice, that in conforming to the order of a foreman he will not be subjected to injury: Republic Iron etc. Co. v. Berkes, 162 Ind. 517, 70 N. E. 815. But this rule has no application where the danger is obvious, and the servant has ample time to see and comprehend the danger, and must have known the danger had he used his senses. If he has time and opportunity to see the danger, he has notice of it.

In the case at bar, from all the facts pleaded, appellant must have known the purpose in cutting the wire. He knew the standard had been weakened by chopping into its base.

He knew if the standard was removed the poles would fall. With the end standards removed, and all the stay wires cut but this particular one, and the ²³⁸ middle standard weakened, he must have known the wire was assisting to hold the standard, and that if it was released the standard would probably break. All the steps taken in the process of unloading the poles were simple, all the conditions existing were open and apparent, and there is nothing in the pleading from which it can be said that appellant, twenty years old and in possession of all his faculties, was prevented from understanding and appreciating the danger to which he would be exposed by cutting the wire.

Judgment affirmed.

For a Discussion of the Principles involved in the principal case, see the monographic note to Houston etc. Ry. Co. v. De Walt, 97 Am. St. Rep. 884-900.

PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS RAILROAD COMPANY v. COX.

[36 Ind. App. 291, 73 N. E. 120.]

GARNISHMENT—Railroads—Defenses.—A railroad corporation is subject to garnishment, and if a judgment is rendered against it in such proceeding, it may successfully defend an action by the principal debtor in another state by setting up the judgment in the garnishment proceedings. (p. 380.)

RAILROADS—Seizure of Goods in Custody of by Officer.—A railroad company is excused from liability for not transporting and delivering property, when, without fault or collusion on its part, the property is seized by legal process and taken out of its possession. (p. 380.)

GARNISHMENT—Railroads.—If property is in the possession of a railroad company, and the transit has either not begun, or has been completed, and such property is held by the company, either at the place of shipment or the place of delivery, and is within the jurisdiction of the court issuing the process, the company is subject to garnishment the same as other individuals or corporations. (p. 380.)

GARNISHMENT of Railroads—Goods in Transit.—A railroad company is not subject to garnishment as to goods in its custody in transit, not actually seized by an officer, and outside the jurisdiction of the court issuing the process. (p. 381.)

GARNISHMENT OF RAILROADS—Goods in Transit—Collusion.—If shippers of goods by railroad consign them to themselves under assumed names in order to evade legal proceedings, the railroad company, with no knowledge save that derived from the shipment and not guilty of any fraud or collusion, is not liable as a garnishee to the shipper's creditors under a writ of garnishment served while the goods are in transit. (p. 383.)

J. L. Rupe and L. P. Newby, for the appellant.

F. C. Guase and William A. Brown, for the appellees.

292 ROBINSON, P. J. Action in attachment, in which a garnishee summons was issued against appellant, the property in appellant's possession being then in this state, but in transit to a place without the state. On April 9, 1901, appellees Fleischman and Currie executed to appellees Cox, Lamb and Beeson their promissory note for eleven hundred and sixty-three dollars and thirty-eight cents, payable in ninety days, and, to secure the note, executed a chattel mortgage on some horses, harness and wheel scoops in Wayne county. The mortgage was duly recorded April 11th. No payment having been made on the note, on Sunday, May 19, 1901, the payees filed their complaint, and an affidavit stating that the makers of the note were nonresidents; that on the morning of that day the makers had loaded the property into one of appellant's cars and were shipping it to Chicago, Illinois, with the fraudulent purpose of cheating **293** the plaintiffs out of their claim, and that defendants owned certain personal property then in the custody of the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, in Henry county. An undertaking in attachment was filed, and also an affidavit that plaintiffs believed that appellant had in its custody and possession and in transit from Wayne county, Indiana, to Chicago, Illinois, the above property, and by reason thereof the sheriff of Henry county could not attach the same. A summons in garnishment was issued and served at 6 o'clock P. M. May 19, 1901, by reading and delivering a copy to A. R. Sligar, appellant's station agent at New Castle, Indiana. It is further found that on Saturday night, May 18, 1901, James Lee and one Freeman delivered to appellant at Greensfork, in Wayne county, twenty-five horses, two wagons, two buggies, twelve sets of double harness and a box of personal effects. On Sunday morning, appellant, through its station agent, loaded the property into two cars, one of which was consigned to James Lee, and the other to Lee and Freeman, Chicago, Illinois, and a regular bill of lading for each car was issued as received from Lee and Freeman. These bills of lading constituted an agreement between the shipper and appellant safely to transport the property to Chicago, Illinois, and deliver the same to the consignee. The agent at Greens-

fork did not know either Fleischman or Currie nor Lee or Freeman. The shippers of the property were Fleischman and Currie, who shipped it under the assumed names of Lee and Freeman, intending to have it delivered to themselves under the assumed names, but appellant had no knowledge of such facts. The train on which the property was shipped left Greensfork for Chicago about 6 o'clock A. M. May 19, 1901, and when the summons was served on appellant the train was in Indiana, somewhere between Logansport and Chicago, the former place being eighty-one miles northwest of New Castle, Indiana. Appellant's road, in its course, runs about fifteen miles from New Castle before it ²⁹⁴ passes out of Henry county. Appellant's agent at New Castle had no knowledge of the shipment or of any of the transactions above mentioned. Neither Fleischman, Currie, Lee nor Freeman accompanied the property in transit, but an employé of theirs did. The train was a regular through freight train, due to arrive at Chicago about 3 or 4 o'clock A. M., May 20th. Appellant had no knowledge of Fleischman and Currie, or that they had any interest in the property. Upon the arrival of the property in Chicago, the parties who had shipped it in the names of Lee and Freeman demanded the same from appellant, and the same was delivered to them on May 25, 1901. Appellant owed Fleischman and Currie nothing, and had no other transaction with them than as above set out. The attaching creditors tendered appellant an indemnity bond satisfactory to appellant's local officers, but the property was delivered to the consignees at Chicago, May 25th, and an indemnity bond taken there. The mortgage contained the usual covenants against removing the property, and the mortgagee's right to take possession and sell it and apply the proceeds in payment of the debt. The property shipped was part of the mortgaged property, and was worth twelve hundred dollars.

Upon a conclusion of law in the mortgagee's favor the court rendered a personal judgment against Fleischman and Currie and appellant.

All the errors assigned present practically the same question—that is, When, if at all, is a common carrier required to answer as garnishee as to property in its possession for transportation only, and which at the time the action is brought is in actual transit?

Section 943 of Burns' Revised Statutes of 1901, Acts of 1897, page 233, authorizes the making of any person a garnishee defendant when such person "has property of the defendant of any description in his possession or under his control; . . . or has the control or agency of any property, moneys, credits or effects."

²⁹⁵ It must be admitted that a railroad corporation is subject to garnishee process, and that in a proper case it must be held to respond as other corporations or an individual. And in an action against the company it may successfully plead that in an action in another state against the plaintiff, as principal, and the company, as garnishee defendant, a judgment was rendered against the company: See *Terre Haute etc. R. Co. v. Baker*, 122 Ind. 433, 24 N. E. 83; *Chicago etc. R. Co. v. Meyer*, 117 Ind. 563, 19 N. E. 320; *Ohio etc. R. Co. v. Alvey*, 43 Ind. 180.

And while by statute (Burns' Rev. Stats. 1901, secs. 5185, 5190; Rev. Stats. 1881, secs. 3925, 3926) a railroad company is required to receive and transport property offered for shipment, and must respond in damages for its failure to do so, yet it is excused from liability for not transporting and delivering property when, without fault or collusion on the carrier's part, the property is seized by legal process and taken out of its possession: See *Ohio etc. R. Co. v. Yohe*, 51 Ind. 181, 19 Am. Rep. 727; *Indiana etc. R. Co. v. Doremeyer*, 20 Ind. App. 605, 67 Am. St. Rep. 264, 50 N. E. 497.

If the property is in possession of the carrier, and the transit has not yet begun, or is completed, and is held by the carrier, either at the place of shipment or the place of delivery, and the property is within the jurisdiction of the court issuing the process, there is no reason for holding that the carrier is not subject to garnishee process the same as individuals or other corporations: See *Landa v. Holck & Co.*, 129 Mo. 663, 50 Am. St. Rep. 459, 31 S. W. 900; *Stiles v. Davis*, 1 Black, 101, 17 L. ed. 33; *Cooley v. Minnesota etc. R. Co.*, 53 Minn. 327, 39 Am. St. Rep. 609, 55 N. W. 141.

But where the property is in actual transit, as in this case, a different rule should be applied. It is fundamental that if property is arrested by a summons in garnishment, it is subject to all the rights of the garnishee. Common carriers, under ordinary circumstances, ²⁹⁶ are required by law to receive and transport such property as is delivered to them, and they can discharge this duty only by carrying the prop-

erty according to their contract. If the general rule is declared that a carrier may be made a garnishee for property in actual transit and beyond the reach of the attaching officer, it would necessarily result in the interference with the prompt discharge of the duty to carry the property of other persons who are not parties to the controversy. A railroad company cannot properly discharge the duties imposed upon it as a common carrier if it be required to stop its trains at any time or place, and select out and care for, at its own risk and expense, property in dispute, in a controversy about which it knows nothing, and between parties to neither of whom it is indebted and with neither of whom it has ever had any transaction, except the receipt from one of them of property for the purpose of transportation only. It is provided by statute (Burns' Rev. Stats. 1901, sec. 951; Acts 1897, p. 233) that "The garnishee shall not be compelled in any case to pay or perform any contract in any other manner, or at any other time than he would be bound to do for the defendant." It would seem that under this statute appellant was bound to deliver the property only at the place designated in the contract between it and the shippers, who were the defendants, and that it could not be required to stop its train and take the property out of the car and deliver it at some other place. It is quite true the mortgagees might have stopped the property while yet in this state, but this should have been done by taking actual possession of it through a proper proceeding. When appellant had delivered the property at Chicago, it had performed the contract of shipment as it would have been bound to perform it for the defendants. But after it had arrived at Chicago it was not within the jurisdiction of the courts of this state, and, as said in *Stevenot v. Eastern R. Co.*, 61 Minn. 104, 63 N. W. 256, 28 L. R. A. 600: "Certainly the garnishee could ²⁹⁷ not be required to bring it back into this state for the purpose of subjecting it to the process of our courts."

In *Illinois Cent. R. Co. v. Cobb*, 48 Ill. 402, it is held: "It is not their [common carriers'] business, nor is it their interest, to know to whom the various articles belong, nor should it be required of them that conflicting claims to the property intrusted to them should be adjusted through controversies, the burden, annoyance and expense of which they must bear. . . . When the property has left the county and is in transit to a distant point, though on the same line of railway, it

would be unreasonable to subject the company to the costs, vexation and trouble of such a process, merely because it had received to be carried that which the law compelled it to receive and carry": See, also, *Michigan Cent. R. Co. v. Chicago etc. R. Co.*, 1 Ill. App. 399; *Montrose Pickle Co. v. Dodson etc. Mfg. Co.*, 76 Iowa, 172, 14 Am. St. Rep. 213, 40 N. W. 705, 2 L. R. A. 417; *Bates v. Chicago etc. R. Co.*, 60 Wis. 296, 50 Am. Rep. 369, 19 N. W. 72; *Bingham v. Lamping*, 26 Pa. 340, 67 Am. Dec. 418; *Lawrence v. Smith*, 45 N. H. 533, 86 Am. Dec. 183; *Sutherland v. Second Nat. Bank*, 78 Ky. 250; *Western Railroad v. Thornton*, 60 Ga. 300; *Bowen v. Pope*, 125 Ill. 28, 8 Am. St. Rep. 330, 17 N. E. 64; *Pennsylvania R. Co. v. Pennock*, 51 Pa. 244; *National Bank v. Furtick*, 2 Marv. (Del.) 35, 69 Am. St. Rep. 99, note, 42 Atl. 479, 44 L. R. A. 115.

In *Montrose Pickle Co. v. Dodson etc. Mfg. Co.*, 76 Iowa, 172, 14 Am. St. Rep. 213, 40 N. W. 705, 2 L. R. A. 417, it is held that property actually outside the state and in custody of a common carrier, who resides within the state, cannot be reached by garnishing the carrier within the state. *Sutherland v. Second Nat. Bank*, 78 Ky. 250, holds that the service of an attachment upon a carrier creates no lien upon property outside of the county. In *Bates v. Chicago etc. R. Co.*, 60 Wis. 296, 50 Am. Rep. 369, 19 N. W. 72, the garnishee summons was served upon an officer of the corporation who had no knowledge ²⁹⁸ of the fact that the company had any property of the defendant in its possession and whose business did not require him to have any knowledge upon that subject, and had at hand no ready means of ascertaining the fact that it had any such property, and within two and one-half hours of the service of the process the property was, without notice, delivered to the person entitled to receive it under the contract by which the company held possession when the summons was served, at a place nearly one hundred miles from the place where the officer was served with the summons. It further appears that the property was out of the state when the garnishee summons was served. In this case it was held that service was insufficient to charge the company as garnishee, and that public policy and the proper discharge of the duties imposed upon common carriers of personal chattels placed in their possession for carriage do not permit the carrier to be held liable upon a garnishee summons for property in its possession, in actual transit at the time the summons is served.

Moreover, in the case at bar the findings show that the property was shipped by Lee and Freeman and consigned to Lee and Lee and Freeman and the bills of lading were so issued. It is true that the court finds that the property was in fact shipped by Fleischman and Currie, and consigned to themselves in the names of Lee and Freeman, but it is also found that appellant had no knowledge of this. Nor is there anything to show that appellant knew or had any means of knowing of any fraudulent purpose in the shipment of the property. It is not shown that appellant had any means of knowing that Fleischman and Currie owned the property, but it is expressly found that appellant had no knowledge of these parties or that they had any interest in the property. The agent upon whom the writ was served had no knowledge of the facts, nor does it appear that any agent of appellant had such knowledge. So far as disclosed by the finding, ²⁹⁹ appellant had the right to rely upon the title to the property being in the consignees. After the shipment, the consignees in the bills of lading had prima facie the legal control and possession of the property. By the writ it was intended that appellant should be legally charged with the responsibility of retaining the property of Fleischman and Currie then in its possession, as in the custody of the law, that it might be applied to the satisfaction of the mortgagees' debt if they succeeded in establishing their claim. As there was no actual seizure of any goods in appellant's possession as the property of Fleischman and Currie, the only effect the service of the garnishee summons could have would be a notice to appellant to retain in its possession any property which it knew, or which the law charged it with the duty of knowing, belonged to Fleischman and Currie. What evidence had appellant, when the writ was served, and before the property reached its destination, that it had any property of the defendants in the attachment? There are no facts showing that appellant knew, or had any means of knowing, that it had such property in its possession; nor are any facts disclosed which overthrow the presumption, upon which appellant could act, that the property belonged to the consignees named in the bills of lading: See *Butler v. Pittsburgh etc. R. Co.*, 18 Ind. App. 656, 46 N. E. 92. It does not seem that, under such circumstances, it would be a reasonable rule to require the carrier to stop its train, disregard, for the time being, its duty as a carrier to other shippers, and determine at its own risk and

expense whether the parties who shipped the goods were or were not in fact the real owners: See *Bates v. Chicago etc. R. Co.*, 60 Wis. 296, 50 Am. Rep. 369, 19 N. W. 72; *Walker v. Detroit etc. R. Co.*, 49 Mich. 446, 13 N. W. 812; *Edwards v. White Line Transit Co.*, 104 Mass. 159, 6 Am. Rep. 213.

In the case last cited, goods were taken from a carrier by an officer under an attachment against a person who was not their owner, and it was held that this was no defense ³⁰⁰ to an action against the carrier for breach of his contract to deliver the goods. Counsel for appellee cite the cases of *Adams v. Scott*, 104 Mass. 164, and *Landa v. Holck & Co.*, 129 Mo. 663, 50 Am. St. Rep. 459, 31 S. W. 900, as sustaining the right to hold, by garnishee process, goods in the hands of a common carrier while in transit. The case of *Adams v. Scott*, 104 Mass. 164, does so hold, but it is the only case to which we have been cited or which we have found that sustains the doctrine. In *Landa v. Holck & Co.*, 129 Mo. 663, 50 Am. St. Rep. 459, 31 S. W. 900, the property was in a car awaiting shipment, was in the county and state in which the court sat and in which the plaintiff resided, and was not in transit when the writ of garnishment was served. The better reasoning and weight of authority exempt the carriers from liability as a garnishee in a case like that at bar. Upon the facts found, a conclusion of law should have followed in appellant's favor.

Judgment reversed, with instructions to restate the conclusions of law.

Property in the Possession of a Carrier, awaiting shipment, is subject to garnishment at any time before its transit has commenced, and garnishment of property in the hands of a carrier excuses a failure to deliver according to contract: Landa v. Holck, 129 Mo. 663, 50 Am. St. Rep. 459. It seems, however, that property in the hands of a carrier, received for transit to a place outside the state, is not subject to garnishment: Baldwin v. Great Northern Ry. Co., 81 Minn. 247, 83 Am. St. Rep. 370. And garnishment does not lie against property in the custody of a carrier when its transit has commenced and it has been carried outside the county or state in which the writ is served: See the note to Landa v. Holck, 50 Am. St. Rep. 465. Consult, also, Wall v. Norfolk etc. R. R. Co., 52 W. Va. 485, 94 Am. St. Rep. 948.

BARNETT v. THOMAS.

[36 Ind. App. 441, 75 N. E. 868.]

PARTITION—Final Judgment.—An order or decree for the sale of the lands sought to be partitioned is a final judgment from which an appeal will lie. (pp. 386, 387.)

PARTITION—Rents and Profits—Accounting for.—In a proceeding for partition one cotenant who has received the rents and profits from the common property may be compelled to account therefor. (p. 388.)

PARTITION—Advancements—Debts—Accounting.—In a proceeding between the heirs of a decedent for the partition of his real estate, where some of them have received advancements and some are indebted to the estate, such advancements and debts should be taken into account, and distribution of the assets of the estate made in accord with the amounts equitably due each of such cotenants. (p. 390.)

DESCENT AND DISTRIBUTION.—The primary source from which advancements should be equalized is the decedent's personal estate. (p. 390.)

PARTITION—Purchaser of Heir's Share.—The purchaser of the interest of an heir at a judicial sale in partition stands in the same relation to the estate as did the heir and receives whatever interest the heir had therein. If the heir has received an advancement, that fact may be shown to reduce the interest to be received by the purchaser. (p. 390.)

PARTITION—Purchaser of Heir's Share in real estate has a right, in a suit for partition thereof, to an accounting as to personal estate left by the decedent and converted to their own use by the other heirs, and also as to advancements made to them. (pp. 390, 391.)

T. S. Adams and L. A. Barnett, for the appellant.

Brill & Harvey, for the appellees.

442 WILEY, C. J. Appellees—except Edward D. Thomas—were plaintiffs below, and appellant and said Thomas were defendants. In their complaint plaintiffs averred that they and appellant were owners in fee simple, as tenants in common, of certain real estate, which is specifically described; that plaintiffs derived their title as heirs of Erasmus D. Thomas, who died seised of certain real estate; that said Edward was a son and heir of decedent, and that his interest in the real estate had been divested by a judicial sale, and appellant had acquired such interest by deed from the sheriff; that decedent had made certain advancements to his children, specifying the amount made to each, and that said advancements to Edward aggregated five hundred and fifty-six dollars.

They further averred that the real estate was not susceptible of ⁴⁴³ division in kind without injury, and asked that it be sold, that an accounting be taken of the several advancements, and that the proceeds be divided according to the interests of all the parties. Appellee Edward D. Thomas filed an answer in which he admitted all of the averments of the complaint. Appellant answered in four paragraphs, to the second, third and fourth of which a demurrer for want of facts was sustained. The trial was had upon the issues joined by the general denial of appellant and the answer of the appellee Edward, and upon request of the parties the court made a special finding of facts and stated its conclusions of law thereon. By the special finding of facts and the conclusions of law the interests of the respective parties were found and determined. The court found that the real estate was not susceptible of division in kind, and that the same should be sold, and the proceeds divided according to the interests of the parties, as determined in the finding and judgment. A commissioner was appointed to make the sale. Appellant's motion for a new trial, for cause and as of right, was overruled. All the rulings above referred to, which were adverse to appellant, are assigned as errors.

Other questions are presented by the record, but from the conclusion we have reached upon the action of the court in sustaining the demurrer to the second, third and fourth paragraphs of answer, all subsequent rulings of which appellant complains need not be considered.

Appellees contend that the appeal is premature, for the reason that the order to sell real estate is not a final judgment, and as there can be no appeal except from a final judgment it is insisted that this appeal should be dismissed. An appeal will lie from an ordinary partition proceeding after the commissioners have reported partitioning the real estate, and such report has been confirmed by the court: *Kern v. Maginniss*, 41 Ind. 398. An order or decree in a proceeding for partition for ⁴⁴⁴ the sale of lands, after it has been ascertained that such lands cannot be partitioned in kind without injury, is as much a final disposition of the cause as a confirmation of the report of commissioners making partition of the property: *Fleenor v. Driskill*, 97 Ind. 27. In such case every question raised by the issues is finally determined and adjudicated when the report of partition is confirmed, or the property ordered sold where partition is impracticable. Where

the property is ordered sold, and the question of distribution determined, no other question can arise, except that of properly carrying out the terms of the decree: 1 Freeman on Judgments, 4th ed., 36. Under the authorities, this appeal is not prematurely prosecuted, but is properly before us.

If the facts stated in the affirmative paragraphs of answer present questions which appellant had a right to have litigated and determined in the partition proceedings, and such questions were pertinent to and affected the rights of the respective parties, it necessarily follows that it was error to sustain the demurrer thereto. Such error might have been obviated had the court in its special findings found and embodied the facts alleged in the answers, but this it did not do. The special findings state, and the decree so ordered, that appellant was the owner, as tenant in common with appellees, of the undivided two forty-fifths of the real estate. From the time appellant acquired the interest in the real estate formerly owned by Edward, he became a tenant in common with all the other joint owners, and was entitled to share in the rents and profits thereof according to his interest therein.

In his second paragraph of answer appellant avers that for more than six years he had been the owner by purchase of the undivided two forty-fifths of said real estate, and that the rental value of all of said real estate, over and above the taxes and other expenses incident to keeping up ⁴⁴⁵ the repairs, was of the value of six hundred dollars per annum, and that he was entitled to two forty-fifths thereof; that appellees during all of said time had the exclusive possession of said real estate, and received and converted to their own use all of said rents and profits, and that during said time they had cut, sold and removed therefrom timber of the value of five hundred dollars, and converted the proceeds thereof to their own use. The prayer of this paragraph is that an accounting be had as to said rents and timbers sold, and that the same be taken into account, and the distribution of the proceeds of the sale of said lands be made accordingly, etc.

In the third paragraph of answer it is alleged that at the time of the death of the decedent certain of the heirs (appellees herein) were indebted to the decedent for moneys loaned to them, specifying the persons and amounts each was indebted, respectively. It is further alleged that no administration on the estate of the decedent was had, and that said several amounts are due and owing said estate. The prayer

of this paragraph is that the several amounts so owing by appellees should be taken into account, and that the proceeds of sale of the real estate be distributed accordingly.

In the fourth paragraph of answer it is alleged that the decedent left a personal estate of the value of three thousand dollars over all indebtedness; that no administration on his estate was had; that appellees took possession thereof and converted the same to their own use; that appellant acquired the interest of Edward D. Thomas in said real estate more than six years ago; and that he is entitled to have an accounting of the personal estate of decedent, and have the proceeds thereof taken into consideration in making the distribution of the funds arising from the sale of the real estate. The prayer of this paragraph is that the appellees be required to account for all of such personal estate, and that it be taken into account in making the distribution, etc.

446 The demurrer admits the facts averred in the several paragraphs of answer to be true. It is therefore admitted that for six years prior to the filing of the petition for partition appellees had exclusive control and possession of the real estate; that the annual rental value thereof was six hundred dollars; and that they cut, sold and removed from the real estate timber of the value of five hundred dollars. These items aggregate four thousand one hundred dollars. Appellant owned an undivided two forty-fifths interest in the real estate, and he was entitled to two forty-fifths of the rental value thereof, and a like proportion of the five hundred dollars, which would be an aggregate of one hundred and eighty-two dollars and twenty-two cents.

It is the rule both in this country and in England that in a proceeding for partition a court of equity will, in a proper case, require one cotenant, who has been in the exclusive possession of the common property, or of more than his portion thereof, or has received rents and profits therefrom, to account for the shares to which his cotenants are entitled: 21 Am. & Eng. Ency. of Law, 2d ed., 1171, and authorities there cited. The case of *Peden v. Cavins* (1893), 134 Ind. 494, 39 Am. St. Rep. 276, 34 N. E. 7, is in point and squarely decides the question. See, also, *Freeman on Cotenancy and Partition*, second edition, section 512, where it is said: "When equity has jurisdiction for partition, no obstacle exists to its proceeding to do complete justice, by compelling an accounting for all rents received; and nothing better than expense and delay

can result for requiring one suit at law for mesne profits and another in equity for partition."

The law regards with much favor the early adjustment of legal and equitable controversies, and the rule prevails that all matters which might have been litigated and determined under the issues will be conclusively presumed to have been litigated: *Beaver v. Irwin*, 6 Ind. App. 285, 33 N. E. 462. As appellant had a legal right to his share of the rents and profits of the real estate, which appellees, while in exclusive possession, appropriated to their own use, he ⁴⁴⁷ was entitled to have such right determined in the equitable proceedings for partition.

In the third paragraph it is sought by affirmative averments to show that certain of the heirs (appellees) of the decedent were indebted to him at the time of his death, that said sums are still due the estate, and that they should be taken into account in the distribution of the proceeds of the sale of real estate, etc. It is the policy of the law, and in accord with strict principles of justice and equity, that in the distribution of estates heirs shall share equally in proportion to their respective interests. The same rule applies in the partition of real estate. Where the real estate is partitioned in kind, or sold under order of the court, and the proceeds distributed to the parties in interest, it would be unfair and inequitable for one heir or one cotenant to receive a greater portion than his share. This would be unfair and unjust to their cotenants. A debt due a decedent becomes a part of the assets of his estate, and if such debt is due and owing from an heir who is entitled to share in his real estate or the distribution of his personal estate, equity demands that an account be taken of it, to the end that an equal distribution may be made. It has been held that a debt due an estate from an heir may be retained out of his distributive share of the surplus proceeds of real estate which has been sold to pay debts: *Fiscus v. Moore*, 121 Ind. 547, 23 N. E. 362, 7 L. R. A. 235. The right of the executor or administrator in such case to retain any such sum depends upon the principle that the legatee or distributee is not entitled to his legacy or distributive share while he retains in his own hands a part of the funds out of which that and other legacies or distributive shares ought to be paid: *Fiscus v. Moore*, 121 Ind. 547, 23 N. E. 362, 7 L. R. A. 235. We cannot perceive any good reason why this rule should not apply where real estate has been

ordered sold in a partition proceeding, the respective interests of the parties determined, and an order made for distribution. If ⁴⁴⁸ one heir should be indebted to the deceased owner of the real estate, while another was not so indebted, and these facts should not be taken into account in the division, then the heir who is indebted would receive a larger share of the estate, and this would result in an unequal distribution of the estate, which neither law nor equity will tolerate.

The fourth paragraph avers that Erasmus D. Thomas died and left a personal estate of the value of three thousand dollars over and above all indebtedness, etc.; that there was no administration on his estate; that appellees took possession of the same and converted it to their own use; that by purchase appellant has been the owner of all the interest of Edward D. Thomas for more than six years, by reason of which he is entitled to have an accounting of the decedent's personal estate, and have the proceeds thereof taken into consideration in making the distribution of the proceeds of the real estate. Appellees in their complaint for partition aver advances to certain of the appellees, and proceed upon the theory that they have a right to have such advancements taken into consideration, to the end that there may be an equal distribution of the proceeds of the sale of real estate. The rule is that, in proceedings between heirs of a decedent for partition of his real estate, the court may and should take into account the advancements made by the decedent to some of the heirs, by requiring that such advancements be brought into hotchpot and adjusted so that all the shares will be equal: 21 Am. & Eng. Ency. of Law, 2d ed., 1173. It has often been held that advancements should be taken into consideration in decreeing partition: *Kepler v. Kepler*, 2 Ind. 363; *New v. New*, 127 Ind. 576, 27 N. E. 154; *Scott v. Harris*, 127 Ind. 520, 27 N. E. 150; *Purner v. Koontz*, 138 Ind. 252, 36 N. E. 1094.

The primary source from which advancements should be equalized is the personal estate, and is so declared by statute: *Burns' Rev. Stats.* 1901, sec. 2563; *Rev. Stats.* 1881, sec. 2407.

⁴⁴⁹ The purchaser of real estate from an heir stands in the same relation to the estate as did the heir, and receives whatever interest the heir has in the estate. If the heir from whom he has purchased has been advanced, that fact may be shown to reduce the interest of the heir, and likewise reduce the interest received by the purchaser: *Duncan v. Henry*, 125 Ind. 10, 24 N. E. 506.

The several advancements alleged to have been made by the decedent to certain of his children aggregate two thousand five hundred and fifty-two dollars, being four hundred and forty-eight dollars less than the value of the personal estate of the decedent, as charged in the fourth paragraph, over and above all indebtedness. Under the admitted facts of this paragraph, appellant was entitled to have the court require appellees to account for the personal estate which they took possession of and appropriated to their own use. Such personal estate of itself was sufficient to equalize the advancements, and this would have left the real estate unburdened. Equality is equity among heirs, and the doctrine of advancement has for its object the furtherance of this thing: Miller's Appeal, 31 Pa. 337.

Both by the letter and spirit of the statute cited, advancements to heirs should be equalized, if possible, out of the personal estate of the common ancestor, and appellant had a right to invoke this rule of law. As appellant stands in the place and acquired the rights of Edward D. Thomas in the real estate, he has a right to have his interest therein, or the proceeds thereof, come to him unburdened by the advancements to his grantor, if he can establish the facts he has pleaded.

Our conclusion is that none of the three paragraphs of answer were vulnerable to the attack of the demurrer. The judgment is reversed, and the trial court is directed to overrule the demurrer to the second, third and fourth paragraphs of answer, and for further proceedings not inconsistent with this opinion.

In Partition Proceedings one cotenant who has received the rents and profits of the common property may be required to account for them: *Bates v. Hamilton*, 144 Mo. 1, 66 Am. St. Rep. 407; *Holloway v. Holloway*, 97 Mo. 628, 10 Am. St. Rep. 339; *Fenton v. Miller*, 116 Mich. 45, 72 Am. St. Rep. 502.

WABASH RAILROAD COMPANY v. ERB.

[36 Ind. App. 650, 73 N. E. 939.]

RAILROADS—Willful Injury—Sufficiency of Complaint.—A complaint alleging that plaintiff was an employé of the defendant railroad company, and while returning from work on one of its velocipedes was negligently run down by one of its locomotives, which approached him from behind without giving warning, and that the injury was caused by the negligence of the defendant company in not equipping its locomotive with any guard, and that the operators of such locomotive could have seen plaintiff for half a mile, but neglected to reduce the speed of the engine, and that such operators wantonly and willfully caused the accident, does not state a cause of action for willful injury. (p. 394.)

MASTER AND SERVANT—Servant Returning Home After Work.—An employé of a railroad company riding on a velocipede on the railroad track at the request of such company after the completion of his day's work, and merely for his own convenience and accommodation, is not an employé of the company so as to render it liable for another employé's negligence. (pp. 397, 398.)

MASTER AND SERVANT—Negligence After Relation Ceases. If a servant is negligently injured by his master after the relation of master and servant has ceased, and, under the circumstances, a stranger could recover of the master, the servant may recover. (p. 398.)

RAILROADS Owe No Duty to Trespassers or mere licensees to keep their premises in a safe condition. (pp. 398, 399.)

MASTER AND SERVANT—Servant as Licensee—Negligence. An employé of a railroad company going home after working hours on a railway velocipede furnished by such company is not a trespasser or a mere licensee upon its track, and the company owes him the duty not to injure him through its negligence. (p. 399.)

MASTER AND SERVANT—Duty to Servant After Working Hours.—A railroad company must exercise ordinary care to avoid injuring its employé who is riding home after working hours on a railroad velocipede at the request or invitation of the railroad company. (p. 400.)

RAILROADS—License to Use Track.—Consideration is not essential to create a valid license to use a railroad track. (p. 400.)

J. F. France and Stuart, Hammond & Simms, for the appellant.

Lesh & Lesh and Branyan & Freightner, for the appellee.

652 BLACK, J. In the appellee's amended first paragraph of complaint against the appellant it was shown, after preliminary averments, that from May 15 to October 2, 1902, the appellee was an employé of the appellant's, working in the bridge building department; that on the day last above mentioned he worked for the appellant on what was known as the Belden bridge, which was a short distance west of An-

draws, Indiana, at which time his home was at Huntington, Indiana, where his family resided; that Huntington was on the line of appellant's railroad, and about seven miles east of the place where he was working on the bridge; that in the evening of that day, while returning from the place where he had been working on the bridge to his home at Huntington, on a railway velocipede furnished to him by the appellant for that purpose, which he was at the time using at the instance and request of the appellant, he was carelessly and negligently run down and struck by a locomotive, commonly designated as a switch engine, at the time under control and operation of the appellant; that he was so struck by the engine at a point on the line of the appellant's railway about one and one-half miles west of Huntington, while proceeding eastward on the velocipede; that while going eastward on the velocipede, and propelling it in the usual manner, the locomotive, drawing a tender, a steam shovel and a caboose, under charge of the appellant's employés, approached from the rear of the appellee, or from the west, at the rate of sixty miles per hour; that no notice was given the appellee, by the sounding of the whistle, ringing of the bell, or otherwise, of the approach of the locomotive, until it had reached a point within about seventy-five feet of the appellee, at which place the employés of the appellant in charge of said engine caused the whistle to sound, whereupon the appellee instantly undertook to throw himself from the velocipede to the side of the ⁶⁵³ road, so as to avoid being struck by the engine, but on account of the high speed of the locomotive and its nearness to him at the time the said notice was given him of its approach as aforesaid, which was the first knowledge he had of the approach thereof, he was unable to get out of the way, and thereupon was struck by the engine and thrown some distance to the south side of the track, and was thereby maimed, bruised and injured in his limbs and body to such an extent as to render him temporarily unconscious and to require him to be confined in a hospital for treatment several months thereafter. His injuries were described, and it was further alleged that said injuries were caused by the negligence of appellant, in this: That said locomotive at the time of the accident was unequipped with any guard; that said accident occurred in daylight, and said employés in charge of said engine had a full and unobstructed view of the appellee for a distance of about one-half mile before reaching

the point where he was struck, and after seeing him had time to avoid the accident, by giving him notice of the approach of the train by the ringing of the bell or the sounding of the whistle, or by slackening the speed thereof in time to enable him to get off the track without injury, but failed to sound the whistle, or in any manner to notify him of the approach of the engine, until too close to him to enable him to get out of the way of the train, as aforesaid, "and they failed and neglected to reduce the speed of said train, or to do anything to avoid said injury or accident, and were thereby guilty of gross negligence; that said employes wantonly and willfully caused said accident; that, after realizing plaintiff's perilous position, they failed to exercise ordinary care and caution to avoid the same." After stating the extent of appellee's physical injury, it was alleged "that he has been damaged by said negligence of the defendant in the sum of," etc.

The appellant's demurrer for want of sufficient facts to this amended first paragraph of complaint having been ⁰⁵⁴ overruled, it is earnestly contended on behalf of the appellant that it does not show willful injury, and that it appears therefrom that the appellee was either a licensee or a trespasser on the railroad track, and therefore it is claimed that the appellant was not responsible for his injury.

The pleading must proceed upon some consistent theory, and it must be good, if at all, either as a complaint for injury willfully inflicted, or as a complaint for injury negligently caused; it cannot be upheld as proceeding upon the theory that the particular injury for which damages are sought was caused both willfully and negligently—that is, inadvertently. There is some confusion in the pleading, indicative, perhaps, of uncertainty in the mind of the pleader as to the theory to be adopted. Considering the language of the pleading in its ordinary meaning, and most strongly against the pleader, it cannot properly be construed as fully and sufficiently showing a cause of action for willful injury. This is plain enough, we think, without taking space to recapitulate, transpose, analyze or group the averments. If the pleading is good, it must be because it is sufficient as a complaint for injury negligently caused. It may be said that it is shown sufficiently, though awkwardly, that the alleged injury to the appellee was caused by the negligence of the persons in the service of the appellant who had charge of the

locomotive engine upon the railway, characterized also as negligence of the appellant, and that the appellant should be held liable under our employers' liability statute (Burn's Rev. Stats. 1901, sec. 7083; Acts 1893, p. 294, sec. 1), if the appellee is shown by the pleading to have been, at the time of the injury, an employé in the service of the appellant.

In *Bowles v. Indiana R. Co.*, 27 Ind. App. 672, 87 Am. St. Rep. 279, 62 N. E. 94, we said: "The general rule may be said to be that where an employé is being carried by his employer ⁶⁵⁵ in the conveyance of the latter to and from the work for which the former is employed, he is regarded not as a passenger, but as an employé; though if he is being carried merely for his own convenience, pleasure or business, he is a passenger."

Where employés of a railroad company went some miles upon a hand-car, repairing the railway, and toward evening, while returning upon the hand-car to the place of starting, one of them was injured, the persons operating the hand-car were treated as fellow-servants: *Chicago etc. R. Co. v. Artery*, 137 U. S. 507, 11 Sup. Ct. Rep. 129, 34 L. ed. 747.

When an employé, at the close of his day's work in the defendant's factory, was changing his clothing preparatory to going home, and was injured by reason of the fact that machinery was unguarded, it was held that the relation of master and servant continued to exist: *Helmke v. Thilmany*, 107 Wis. 216, 83 N. W. 360.

In *International etc. R. Co. v. Ryan*, 82 Tex. 565, 18 S. W. 219, the plaintiff was a bridge carpenter employed by the day by the railroad company. While sitting in a car provided as a sleeping-car for the bridge gang by the railroad company, he was injured through negligence of an employé in charge of a switch engine, which collided with the car, which was upon a sidetrack, where it had arrived about 6 o'clock in the evening. His day's work consisted of ten hours' labor. His time was his own after 6 o'clock. He had no contract for any particular length of time, and could have quit the employment of the railroad company at 6 o'clock. He was entitled to sleep in the car at the end of each day's work. He expected to go to work with the bridge gang next day, as usual. He was not working for the railroad company when he was injured, but was attending to his own affairs, engaged in writing a letter. After 6 o'clock that evening he was not bound to ⁶⁵⁶ work further for the com-

pany, and the company was not bound to keep him longer. It was held that he was in the employment of the company when injured. It was said by the court: "His presence in the car on the sidetrack at the time of the collision can be explained in no other way under the proof. It was only by reason of the fact that he was an employé of the company that he was in the car on the sidetrack at the time he was injured."

In *Wilson v. Banner Lumber Co.*, 108 La. 590, 32 South. 460, the laborers of the defendant were taken about eighteen miles every morning to their place of work, and returned in the evening on the defendant's hand-car. This mode of conveyance had to be resorted to in order to obtain labor at the place needed. There was at least acquiescence of the defendant in permitting the laborers to ride on the hand-car in returning home, when one of them, for causing whose death the action was brought, was killed by the collision of the car with an animal on the track. It was held that the defendant owed him the duty of a master toward a servant.

In *Heldmaier v. Cobbs*, 96 Ill. App. 315, the plaintiff, employed in the operation of a steam drill, was injured in the boiler-house from which the steam was provided by the employer, the injury occurring while the plaintiff was there eating his dinner, having ceased work for an hour and having gone to the boiler-house for such purpose. It was held that when injured he was in the employ of the defendant. It appeared that he was accustomed to eat there "by the consent, if not by the actual direction, of the foreman. Appellee, therefore, had a right to be at the engine-house at the time in question and was there by consent of appellant. While he was not actually at work at the time, yet he was still in the employ of the master, in the sense that his business kept him in that vicinity. He was not in the position of a mere visitor, as ⁶⁵⁷ one who was not connected with the business would have been. Under the circumstances we think the master owed him, at the time of the accident, the same duties that he would have owed him had he then been actually at work at the drill."

The time at which the appellee was injured was not within the hours during which, under his contract, he was to work upon the bridge. He had worked as a bridge builder upon the bridge the full time for that day. If, after actually ceasing so to work, but while still on the premises of the company, and when starting therefrom to walk or ride upon a public highway, he ~~had been i~~ another servant of

the company acting in the service of the latter, the appellee would probably be regarded as a fellow-servant; though, if the injury had occurred while he was pursuing his journey homeward along such highway, walking or riding in a buggy, he would probably be regarded as a stranger. At the time of the injury the relation between the parties as to the work for which he was employed was changed, in that he was not then subject to orders of the appellant as to the manner of doing work. Where a workman employed to work on the track quit that work one-half hour before the usual quitting time, upon the order of his foreman to get upon a train to go to a place where he was to receive his wages, and was injured during his usual working time, while going along the track to get upon the train, it was held that the relation of master and servant had not changed: *O'Brien v. Boston etc. R. Co.*, 138 Mass. 387, 52 Am. Rep. 279.

Where, under the contract of employment, the employé was provided with transportation free of charge to and from the place of his work, he having no particular duty to perform while so traveling, his wages, at a certain sum per hour, beginning when he reached the place of work and ending when he left that place, it was held that while ⁶⁵⁸ so on his way to work he was an employé: *Vick v. New York etc. R. Co.*, 95 N. Y. 267, 47 Am. Rep. 36.

The pleading before us shows that the appellee was returning home from his work on a railway velocipede furnished to him by the appellant for that purpose, which he was at the time using at the instance and request of the appellant. It is not shown why or upon what motive or for what consideration the velocipede was furnished or the request was made. It does not appear to have been a part of the contract of employment that the appellee should or might so use the vehicle. It does not appear that under his contract he was to do more than to work upon the bridge or to receive therefor more than his wages, and it does appear that the time during which he was to work that day was ended. It is not shown that he was furnished the velocipede and requested to use it in the course of his employment, but, so far as expressly made to appear, it was used and intended by both parties to be used for his own convenience alone. It is not expressly and affirmatively shown that it was thus used for the benefit or convenience of the railroad company or for the mutual benefit of the parties, or that it was so used habit-

ually or on any other than this particular day, or upon an understanding or agreement entering into the original employment or any subsequent contract, or that the giving of the permission or making of the request so to use it was in any manner a means by which the company procured the appellee's services on the bridge, or constituted an inducement to enter or to continue in the service. The use of the velocipede may have been, so far as appears affirmatively, a privilege to which, under the terms of the employment, the appellee might not have been entitled, though bound to perform his labor on the bridge. The privilege may have been connected with the employment, in that it would not have been granted if the appellee had not been an employé, or, being such, had not resided at a ⁶⁵⁹ distance from the place of his work; but even this is not affirmatively shown. It not appearing that the rightful use of the velocipede was in any way an incident of the employment, there seems to be wanting an important element of a cause of action in favor of the appellee as an employé. It is not enough, as a matter of pleading, that all the facts as to which the pleading is thus silent might have existed consistently with what is alleged. The theory on which the pleading proceeds must be gathered from its averments.

It does not necessarily follow that the pleading did not show a cause of action on another theory. "If a servant is injured outside of his working hours, and while not on duty, by another servant of the same master, he can recover damages from the master, provided a stranger might recover such damages under the same circumstances; for he is not a servant when injured, and is not injured by a fellow-servant; in such a case the status of the injured servant is that of a stranger": 4 Thompson on Negligence, 2d ed., sec. 4990. Though we hold the appellee not shown to have been an employé in the service of the appellant at the time of the injury, yet the injury is by the pleading attributed to the negligence of the appellant, and if it appears from the pleading that when he was injured on the railroad he was not a trespasser or a mere licensee, and does not affirmatively appear that he proximately contributed to his injury by his own fault or negligence, the pleading must be regarded as showing a cause of action.

The rule is the same as to trespassers and mere licensees; that is, licensees without invitation or inducement. An em-

ployé who goes upon the track, not in the line or discharge of his duty, and without invitation, express or implied, is at most a mere licensee to whom the company owes no duty to keep the place safe: *Cleveland etc. R. Co. v. Workman*, 66 Ohio St. 509, 540, 90 Am. St. Rep. 602, 64 N. E. 582.

⁶⁶⁰ It appears, to repeat, that the appellee was returning in the evening from his working place to his home on the railway velocipede "furnished to him by the defendant company for that purpose"—that is, to ride thus upon the velocipede over a particular portion of the railroad on that evening—which velocipede he was at that particular time using at the instance and request of appellant. If he was thus upon the track by invitation of the appellant, he was not a trespasser or a mere licensee; and though he could not recover if himself guilty of contributory negligence, he was not required to negative such negligence in his pleading or by his evidence, the burden as to that matter being upon the appellant. As a matter of pleading, we think the appellee was shown to have been upon the railroad track, not through bare tolerance of the company, but under circumstances which placed upon the appellant the duty not to injure him through negligence as alleged in the pleading.

It is insisted on behalf of the appellant that the special findings of the jury in answer to interrogatories show that the general verdict in favor of the appellee proceeded upon the first paragraph of the complaint, and not upon any of the other paragraphs; and we may so treat the case.

A motion of the appellant for judgment in its favor upon these special findings, notwithstanding the general verdict, was overruled.

We will notice the grounds upon which the appellant in the statement of points in its brief contends that, upon the special findings of the jury, the appellant was entitled to judgment as to the first paragraph of complaint. It is insisted that the facts specially found show that the appellee's injuries were not willfully inflicted by the appellant. Inasmuch as we have determined, in agreement with the view taken by counsel for the appellant, that the first paragraph of complaint did not show that the ⁶⁶¹ injury was one willfully inflicted, it was not necessary that the evidence should establish such a state of facts.

Again, it is contended that the special findings show that the appellee was using the velocipede for his own convenience

and accommodation, and that he was not at the time in the performance of any service for, or transacting any business with, the appellant, and that therefore he was a trespasser, or at most a licensee, and the appellant owed him no duty except not willfully to injure him.

In 2 Thompson on Negligence, second edition, section 1836, referring to the distinction between those who use a railway track for the purpose of passage, without the consent of the company, express or implied, but with its bare tolerance, and those who use it with its consent or invitation, express or implied, it is said: "The owner or occupier of real property has, of course, the right to consent to have a stranger make a passageway over it for his own convenience entirely, and not in any sense for the benefit of such owner or occupier; and if he makes such a concession to a stranger, although gratuitously, it is a sound and just conclusion that this raises a duty upon the part of the owner or occupier, not merely to abstain from wantonly injuring the stranger when so using his premises, as in the case of a trespasser or bare licensee, but to exercise ordinary or reasonable care to avoid injuring him." A consideration is not essential to the creation of a valid license: *Spades v. Murray*, 2 Ind. App. 401, 28 N. E. 709.

The other reasons under this head proceed upon the grounds that the answers to the interrogatories did not sustain an action based upon the theory that the relation of master and servant existed when the appellee was injured, and that, if they did show that he then was performing service under such a relationship, his recovery should be prevented by his contributory negligence, as he, it is claimed, by looking, might have seen the train for a distance ⁶⁶² of a quarter or a half of a mile before it struck him. As we have seen, it was not necessary to the appellee's cause of action under the first paragraph of complaint to show the appellee was serving as an employé at the time of the injury.

Upon careful examination of the lengthy special findings, we do not discover any fact or facts which, taken in connection with other facts found or provable under the issue, should override the conclusion, included in the general verdict, that the appellee was not proved to have been chargeable with contributory negligence.

Judgment affirmed.

The Question Whether the Relation of Master and Servant exists after working hours or when an employé is not on duty is considered in Adams v. Iron Cliffs Co., 78 Mich. 271, 18 Am. St. Rep. 441; Ewald v. Chicago etc. Ry. Co., 70 Wis. 420, 5 Am. St. Rep. 178; Savannah etc. Ry. Co. v. Flannagan, 82 Ga. 579, 14 Am. St. Rep. 183; Doyle v. Fitchburg R. R. Co., 162 Mass. 66, 44 Am. St. Rep. 335.

A Railroad Employé whose duties do not require him to go upon the track in a hand-car, but who does so as a matter of convenience and without objection from the railroad company is said to be, at most, a mere licensee to whom the company owes no duty of especial protection in running trains, except to use reasonable care after discovering him: Cleveland etc. Ry. Co. v. Workman, 66 Ohio St. 509, 90 Am. St. Rep. 602.

Am. St. Rep., Vol. 114—26

CASES
IN THE
SUPREME COURT
OF
IOWA.

JACOBS v. JACOBS.

[130 Iowa, 10, 104 N. W. 489.]

ACCORD AND SATISFACTION.—Where a Son has turned over to his mother all his earnings before and after his majority, a repayment to him of a portion of the fund, without an accounting or a severance of the family relations, at a time when he contemplates marrying and going into business for himself, does not amount to a satisfaction of his interest. (p. 404.)

EMANCIPATION OF INFANT—What Constitutes.—If a minor engages in business on his own account, and, with his father's assent, turns over all his earnings to his mother, who invests them in her own name, and supplies him the money to pay his bills, the fund being regarded by all three as belonging to the son, he is thereby emancipated and the father is not entitled to the fund accumulated. (pp. 405, 406.)

EVIDENCE—Declarations of Deceased Person.—Where an administrator sues to recover a fund transferred by his decedent without consideration, and the son of the deceased intervenes, claiming that the money belongs to him, his brothers and sisters may testify that in her lifetime the deceased stated to third persons that she held the fund for the son. (pp. 406, 407.)

TRUST FUNDS.—If a Son Turns Over His Earnings to his mother under an implied agreement that she is to keep them for him and ultimately return them to him, the same becomes a trust fund to which her husband acquires no right by a transfer thereof to him without consideration. He takes securities, so assigned, with an obligation to account for them to the real owner, and his second wife, so far as the proceeds of such securities are put in her name, holds them under a like obligation. (p. 407.)

ACTIONS—Inconsistent Remedies.—If an administrator sues to recover funds as belonging to the estate, but subsequently intervenes, claiming the funds as his own, there is no such inconsistency in the remedies pursued as to preclude a recovery in the intervention, the court having dismissed the action brought in the name of the administrator and there being no other claimant to the fund. (p. 407.)

TRUST FUND.—The Measure of Recovery Against the Assignee of a trust fund is limited to the amount received by him, and is not determined by the amount of the original fund. (p. 408.)

COSTS.—No Portion of the Costs Should be Taxed to an intervenor who is successful on all the issues of his petition, save one as to which no costs were incurred beyond those necessarily incurred in the trial of the other issues. (p. 408.)

Read & Read, for the appellants.

Bowen, Brockett & Welday, for the appellee.

¹² **McCLAIN, J.** The defendant Charles Jacobs and his wife, Leah Jacobs, came to America from Russia, in 1865, and in 1869 removed from Rochester, New York, to Des Moines. Prior to this removal he had been engaged in the business of peddling, and after coming to Des Moines he continued for some years to engage in that business. At the time of the removal to Des Moines there were three children—Hannah, Isaac and Moses. Within a few years another daughter ¹³ and another son were born, and all of these children remained at home with their parents until they arrived at or near majority. Moses, however, continued to reside with his parents until his marriage in June, 1901, when he was thirty-two years of age. The three sons successively, on reaching the ages of from six to nine years, engaged in the business of selling newspapers in Des Moines. Isaac continued in that business, with an interval when he was a newsboy on railroad trains, until he was about eighteen years of age, when he was apprenticed to the jeweler's business, and subsequently removed to another place, engaging there in that business for himself. Louis, the youngest, accumulated some money of his own during his minority, although, as it appears, with some protest from his parents, and also left home before his majority, and engaged in business for himself. But all three of the boys at first brought home the money realized from the sale of papers, and gave it to their mother, with their father's assent, and in this way a considerable fund was accumulated, which was loaned out in the mother's name, the business, however, being transacted to some extent, at least, by the father. We are satisfied from the evidence that the father contributed but little, if anything, to the accumulation of this fund, which, as the formal transactions would indicate, was regarded as being within the custody and control of the mother.

For at least twenty years prior to the death of the mother the father had not been engaged in any employment yielding pecuniary returns, although he had assisted his wife in

running the house, and had to some extent aided the boys in carrying on the business of selling newspapers. Moses was, without question, the most active and successful of the three boys in selling newspapers, and as he attained maturity he derived a large income from the business, amounting in some years to a net sum of not less than \$2,500 a year, and all the money which he received as well after his ¹⁴ majority up to the time of his marriage as during his minority he turned over to his mother, who from week to week furnished him the sums necessary to pay his bills for papers, as already stated. He lived with his parents, and it appears that his clothing was provided by them. Not long before his marriage Moses insisted to his father and mother that he should have some of the accumulated money, and \$15,000 was turned over to him, substantially without protest, save that his father objected to his having more than \$10,000 at that time, with the suggestion that he should have \$5,000 later. The sum of \$15,000 thus received was deposited in a bank in the name of Moses, but the certificate of deposit was retained by his parents until he married and went in business for himself, when it was surrendered to him. At the time this sum of money was surrendered to Moses his mother had remaining in her possession in money and securities a considerable fund, the amount of which is left quite uncertain under the evidence; but during her last illness in 1901, at her husband's request, she conveyed to him the homestead, and assigned to him securities to the value of more than \$10,000. About six weeks after her death her husband was married to his present wife, and converted some of the notes which he held by assignment into other securities taken in her name.

1. It is claimed that the \$15,000 paid to Moses was so paid and accepted by him in full satisfaction of any claim which he might have on the funds in his mother's hands, but, after reviewing the evidence, we are satisfied to state the conclusion that there was no intention on either side to make any final settlement or adjustment as to the extent of his right to the funds in his mother's hands. Neither Moses nor his parents seem to have regarded the payment as terminating his relations as a member of the family or as interested in the funds. We are well satisfied that, if there had been a full accounting and settlement, some more definite evidence thereof ¹⁵ would have been produced than is to be found in

this record. Moses was at this time anticipating marriage and the establishment of a place of business, and seems to have thought that it was time to have some money in his own name, and no serious objection was made as to his right to insist on the amount which he demanded, which amount seems to have been proposed by him without any knowledge, or means of knowledge, as to how much money his mother had, or the amount which may have been contributed to the funds in her hands by other members of the family.

2. Counsel on each side discuss the question of emancipation, it being contended on one hand that Moses was emancipated when he was first allowed to engage in the sale of newspapers on his own responsibility, and on the other that he was not emancipated when he attained his majority, but as he continued a member of the family, and paid over his earnings to his mother, these earnings were the property of his parents. In reaching a conclusion as to emancipation, it is important to bear in mind that Moses' earnings from the first were not turned over to his father, who had a right to them, but to his mother, with his father's assent; and it is established beyond controversy in the evidence that the funds thus received by his mother from him were repeatedly referred to by both parents as belonging to Moses. Declarations to this effect were made when the money was loaned in the name of the mother, and during the latter years of her life Moses on some occasions transacted the business for her and in her name. These declarations show in a general way that the greater part of the fund was regarded as having been contributed by Moses, and there is no question but that his contributions to this fund after deducting the \$15,000 received by him, exceeded the amount which was finally transferred by his mother to his father during her last illness.

If these earnings had from the first been delivered to the father, who was entitled to them, and controlled by him, ¹⁶ there would be more force in the argument that there was no emancipation, at least prior to majority; but even so far as the father assisted in carrying on the business of selling papers, such assistance was rendered simply in a subordinate capacity, and alike to Moses and the other two sons. Moses was allowed to manage his business in his own name, and although, as already indicated, he paid over the money received by him from day to day to his mother, and obtained from her the money necessary to pay his bills, yet from all

the circumstances we cannot avoid the conclusion that the father, who was entitled to Moses' earnings, voluntarily surrendered his right thereto, and assented that such earnings be accumulated by the mother, and held by her for the benefit of her son; and this, we think, was sufficient to constitute emancipation: *Dierker v. H  ss*, 54 Mo. 246; *Everett v. Sherfey*, 1 Iowa, 356; *Bener v. Edginton*, 76 Iowa, 105, 40 N. W. 117; *Crary v. Hoffman*, 115 Iowa, 332, 88 N. W. 833; *Bristol v. Chicago etc. R. Co.*, 128 Iowa, 479, 104 N. W. 487. While none of the cases cited by counsel are particularly pertinent to the facts of the case before us, we have no difficulty in reaching the conclusion that Charles Jacobs relinquished his right to the earnings of Moses, and cannot now assert any claim to the funds derived by him from his wife on the ground that such funds were the result of the earnings of Moses before emancipation.

3. Some question is made as to the competency of the testimony of the other children, all of whom were called as witnesses in behalf of plaintiff and intervener, with reference to declarations of the mother as to the funds accumulated by her being held for Moses. But such witnesses were certainly competent to testify as to declarations made in their presence to others, although they may have been possibly interested as heirs of their mother in the result of the action brought by the administrator to recover the funds transferred by her to her husband prior to her death. It is only as to personal ¹⁷ transactions and communications between persons who are interested and the deceased that the testimony is rendered incompetent by Code, section 4604. These heirs were not parties to nor interested in the issues arising on the petition of intervention by Moses in his own name and right. The sole relief granted was against the defendants on this petition of intervention, and we see no necessity for the further discussion of the question of competency.

4. Having reached the conclusion on the evidence that Leah Jacobs had in her hands a sum of money which both she and her husband recognized as a trust fund, we have no serious difficulty in sustaining the decree of the trial judge. As before indicated, Charles Jacobs has not within the past twenty years contributed anything to the fund held in his wife's name. As to contributions by Isaac and Louis, it is enough to say that they are not asserting any claim to the fund. Even if they have contributed thereto, intervener

should not be denied relief in the amount of the fund turned over by Leah Jacobs to her husband without consideration, if it amounts to no more than intervenor has contributed. We are satisfied that the amount of his contribution more than equals the amount of the fund thus turned over. And here it may be suggested that there is no occasion for a discussion of resulting or constructive trusts. If the evidence shows that Leah Jacobs received the money of her son Moses under an implied agreement to keep it for him and ultimately return it to him, then all moneys thus received by her from him constituted a trust fund in her hands, to which her husband could acquire no right by transfer of the securities without consideration, and the husband took the securities with an obligation to account for them to their real owner. The present wife, so far as proceeds of securities have been put in her name, holds such proceeds under like obligation. The doctrine of trusts is argued with reference to the homestead, as to which it would, of course, be pertinent, but as the ¹⁸ intervenor now makes no claim to the homestead we need not give the matter further consideration.

5. It is contended that the remedy asked by intervenor in his own name is inconsistent with the remedy asked in the action as originally brought by him as administrator. But we do not see that there is any such inconsistency as to make it improper to give the relief granted in the lower court on his petition of intervention. As the lower court dismissed the petition brought in the name of the administrator and granted relief only on the petition of intervention, no wrong was done so far as the defendants are concerned. If it appeared that Moses Jacobs was entitled in his own right to the fund turned over to his father, it was certainly competent for the court to adjust the controversy under the issues raised on the petition of intervention so long as no other claimant to the fund was asking relief.

6. On the cross-appeal it is argued for intervenor that he was entitled to a larger judgment, and we think it may be conceded that the evidence tends to show that the contribution made by Moses Jacobs to the funds in his mother's hands exceeded the aggregate of \$25,000, which he has secured to him from the payment by his mother of \$15,000 and the judgment against his father for \$10,000; but no specific objection is made to the finding of the court as to the amount of the securities transferred to his father by his mother, or as

to the propriety of the credits given to the father out of the fund represented by such securities, and the intervener was entitled to judgment against his father only to the extent of the securities received by him in excess of the expenditures which the court recognized as proper. The decree is based evidently not on what Moses Jacobs contributed to the fund in his mother's hands, but on the showing as to the amount of the fund received by the father. The same considerations are applicable to the complaint in behalf of the administrator as to ¹⁹ the dismissal of his original petition. It does not appear that the defendants have funds in their hands, aside from those disposed of by the decree, for which they should account to the estate.

Complaint is further made on behalf of intervener as to the taxation of costs. The decree provides that one-third of the entire costs in the whole proceeding be taxed to defendants, one-third to intervener, and one-third to the administrator. We do not understand on what theory any portion of the costs were taxed against intervener. As to no issue raised in his petition of intervention was he unsuccessful, save as to the conveyance of the homestead, which he sought to have set aside. But as no costs seem to have been incurred with reference to this branch of the case which were not necessary in the trial of the issues as to the personal securities, we think it would have been equitable to assess the entire costs, so far as the issues of the intervention were concerned, to the defendants. There was no impropriety in taxing a portion of the costs to the administrator, whose petition for relief was practically abandoned during the course of the trial.

The result is that two-thirds of the costs in the lower court are taxed to defendants and one-third to the administrator as plaintiff in the original action, and that the cost of this appeal are taxed to the appellants. Otherwise the decree of the trial court is affirmed.

Accord and Satisfaction are discussed at length in the monographic note to *Harrison v. Henderson*, 100 Am. St. Rep. 390-456.

The Emancipation of Infants is discussed in the recent monographic note to *Vance v. Calhoun*, 113 Am. St. Rep. 113-122.

STATE v. HIGBY COMPANY.

[130 Iowa, 69, 106 N. W. 382.]

CORPORATION—Power to Act as Trustee.—A corporation, authorized by its charter to act as a trustee, may hold its own stocks in trust for beneficiaries designated by the donor. (p. 411.)

QUO WARRANTO does not Lie to Test a Corporation's power to hold property as a trustee, for the public has no interest in such merely private affairs. (p. 411.)

Alfred Grundy, for the appellants.

Courtwright & Arbuckle, for the appellee.

⁷⁰ **DEEMER, J.** Defendant is a corporation for pecuniary profit, organized under the laws of this state permitting the formation of such artificial bodies for the transaction of any lawful business, and giving them power to acquire and transfer property, "possessing the same powers in such respects as natural persons": See Code, secs. 1607, 1609. The general nature of its business, as defined by its articles, was "owning, buying, selling, renting, and otherwise handling real estate for pecuniary profit, with power to act as trustee, to hold real and personal property, including shares in itself, for any person capable of becoming a member, in trust, but in such cases the consent of the directors must be obtained"; and to do any other business not inconsistent with its articles, when deemed wise and prudent, with the consent of each of the directors.

About August 21, 1904, and after the organization of the corporation, Alice M. Higby, one of the stockholders, and the president of the corporation, made, executed and delivered to defendant a trust deed, whereby she conveyed one hundred shares of stock in said corporation to said corporation, to be held, managed and controlled by it, paying to said Alice Higby all dividends accruing thereon during her natural life, and using enough thereof after her death to provide a suitable vault or monument for herself and husband, and the remainder of the stock with its dividends to be used for the benefit of one Seward Higby, and after his death to be divided among the heirs of his body as they became of age. If Seward should fail to marry, or fail to have issue, these shares were to go to the heirs of the body of Jesse Higby. Other shares were to be held in trust for the heirs of the body

of Jesse Higby. In certain contingencies the trust was to cease and vest at once in the heirs of Seward and Jesse Higby. The trustee was given power to manage the trust as it saw fit. Each and all of the directors accepted this trust.

It appears that Seward Higby is unmarried, and that ⁷¹relator is next friend for the grandchildren of Alice M. Higby, who died May 29, 1905. Defendant has possession of the aforesaid stock under the deed of trust, and is administering it according to the terms thereof. Jesse Higby sold some of the stock held by him to one Hieber, and Hieber sold part of this to one Benson. Defendant has never been appointed trustee by any court, has not given bond, and has made no report, save to Seward and Jesse Higby.

This action was brought to oust defendant and to exclude it from the privilege of acting as trustee. It is claimed that defendant cannot act in that capacity, that neither under the law nor under its charter may it act as such, that it is contrary to public policy to allow private corporations to administer trust estates without protective limitations and safeguards, and that in no event should it be allowed to act for minors or other persons under the sovereignty or protective care of the state. We have it settled for this state that a corporation may purchase and hold its own stock: *Iowa Lumber Co. v. Foster*, 49 Iowa, 25, 31 Am. Rep. 140; *Rollins v. Shaver W. & C. Co.*, 80 Iowa, 380, 20 Am. St. Rep. 427, 45 N. W. 1037. In the former case it is said that corporations may assume such powers as are deemed advisable, provided such powers do not exceed those possessed by natural persons. In the instant case the articles of incorporation expressly authorize such transactions as were attempted to be exercised; and there is nothing in the general statutes to which our attention has been called, or which we can find, expressly forbidding them. Indeed, as a natural person may hold property as trustee, we can see no objection to a corporation's doing so, provided its articles are broad enough to authorize it.

At common law, originally, a corporation could not hold land or other property as trustee: 1 Blackstone's Commentaries, 477; *Minnesota L. & T. Co. v. Beeber*, 40 Minn. 7, 41 N. W. 232, 2 L. R. A. 418. The reasons for this were technical in the extreme, and since the statute of uses (Stats. 27 Hen. VIII, ⁷²c. 10) corporations may hold as trustees: *Sinking Fund v. Walker*, 6 How. (Miss.) 143, 38 Am. Dec. 433.

The general rule in this country now is that a corporation may hold real or personal property in trust for any purpose that is not foreign to the business for which it was created; and a court of equity will enforce such trusts: See cases cited in 7 Am. & Eng. Ency. of Law, 2d ed., 732; *Vidal v. Girard's Exrs.*, 2 How. (U. S.) 127, 11 L. ed. 205; *Phillips v. King*, 12 Mass. 546; *Matter of Howe*, 1 Paige (N. Y.), 214; *South Newmarket U. Seminary v. Peaslee*, 15 N. H. 317; *Protestant Soc. v. Churchman's Representative*, 80 Va. 718; *De Camp v. Dobbins*, 29 N. J. Eq. 36; *Ex parte Trustees of Greenville Academies*, 7 Rich. Eq. (S. C.) 471; *Bell Co. v. Alexander*, 22 Tex. 350, 73 Am. Dec. 268. In the present case the trust was not foreign to the business for which defendant was created, but is in exact accord therewith; and as there is no statute prohibiting such corporation from acting as trustee, there is no reason for ousting the defendant from its corporate franchises.

Plaintiffs rely upon a line of cases holding that in the absence of express statute a corporation cannot act as guardian, administrator or executor. This we may concede, for the authorities seem to so hold; but such rule does not apply here. There is no need for a bond or oath by the trustee, and the trust is not of such a personal character that a corporation may not execute it. Doubtless a court of equity might require the defendant to give bond as security for the proper exercise of its trust under acts of the 29th General Assembly; and for malfeasance or other cause might remove it and appoint another under its general equity powers. But nothing of that kind is asked here. The purpose of this action is to oust the defendant, and to exclude it from its franchises and privileges; and unless it be found to be acting illegally as a corporation, plaintiffs' remedy, if they have any, is to secure the appointment of a new ⁷³ trustee, in order that the trust may not fail. Of course, if the defendant is organized without authority of law, judgment of ouster is the proper decree; but this does not appear to be the case.

2. Finding, as we do, that defendant is organized pursuant to law, plaintiffs' remedy, as already suggested, is not quo warranto; for the public has no interest in a merely private affair: *State v. Ferry Co.*, 11 Neb. 354, 9 N. W. 563; *Harris v. Mississippi etc. R. R. Co.*, 51 Miss. 602; *State v. Omaha etc. Bridge Co.*, 91 Iowa, 517, 60 N. W. 121; *Attorney General v. Chicago etc. R. R. Co.*, 35 Wis. 425.

Other matters discussed by counsel have no application to the case. Even were a guardian appointed for plaintiffs, he would have no right to any of the property conveyed to defendant in trust, unless it were found that the corporation itself was illegally organized without authority of law, and even then it is doubtful if plaintiffs, who are not lineal descendants of the deceased, would have any right to the property conveyed to defendant in trust. Upon this proposition we need not further speculate; for, having found that defendant may act as trustee, that is the end of the controversy.

The trial court was right in denying the relief asked, and its judgment is affirmed.

A Corporation may be a Trustee both of real and personal property, and its authority as such is the same as that of an individual so acting: *Deringer v. Deringer*, 5 Houst. (Del.) 416, 1 Am. St. Rep. 150. As to the authority of a corporation to purchase its own stock, see *Porter v. Plymouth Gold Min. Co.*, 29 Mont. 347, 101 Am. St. Rep. 569, and authorities cited in the cross-reference note thereto.

WRIGHT v. COUNCIL BLUFFS.

[130 Iowa, 274, 104 N. W. 492.]

BOUNDARIES—Land Bordering on Lake.—The owner of land bordering on a non-navigable meandered lake has no title to the bed thereof covered with water. (p. 413.)

ACCRETION—Burden of Proof to Show Title.—One who asserts title to land beyond a meander line on the theory of accretion or reliction has the burden of proof as against the party in possession. (p. 414.)

BOUNDARIES.—A Meander Line is not a boundary line, if it substantially represents a water line, and the land actually abuts on a body of water proper to be meandered; but if there is no body of water proper to be meandered, the meander line constitutes a boundary, and the owner of land described by means of such line acquires no title beyond it. (p. 414.)

ACCRETION—Meander Line.—Where government surveyors in meandering a lake proper to be meandered included in the lake land only temporarily covered with water, this does not make such land a part of the lake so that title thereto can be acquired through accretion or reliction by owners abutting on the meander lines. (p. 415.)

Plaintiffs own lots which, according to the government survey, abut on a body of meandered water known as Big Lake. The tract of land in controversy is between the meander line

and the median line of a portion of the territory platted as lake or bayou which is not permanently covered with water. The plaintiffs claim title to this tract as a part of the bed of the lake included between the meander lines and not covered by the descriptions of their lots. The defendant is in possession of the tract by a tenant, and asserts title under an act of Congress purporting to convey to defendant the title of the United States to the meandered lake, upon condition that the premises be held for public use, resort, and recreation. The petition of plaintiffs was dismissed, and they appeal.

Wright & Baldwin and Mayne & Hazelton, for the appellants.

S. B. Snyder, city solicitor, and Harl & Tinley, for the appellee.

²⁷⁶ McCLAIN, J. In their petition plaintiffs assert title to the tract in controversy on the theory that as riparian owners their title extends to the middle of the bed of the lake or bayou, which is conceded on both sides to be a non-navigable body of water. This claim, however, is without legal foundation, for it has been held by this court that the owners of land bounded on non-navigable lakes have no title to the bed of such lakes covered by water: *Noyes v. Collins*, 92 Iowa, 566, 54 Am. St. Rep. 571, 61 N. W. 250, 26 L. R. A. 609; *Noyes v. Harrison County*, 104 Iowa, 174, 73 N. W. 480; *Rood v. Wallace*, 109 Iowa, 5, 79 N. W. 449. Nor is it claimed that this lake, or rather the portion of it which, as indicated by the government plat, extended over the tract in controversy and other land to a connection with the Missouri river, was ever a non-navigable stream in such sense that the title of the adjoining owners would extend to the center thereof. That idea is precluded by the fact that the banks were meandered in the original survey, and the rule announced in the foregoing cases as to the title to the beds of non-navigable lakes in Iowa is applicable, and excludes any ownership by plaintiffs to the tract in question as a part of the bed of the non-navigable lake.

But the case appears to have been tried in the lower court, and is now presented here in behalf of plaintiffs on the theory that the tract in question was at the time of the original survey a part of the bed of the lake covered by water, and was

subsequently by ²⁷⁷ gradual recession of the water added to plaintiffs' lots by accretion or reliction, and that theory of the case is therefore properly within our consideration. Inasmuch as defendant is in possession of the tract, and plaintiffs are seeking to have their title to such tract established, the burden is on the plaintiffs to show such accretion or reliction as to extend their title beyond the original meander line over this tract. On a close examination of the record we fail to find such evidence as would warrant us in holding that there had ever been such accretion or reliction as would thus extend plaintiffs' boundary so as to include this tract. The fact that the government surveyors ran meander lines along the two sides of an irregular watercourse or body of water connecting the lake as it now exists with the Missouri river does not prove that the land included within these meander lines was at the time of the survey a part of the lake in such sense that the doctrine of accretion or reliction is to be applied in determining plaintiffs' boundary.

The meander line is not a boundary line if it substantially represents a water line and the surveyed tracts actually abut upon a body of water proper to be meandered under the rules governing public survey; for in such case the title of the abutting owners extends to the actual water line, at least as it existed at the time the survey was made. But if there is no body of water proper to be meandered, the meander line limits the title of the owners of the tracts described in the survey by means of such meander lines, and they do not acquire any title to land beyond the meander lines. The running of the meander line does not establish the character of the land outside of such boundary: *Schlosser v. Hemphill*, 118 Iowa, 452, 90 N. W. 842; *Grant v. Hemphill*, 92 Iowa, 218, 59 N. W. 263, 60 N. W. 618; *Carr v. Moore*, 119 Iowa, 152, 97 Am. St. Rep. 292, 93 N. W. 52; *Iowa v. Rood*, 187 U. S. 87, 23 Sup. Ct. Rep. 49, 47 L. ed. 86; *Rood v. Wallace*, 109 Iowa, 5, 79 N. W. 449.

The case before us differs from *Schlosser v. Hemphill*, 118 Iowa, 452, 90 N. W. 842, and *Carr v. Moore*, 119 Iowa, 152, 97 Am. St. Rep. 292, 93 N. W. 52, only in this respect: that in those cases ²⁷⁸ it was found that there was no body of water proper to be meandered, and there was no occasion for the application of the doctrine of accretion or reliction, while in this case it appears that there was at the time of the original survey, and still is, a body of water proper to be meandered and

constituting a lake, but the meander lines, instead of following the lake, included a large tract of land not permanently covered by water, and not properly included, therefore, within the body of the lake, the tract of land in controversy being a portion of the tract thus improperly included. This tract may have been temporarily covered with water at the time of the original survey in such sense that it was swampy and overflowed, and is still occasionally overflowed in times of flood by water thrown back from the Missouri river, but there is no sufficient evidence, in our judgment, that it ever constituted a part of the bed of the lake. Now, we think it clear that the mere action of the government surveyors in running these meander lines did not make this land a part of the lake bed in such sense that, since the water covering it temporarily and at infrequent intervals has receded, the doctrine of accretion and reliction should apply, and we reach the conclusion that the tract of land in question did not pass to the plaintiffs on the recession from it of water which may have covered it. With reference to the land thus temporarily overflowed, the meander line bounding plaintiffs' premises constituted a boundary line, and plaintiffs must be limited as to their title to the tracts conveyed to them by the government by the boundaries fixed for such tracts. We do not think this a proper occasion to go into an elaborate discussion of the question whether the doctrine of accretion and reliction is applicable as extending the boundaries of riparian owners along the shores of an actual lake existing at the time of the original survey, the waters of which have subsequently receded; for we reach the conclusion under the evidence that the actual boundaries of the lake were substantially the same when the ²⁷⁹ original survey was made as they are now. Big Lake is fed by springs along its shore, and has never, as we think, covered the land in controversy, except as the water of the Missouri river has been thrown back into it in times of flood. At such times the water covering this tract has been water thrown back from the river, and not water constituting substantially a part of the body of the lake. Along the boundaries of the principal body of the lake the meander line is inside, rather than beyond, the water line, and there is no evidence of any such change in conditions as to justify a belief that the lake, by drying up, has receded from the land in controversy, and that its substantial boundaries have been materially changed.

The conclusion above indicated renders it unnecessary to discuss the effect of the congressional grant of the lake to the city, or the facts with reference to the assertion of title over the tract in controversy based on this grant as color of title for the statutory period of limitation.

The decree of the trial court was, as we think, correct, and its judgment is affirmed.

Meander Lines are not Boundary Lines, as a general rule, but they may be so regarded under some circumstances: *Security Land etc. Co. v. Burns*, 87 Minn. 97, 94 Am. St. Rep. 684; *Fuller v. Shedd*, 161 Ill. 462, 52 Am. St. Rep. 380; note to *Allen v. Weber*, 27 Am. St. Rep. 59.

Shore Owners on Meandered Lakes take title only to the water's edge: *Hammond v. Shepard*, 186 Ill. 235, 78 Am. St. Rep. 274; *Noyes v. Collins*, 92 Iowa, 566, 54 Am. St. Rep. 571.

ESTATE OF COE.

[130 Iowa, 307, 106 N. W. 743.]

CONFLICT OF LAWS.—*The Fund Recovered for a Wrongful Death* should be distributed according to the law of the state where the death was occasioned, and not according to the law of the decedent's domicile. (pp. 417, 418.)

Charles Coe, a resident of Iowa, was killed in a railway accident in Illinois. The railway company, without suit, paid a certain amount as damages for the death to the administrator of the deceased. The deceased left a widow, but no issue, and she claims the entire fund, as the Illinois statute provides. The parents of the deceased claim that the fund should be disposed of according to the law of Iowa which entitles them to one-half of it. From a judgment sustaining the claim of the widow, who is the plaintiff, the defendants appeal.

Cochran & Egan, for the appellants.

John W. Jacobs and Roadifer & Arthur, for the appellees.

³⁰⁸ SHERWIN, J. There is but one question for determination, namely, To whom does this money belong? The statute of Illinois, under which claim was made for damages for the death of Coe, is as follows:

"Paragraph 1. Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case, the person who, or company or corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

"Par. 2. Every such action shall be brought by and in the name of the personal representative of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person and shall be distributed to such widow and next of kin, in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person, not exceeding the sum of five thousand dollars; provided, that every such action shall be commenced within two years after the death of such person": Hurd's Rev. Stats. 1903, c. 70.

The Illinois statute also provides that if the husband die without issue, leaving a widow, the whole of his personal estate shall descend to her.

The right to recover in cases of this kind depends solely ³⁰⁰ on the statute of the state where the wrongful act is committed: *Hyde v. St. Louis etc. Ry. Co.*, 61 Iowa, 441, 47 Am. Rep. 820, 16 N. W. 351. And while actions to recover damages for the death of a person are quite uniformly held to be transitory, it is nevertheless the general rule that, when the statute creating the liability limits recovery to certain persons, only the designated persons have any right to, or interest in, the amount recovered; and that a recovery in a jurisdiction, other than where the liability arises, will not justify a distribution of the fund not in accordance with the statute creating the right. This we conceive to be the sound rule. The liability being created solely by the statute, it is clear that it may also limit the beneficiaries thereunder; and, when it does so, it is equally as clear that the wrongdoer cannot be made to contribute to others, and that no one else has or can

have any property interest in, or right to, the amount recovered, or any part thereof. Under the statute of Illinois, the railway company was not liable to the decedent's estate. It was only liable to his widow or next of kin, and then the damage paid is to be distributed as personal estate of the intestate, the whole of which, under the Illinois law, goes to the widow, if there be no issue.

The precise question under consideration has not heretofore been directly determined by this court, but the rule here announced finds support in the reasoning in the cases of *Morris v. Chicago etc. Ry.*, 65 Iowa, 727, 54 Am. Rep. 39, 23 N. W. 123, and *Hyde v. St. Louis etc. Ry. Co.*, 61 Iowa, 441, 47 Am. Rep. 820, 16 N. W. 351. In the latter, an action was brought in this state to recover for the death of the plaintiff's intestate, who was killed by the defendant, in Missouri. The wrongful act having been done in that state, and the plaintiff not pleading or proving a statute thereof creating liability, we held there could be no recovery under the statute of Iowa. In discussing the question, it is said: "Again, if the cause of action survives, it must survive to some person or persons. A cause of action which survives only by statute must survive to the person ³¹⁰ or persons designated by statute." It is further said therein that, if the cause of action survived to particular persons, it could not be held to have survived to the personal representative. The reasoning of the *Hyde* case fully supports our conclusion here. All of the cases in other jurisdictions, deciding the point to which our attention has been directed, support the appellee's contention. In *Dennick v. Central R. R. Co.*, 103 U. S. 11, 26 L. ed. 439, the plaintiff brought her suit, in New York, to recover damages for the death of her husband by an accident on the defendant's railroad, in New Jersey. The statute of the latter state permitted a recovery for the benefit of the widow and next of kin, and, in answer to the contention that the administrator could only administer that which was of the estate of the deceased in his lifetime, Mr. Justice Miller said: "The statute of New Jersey says the personal representative shall recover, and the recovery shall be for the benefit of the widow and next of kin. It would be a reproach to the laws of New York to say that, when the money recovered in such an action as this came to the hands of the administratrix, our courts could not compel distribution as the law directs." The question is decided in accordance herewith in the following cases: *McDonald v. Me-*

Donald, 96 Ky. 209, 49 Am. St. Rep. 289, 28 S. W. 482; Hanna v. Grand Trunk Ry. Co., 41 Ill. App. 116; Florida Cent. etc. R. Co. v. Sullivan, 120 Fed. 799, 57 C. C. A. 167, 61 L. R. A. 410; Matter of Degaramo, 86 Hun, 390, 33 N. Y. Supp. 502; Stewart v. Baltimore etc. R. R. Co., 168 U. S. 445, 18 Sup. Ct. Rep. 105, 42 L. ed. 537. In re Estate of Cook, 126 Iowa, 158, 101 N. W. 747, and Romano v. Capital City Brick etc. Co., 125 Iowa, 591, 106 Am. St. Rep. 323, 101 N. W. 437, 68 L. R. A. 132, do not discuss or decide this question, and are not in conflict with our conclusion.

The judgment is right, and it is affirmed.

The Principal Case is supported by McDonald v. McDonald, 96 Ky. 209, 49 Am. St. Rep. 289; Hartness v. Pharr, 133 N. C. 566, 98 Am. St. Rep. 725. See, too, Hartley v. Hartley, 71 Kan. 691, post, p. 519.

COWNIE GLOVE COMPANY v. MERCHANTS' DISPATCH TRANSPORTATION COMPANY.

[130 Iowa, 327, 106 N. W. 749.]

CARRIER.—To Constitute One a Carrier It is not Necessary that he own the means of transportation. (pp. 420, 421.)

CARRIER.—Nature of Liability.—A Common Carrier is an insurer, except for a loss occasioned by the inherent quality of or a defect in the goods, or by the act of God, of the owner, or of the public enemy; and the law casts upon the carrier the burden of proving that a loss resulted from one or more of these causes. (p. 422.)

CARRIER.—Importation in Bond—Clearance Papers.—A carrier who undertakes to transport goods from a foreign country and deliver them in bond at an internal port of entry is liable for injury to them while detained at the original port of entry because of his failure to procure clearance papers. (p. 423.)

Carr, Hewitt, Parker & Wright, for the appellant.

Parrish & Dowell, for the appellee.

326 SHERWIN, J. The plaintiff is an importer of gloves, and in March, 1901, it entered into an oral contract with the defendant, by which the defendant undertook to transport a case of gloves from the city of Erlangen, Germany, to Des Moines, Iowa, and deliver the same to the plaintiff in bond. For the purpose of carrying out the contract and to enable the defendant to direct and control the shipment, the plaintiff

executed and delivered to the defendant a writing as follows: "Jacob Wiessner, Erlangen, Germany. Hereafter, and until further orders, please forward all of our goods in accordance with instructions you will receive from the Merchants' Dispatch Transportation Co., or their representative." Following the signature of the plaintiff to this order, the following also appears: "Please follow instructions relative to forwarding goods covered by above order in accordance with our letter of this date, and note—upper part of order to be filled out by consignee, lower part will be completed by Merchants' Dispatch Transportation Co., New York, when order is sent to their foreign representatives." The plaintiff subsequently ordered a case of gloves of said Wiessner, which was delivered to the defendant in the city of Erlangen, about the twelfth day of March, 1901. The goods were shipped from Hamburg for New York in the latter part of March, to be from there transported in bond to Des Moines, which is a port of entry ³²⁹ for imported goods. The goods were landed in New York in proper season, but, owing to a failure to comply with the customs regulations, they were kept there by the customs officials until late in the fall of the same year, and when they reached the plaintiff in Des Moines they were so badly damaged as to be of but slight value. The plaintiff claims that the contract required the defendant to deliver the goods in bond in Des Moines, and that this necessarily involved the duty of providing the papers necessary to clear them at the seaport entry, while the defendant insists that such duty rested on the plaintiff. The appellant alleges a large number of errors, and we shall discuss them without regard to the order of presentation in its brief.

1. The gloves were shipped "to order" and a draft made on the plaintiff, with bill of lading attached. The appellants therefore claim that title thereto did not vest in the plaintiff until payment of the draft and surrender of the bill of lading, and that the evidence does not show that the gloves were damaged after they became the property of the plaintiff. The gloves were damaged while they were in the custom-house in New York, and the evidence was sufficient to warrant the finding that the damage occurred after the plaintiff acquired ownership thereof.

The evidence also sufficiently showed that the defendant was a common carrier, and that the gloves were delivered to it as alleged. To constitute a common carrier, it is not essential

that the person or corporation undertaking such service own the means of transportation. If the contract is that the goods will be carried and delivered, it makes the one so contracting a common carrier, regardless of the name or the ownership of the line or lines over which the service extends: Ray's Negligence of Imposed Duties, 6, 7; 6 Cyc. 369; Buckland v. Adams Exp. Co., 97 Mass. 124, 93 Am. Dec. 68; Merchants' Dispatch Transp. Co. v. Bloch, 86 Tenn. 330 392, 6 Am. St. Rep. 847, 6 S. W. 881; Lawson on Contract of Carriers, sec. 233.

The customs law (Act June 10, 1880, c. 190, 21 Stats. 173 [U. S. Comp. Stats. 1901, p. 1963]), provided that dutiable goods consigned to and destined for interior ports might immediately pass the port of first arrival without appraisement and liquidation of duties at the latter port, upon compliance with the requirements of section 4 of the act, and under the restriction of section 9 thereof, which were as follows:

"Sec. 4. That sections 2853 and 2855 of the Revised Statutes of the United States be, and the same are hereby, so amended as to require that all invoices of merchandise imported from any foreign country and intended to be transported without appraisement to any of the ports mentioned in the seventh section of this act, shall be made in quadruplicate; and that the consul, vice-consul, or commercial agent, to whom the same shall be produced, shall certify each of said quadruplicates under his hand and official seal in the manner required by section 2855 of the Revised Statutes, and shall then deliver to the person producing the same two of the quadruplicates, one to be used in making entry at the port of first arrival of the merchandise in the United States, and one to be used in making entry at the port of destination, file another in his office there to be carefully preserved, and as soon as practicable transmit the remaining one to the collector or surveyor of the port of final destination of the merchandise. . . .

"Sec. 9. That no merchandise shall be shipped under the provisions of this act after such merchandise shall have been landed ten days from the importing vessel, and merchandise not entered within such time shall be sent to a bonded warehouse by the collector as unclaimed, and held regularly, entered and appraised."

A consular invoice was made as required by this act, but a quadruplicate thereof was not filed with the customs officials

at the port of New York, and, as a consequence of such neglect, appraisement and liquidation of duties was ³³¹ required at said port, occasioning the delay of which we have spoken, and the consequent damage to the gloves. If, under the contract of carriage, it was the defendant's duty to clear the goods at the port of New York, it is liable for the damages caused by their detention there, unless the plaintiff was bound to release them by payment of the duty. The plaintiff does not allege in its petition, nor is there evidence tending to show an express agreement as to the filing of clearance papers by either party, and, if that duty rested on the defendant, it was because of its contract to deliver the goods in bond in Des Moines, and because of its agreement to take exclusive charge of the shipment and to release the plaintiff from any care in connection therewith, so far at least as the clearance of the goods at New York was concerned. A careful examination, and consideration of the evidence on this question satisfies us that the jury was warranted in finding therefrom that the defendant undertook to clear the goods at the port of first arrival, and that it was at fault in not doing so.

A common carrier is an insurer, except for a loss occasioned by the inherent quality of or defect in the goods shipped, the act of God, or of the owner, or the act of the public enemy. And the law casts upon the carrier the burden of proving that the loss resulted from one or more of these causes: Ray on Negligence of Imposed Duties, secs. 2, 10; *Hart v. Chicago etc. R. Co.*, 69 Iowa, 485, 29 N. W. 597; *St. Clair v. Chicago etc. R. Co.*, 80 Iowa, 304, 45 N. W. 570.

If Des Moines had not been a port of delivery, a simple contract to transport the goods from Erlangen to that destination would have created no obligation on the part of the carrier to pay the duties thereon, and a failure on the part of the owner thereof to do so would be an act excepting the carrier from liability, and in this connection we may as well notice the contention of the appellant that the plaintiff was bound to pay the duty ³³² when he learned that the goods could not be cleared at New York without such payment. The court so instructed, and, whether right or wrong, it is the law of the case, so far as the appeal is concerned. We think, however, that the question whether the plaintiff could or should have paid the duty sooner, in the exercise of due diligence, was properly submitted to the jury, and that its finding should not be disturbed.

It is urged there was such inconsistency between instruction 1, which told the jury what the plaintiff must prove to make its case, and instruction 6, which stated that if the defendant contracted to transport the goods and deliver them in bond in Des Moines, it was its duty to procure and file clearance papers, as to confuse and mislead the jury to the defendant's prejudice. There is no such inconsistency, as we view the record, for the latter instruction simply covered the defense insisted upon by the appellant. It is also said that the same instruction was erroneous because an agreement to deliver in bond in Des Moines did not impose on the defendant a duty to procure a clearance of the goods at New York; but what we have heretofore said disposes of the contention.

There is no merit in the appellant's contention that instruction 7 assumed that there was a contract for the shipment of goods.

Some of the other instructions are criticised, but we think that as a whole they were fair and fully presented the questions in the case, and are sustained by what has already been said on the main proposition.

Complaint is made of the refusal to give some of the instructions asked by the defendant, but we find no error in the denial. So far as they contained the law applicable to the case, they were embodied in those given.

We have given the whole record and arguments careful examination, and find no error for which there should be a reversal of the case.

The judgment is therefore affirmed.

Bishop, J., taking no part.

A Transportation Company may be a common carrier and responsible as such, although it owns no railroad or line of transportation: *Merchants' Dispatch Co. v. Bloch*, 86 Tenn. 392, 6 Am. St. Rep. 847.

If a Carrier is Instructed to Carry Goods in Bond, but, disregarding such instructions, takes the goods out of bond without authority, thus rendering them of less value and causing a loss at the point of destination, he is liable for actual damages: *Smith v. New Orleans etc. R. R. Co.*, 106 La. 11, 87 Am. St. Rep. 285.

STATE SAVINGS BANK v. SHINN.

[130 Iowa, 365, 106 N. W. 921.]

JUDGMENT LIEN—Notice—Mistake in Names.—A judgment entered and indexed against "Mrs. G. B. Smith" may be a lien on property in the name of "Kate L. Smith," as against a purchaser who knows that the judgment exists and that they are one and the same person. (p. 426.)

EXECUTION SALE.—**Mere Inadequacy of Price** is not ground for setting aside a sheriff's sale. (p. 426.)

Action by the owner of a lot to restrain the sheriff from executing a deed thereto in pursuance of a sale by him. The petition of the plaintiff was dismissed and he appeals.

J. S. Dewell, for the appellant.

No appearance for the appellee.

³⁶⁶ DEEMER, J. In the year 1888 Kate L. Smith obtained title to the lot in question by devise from her father, and in January of the year 1902 conveyed the same to plaintiff by warranty deed, the consideration being eight thousand five hundred dollars. In August of the year 1897 Katy and Mary Dolan obtained judgment before a justice of the peace against Mrs. G. B. Smith for the sum of about ninety dollars. This judgment was transcribed to the district court of Harrison county. Neither this judgment nor the index thereof refers to Kate L. Smith, nor do either show that Mrs. G. B. Smith was the wife of any particular Smith, save as the name itself serves to distinguish the individual. November 11, 1903, execution issued upon this judgment, which was levied upon the property, and pursuant to proper notice the same was sold to the plaintiff in ³⁶⁷ execution for the sum of one hundred and forty-five dollars and seventy-five cents. Certificate of sale issued in due course, and this action is to restrain the issuance of a deed.

The testimony shows that Kate L. Smith is the daughter of one Willard Bump, from whom she obtained title to the property, and that she is the widow of one G. B. Smith. Plaintiff's attorney and one of its stockholders knew, when negotiating for the property, that Mrs. G. B. Smith was the wife of G. B. Smith, who was then alive, and that her correct name was Kate L. Smith. He also said that there was another

G. B. Smith in Missouri Valley at this time and another Mrs. G. B. Smith, and that he knew the judgment above referred to was against Mrs. G. B. Smith, and presumed it was intended to be against "Mrs. G. B. Smith here referred to."

Plaintiff contends that the judgment upon which the execution issued never became a lien upon the property, and that it purchased the same free from any claim of the judgment creditors. The record title to the property when plaintiff purchased was in Kate L. Smith; and there were no judgments of record against any such person, nor was there an index to any such judgment. There was, however, a judgment against Mrs. G. B. Smith, which, as we understand, was properly indexed; but there was nothing of record showing that Kate L. Smith and this Mrs. G. B. Smith were one and the same person. Recordation and indexing of instruments and judgments is provided for in order that bona fide purchasers and encumbrancers having no actual notice may be protected; and it is generally held that failure to docket or index a judgment does not wholly destroy its effect as a lien: *Wheeler v. Heermans*, 3 Sand. Ch. (N. Y.) 597; *Appeal of York Bank*, 36 Pa. 458; *Cushing v. Edwards*, 68 Iowa, 145, 25 N. W. 940; *Fuller v. Nelson*, 35 Minn. 213, 28 N. W. 511; *Buchan v. Sumner*, 2 Barb. Ch. (N. Y.) 165, 47 Am. Dec. 305. The object of the docket and index is to apprise intending purchasers ³⁸⁵ or encumbrancers of judgment liens: *Cummings v. Long*, 16 Iowa, 41, 85 Am. Dec. 502. For some purposes judgments are valid as soon as rendered, and, even if improperly indexed, they are valid between the parties, and as to every one save bona fide purchasers or encumbrancers: *Gordon v. Rixey*, 76 Va. 694, and cases hitherto cited. In the present case there was a judgment against Mrs. G. B. Smith, which was properly procured, and plaintiff through its agent and attorney knew that it was intended to be against Kate L. Smith, and that Kate L. Smith and Mrs. G. B. Smith were one and the same person. In such circumstances it is in no position to say that there was no judgment and no lien upon the land: *Delavan v. Pratt*, 19 Iowa, 429; *Peterson v. Little*, 74 Iowa, 223, 37 N. W. 169; *Cushing v. Edwards*, 68 Iowa, 145, 25 N. W. 940; *Howe v. Thayer*, 49 Iowa, 154; *Sterling Mfg. Co. v. Early*, 69 Iowa, 94, 28 N. W. 458; *Balm v. Nunn*, 63 Iowa, 641, 19 N. W. 810; *Markham v. Buckingham*, 21 Iowa, 494, 89 Am. Dec. 590; *Aetna L. Ins. Co. v. Hesser*, 77

Iowa, 381, 14 Am. St. Rep. 297, 42 N. W. 325, 4 L. R. A. 122; Appeal of York Bank, 36 Pa. 458; Appeal of Stephens' Exrs., 38 Pa. 9; Craig v. Sebrell, 9 Gratt. (Va.) 131; Thomas v. Desney, 57 Iowa, 58, 10 N. W. 315.

Counsel's argument is based upon the proposition that as between the parties thereto the judgment never became a lien upon Kate L. Smith's property, and that, no matter what plaintiff's knowledge, it purchased the property free from any claim or lien of the judgment creditor. This position is fallacious. A judgment may be a lien as between the parties, although not properly indexed: *Jenny v. Zehnder*, 101 Pa. 296.

2. The property levied upon was worth from twelve thousand to fifteen thousand dollars, and was sold for a little over one hundred and forty-five dollars. The sale was in all respects regular unless it be for inadequacy of bid, or because of failure of the sheriff to adjourn the sale for want of bidders.

It is argued that the sheriff should have looked for other property belonging to the judgment defendant before levying upon the valuable property he did take. There is no ~~300~~ showing that Mrs. G. B. Smith had any other property, and the record discloses that he was directed by the plaintiffs in execution to levy upon this particular property. It consists of a single lot upon which is a valuable building about one hundred feet long by twenty-five feet wide, fitted up for a banking business. At the sale the sheriff offered it in as small subdivisions as possible, and while he might in his discretion have adjourned the sale for want of bidders, he was under no obligation to do so here, for all prior proceedings, notices, etc., were in strict conformity to law. Mere inadequacy of price is not ground for setting aside a sheriff's sale; and in this case that appears to be the only reason for interfering therewith: *Griffith v. Milwaukee H. Co.*, 92 Iowa, 634, 54 Am. St. Rep. 573, 61 N. W. 243; *Peterson v. Little*, 74 Iowa, 223, 37 N. W. 169.

As plaintiff had actual notice of the judgment, and constructive, if not actual, notice of the sale, it should have attended the same and protected its interests. Failing in this, it may still protect itself by redeeming from the sale, unless by its own laches it has waived or forfeited its right to do so. And while the sheriff might in his discretion have adjourned the sale because the amount offered was grossly inadequate,

there is no reason here for setting it aside for failure on the part of the sheriff to exercise his discretion. The sale was for a judgment creditor, and he was not bound to bid more than enough to satisfy his claim. And if the rule we have announced does not apply, a judgment creditor for a small amount might not be able to collect his judgment because of inability to raise enough money to bid on the property. The cases relied upon by appellant are not in point. We shall not review them, for none seem to involve the exact question now before us.

There is no reason for disturbing the sale, and the decree must be, and is, affirmed.

Irregularities in Docketing or Indexing a judgment as affecting the lien thereof are considered in the note to *Western Sav. Co. v. Currey*, 87 Am. St. Rep. 665-673.

A *Judicial Sale* will not be set aside, as a rule, for mere inadequacy of price: *Clark v. Glos*, 180 Ill. 556, 72 Am. St. Rep. 223; *Stroup v. Raymond*, 183 Pa. 279, 63 Am. St. Rep. 758.

STATE v. MATHESON.

[130 Iowa, 440, 103 N. W. 137.]

EVIDENCE.—A Photograph is Admissible in evidence, not merely as a map or diagram representing things to which a witness testifies from his independent observation, but as direct evidence of things which have not been directly described by a witness as having come within his observation. (p. 430.)

EVIDENCE.—An X-Ray Photograph showing the presence of a dark substance in a human body is admissible in a prosecution for an assault to murder, after proof that it was taken by a competent person, to show the course and location of a bullet. (p. 431.)

WITNESS—Impeachment by Previous Declarations.—If there is an inconsistency between the belief of a witness, as indicated by his previous declarations, and that which would naturally be indicated by his examination in chief, they may be shown, although not directly contradictory of any specific statement in his testimony. (p. 433.)

ASSAULT TO MURDER—Accidental Shooting.—If the defense in a prosecution for assault to murder is that the shooting was accidental and without wrongful intent, it is error to instruct the jury, in effect, that unless they find affirmatively that the shooting was accidental, they are to disregard the evidence as to an accident, but are to apply the rule as to presumption of intent from a wrongful act. (p. 435.)

EVIDENCE.—The Flight of One Accused of Crime is a circumstance *prima facie* indicative of guilt. (p. 437.)

JURORS—Waiver of Incompetency.—An objection to a juror because his name was not on the jury list is waived by a failure to make inquiry as to his competency on his preliminary examination. (p. 437.)

Defendant was convicted of an assault with intent to commit murder, and appeals from a sentence to imprisonment in the penitentiary.

J. P. Organ, Harl & Tinley and Flickinger Bros., for the appellant.

Charles W. Mullan, attorney general, and Lawrence De Graff, assistant attorney general, for the state.

⁴⁴¹ **McCLAIN, J.** At a conference which was being held in a secluded place between the defendant, a young man nineteen years of age, and one Williams, in regard to the stealing of some jewelry from the latter's store, at which one Baker, who was an officer, and Henry Matheson, the father of the defendant, and one other person, were present, a revolver which defendant had been carrying in his hip pocket, and which he was at the time taking from his pocket, was discharged, and Baker was wounded as a result of the discharge. The claim on behalf of defendant was that the revolver was accidentally discharged whilst he was attempting to extract it from his pocket, while Baker testified that it was intentionally aimed and discharged at him by the defendant.

1. The ground on which defendant stood was a little lower than that on which Baker stood, according to some of the witnesses; and it was a material inquiry whether the ball, which entered Baker's body at the margin of the ribs, about an inch to the right of the median line, took an upward or a downward ⁴⁴² course, for an upward course would indicate that the revolver was discharged while it was near the level of defendant's hip, and would tend to contradict the testimony of Baker that defendant aimed the revolver at him before it was fired, while a downward course would be consistent with Baker's account of what took place. The physician who probed for the bullet did not find it, but one Greenland, who testified that he was an electrical engineer, and familiar with the use of the X-ray machine, produced an X-ray photograph, or "radiograph," as it is called in his testimony, which he testified was produced by subjecting the middle portion of Baker's body to the proper process for taking a photograph

of the interior thereof by means of the X-ray machine, which photograph showed the vertebrae of the spinal column in the lumbar region, and appeared to show a dark object in the shape of a bullet close to one of the vertebrae. One McRae, a physician, by means of a comparison of the spot where the bullet entered Baker's body with the location of the supposed bullet, as shown by the radiograph, testified that the course of the bullet was downward. To the admission of the radiograph in evidence the defendant objected and the overruling of his objection is one of the alleged errors relied upon for reversal.

The principal objection urged to the introduction of the radiograph, and the use of it by the witness McRae for the purpose of determining the course of the bullet, is that it was not sufficiently identified as a representation of anything about which there was evidence before the jury. The theory of counsel seems to be that, in general, a photograph is admissible in evidence only as a representation of something which a witness testifies to as of his own knowledge, resulting from observation, and that as no witness testified to, or could testify to, the presence of a bullet lodged in Baker's body, near the spinal column, by any direct observation, the radiograph showing what appeared to be a bullet in that locality was not admissible.

⁴⁴³ It is true that photographs, like maps, diagrams or other methods of representing visually the facts to which a witness directly testifies, or which might be directly observed by the jury if they had an opportunity to make inspection, have been held to be admissible simply as constituting such a representation: *Reddin v. Gates*, 52 Iowa, 210, 2 N. W. 1079; *Ruloff v. People*, 45 N. Y. 213; *Cowley v. People*, 83 N. Y. 464, 38 Am. Rep. 464; *People v. Fish*, 125 N. Y. 136, 26 N. E. 319; *Baustian v. Young*, 152 Mo. 317, 75 Am. St. Rep. 462, 53 S. W. 921; *Dederichs v. Salt Lake City R. Co.*, 14 Utah, 137, 46 Pac. 656, 35 L. R. A. 802; *Hampton v. Norfolk etc. R. Co.*, 120 N. C. 534, 27 S. E. 96, 35 L. R. A. 808.

But the court takes judicial notice of the fact that by the ordinary photographic process a representation may be secured, sufficiently truthful and reliable to be considered as evidence with reference to objects which are in a condition to be thus photographed, without regard to whether they have been actually observed by any witness or not. As is said in

Luke v. Calhoun County, 52 Ala. 115: "A court cannot refuse to take judicial cognizance that photography is the art [of] producing fac-similes or representations of objects by the action of light on a prepared surface. As such, it has been so long recognized, and the mechanical and chemical process employed, and the scientific principles on which it is based, are so generally known that it would be vain for a court to decline cognizance of it." And in *Udderzook v. Commonwealth*, 76 Pa. 340, it is said that photography "has become a customary and common mode of taking and preserving views, as well as likenesses of persons, and has obtained universal assent to the correctness of its delineations. We know that its principles are derived from science; that the images on the plate, made by the rays of light through the camera, are dependent on the same general laws which produce the images of outward forms upon the retina through the lenses of the eye. The process has become one in general ⁴⁴⁴ use—so common that we cannot refuse to take judicial cognizance of it as a proper means of producing correct likenesses." Therefore a photograph is admissible, not merely as a diagram or map representing things to which the witness testifies from his independent observation, but as direct evidence of things which have not been directly described by a witness as having come within his observation. Thus in *Barker v. Town of Perry*, 67 Iowa, 146, 25 N. W. 100, this court has said that, "wherever it is important that the locus in quo or any object be described to a jury, it is competent to introduce a photographic view." And in that case it was held not improper to allow the jury to take with them to the jury-room a photograph which had been introduced in evidence, and make use of a magnifying glass in order to minutely observe those things which could be seen in the photograph by means of such glass. The magnifying glass was permitted in this case on the same principle as its use was allowed in *Frank v. Chemical Nat. Bank*, 45 N. Y. Super. Ct. 452, and *Kannon v. Galloway*, 2 Baxt. 230—for the purpose of discovering whether the signature to a written instrument introduced in evidence was genuine; and it is plain that the photograph was recognized as an independent instrument of evidence, the true significance of which might be discovered by means of the glass. And as a further illustration of the use of photographs as independent instruments of evidence, when properly identified, see *Omaha Southern R. Co. v. Beeson*, 36 Neb. 364, 54

N. W. 557. It is apparently on the same principle that, in the comparison of signatures or purported signatures, enlarged photographic copies are admitted: *Luco v. United States*, 23 How. 515, 16 L. ed. 545; *Marcy v. Barnes*, 16 Gray, 161, 77 Am. Dec. 405; *Howard v. Illinois Trust etc. Bank*, 189 Ill. 568, 59 N. E. 1106.

The process of X-ray photography is now as well established as a recognized method of securing a reliable representation of the bones of the human body, although they are ⁴⁴⁵ hidden from direct view by the surrounding flesh, and of metallic or other solid substances which may be imbedded in the flesh, as was photography as a means of securing a representation of things which might be directly observed by the unaided eye at the time when photography was first given judicial sanction as a means of disclosing facts of observation; and for that purpose X-ray photographs, or sciagraphs, or radiographs, as they are variously called, have been held admissible on the same basis as photographs: *Bruce v. Beall*, 99 Tenn. 303, 41 S. W. 445; *Miller v. Dunmon*, 24 Wash. 648, 64 Pac. 804; *Chicago etc. R. Co. v. Spence*, 213 Ill. 220, 104 Am. St. Rep. 213, 72 N. E. 796; *Carlson v. Benton*, 66 Neb. 486, 92 N. W. 600; *City of Geneva v. Burnett*, 65 Neb. 464, 101 Am. St. Rep. 628, 91 N. W. 275, 58 L. R. A. 287; 1 *Wigmore on Evidence*, secs. 795-797. As is said in *Mauch v. City of Hartford*, 112 Wis. 40, 87 N. W. 816: "It is the duty of courts to use every means for discovering the truth reasonably calculated to aid in that regard. In the performance of that duty every new discovery, when it shall have passed beyond the experimental stage, must necessarily be treated as a new aid in the administration of justice in the field covered by it. In that view, courts have shown no hesitation, in proper cases, in availing themselves of the art of photography by the X-ray process." We have no difficulty, therefore, in holding that the radiograph admitted in evidence in this case, after proof that it was taken by a competent person, was admissible to show that there was in the body of Baker at the time it was taken some hard substance, in the shape of a bullet, near the spinal column.

It is objected, however, that there is no evidence that this object which is represented in the radiograph was a bullet. True enough, but it was proper for the jury to take the evidence for what it was worth, as indicating that something in the shape of a bullet was lodged in Baker's body. Whether

it was in fact a bullet, they must determine, just as they would have been required ⁴⁴⁶ to determine the fact if the witness had testified that he saw something the size and shape of a bullet. That is all he could have told simply by looking at it if it had been exposed to view.

It is further objected that there was no evidence as to when the radiograph was taken, and therefore that it does not appear that the bullet, if such it was, occupied the same position in Baker's body that it did when it first lodged there after being fired from defendant's revolver. Of course, evidence as to the location of the bullet at a subsequent time would not be material, unless there was some reasonable ground for assuming that its location had not changed in the meantime; but we think that we can properly take judicial notice of the fact that a bullet imbedded in human flesh usually becomes encysted, and does not change its location without external interference; and it seems to us that the probability that the bullet when discovered by means of the radiograph was in the same position that it was when it first lodged in Baker's body is sufficiently strong to have warranted the jury in taking the information furnished by the radiograph for what it was worth, in their judgment, in determining whether the course of the bullet after entering the body was downward or upward.

2. Henry Matheson, the father of defendant, was a witness in his behalf, and, on cross-examination, testified that he told his son, if he knew anything more about the stealing of the jewelry than he had already told, to tell it, and they would "fix it up"; and he was asked what he meant when he said that they would "fix it up." But as he put his own version on the conversation which he had related, and there was no effort to contradict him in this respect, we do not see that there was any prejudicial error in overruling the objection to the questions.

But he was also asked whether he did not say to one Hanson that "we had the thing fixed up when the boy shot ⁴⁴⁷ that deputy sheriff," and to one Swanson that "the boy got mixed up in that jewelry stealing, and now he has shot the deputy sheriff"; and, having made a qualified denial as to such statements, Hanson and Swanson were called as witnesses for the prosecution on rebuttal, and testified that the statements above quoted had been made to them, respectively, by the witness. Objections were made to the questions asked of the witness on

cross-examination, and to the questions asked of Hanson and Swanson, respectively, in regard to these statements, which, as they testified, were made to them by him; and the question is whether the cross-examination laying the foundation for an impeachment, and the questions to the other witnesses for the purpose of showing these statements by way of impeachment, were properly admitted.

It is true that previous statements made by a witness as to a matter of opinion or a conclusion cannot be shown for the purpose of impeachment, although they tend to contradict the inferences which might be drawn from the recital of the facts given in the witness' examination in chief: *People v. Stackhouse*, 49 Mich. 76, 13 N. W. 364; *Saunders v. City etc. R. Co.*, 99 Tenn. 120, 41 S. W. 1031; *Drake v. State*, 29 Tex. App. 265, 15 S. W. 725; *Welch v. State*, 104 Ind. 347, 3 N. E. 850. It is also said properly that the answer solicited by a witness on cross-examination as to collateral matter cannot be contradicted; "collateral matter" being defined to be a matter which the cross-examining party would not have been permitted to introduce in evidence as a part of his original case: *Hildeburn v. Curran*, 65 Pa. 59; *Johnston v. Spencer*, 51 Neb. 198, 70 N. W. 982; *Welch v. State*, 104 Ind. 347, 3 N. E. 850. And of course the prosecution cannot show declarations of a third person which are against the defendant, even though the person who has made such declarations is called as a witness by the defendant: *State v. Keefe*, 54 Kan. 197, 38 Pac. 302. These cases are relied on, in a general way, in behalf of appellant, to support the proposition ⁴⁴⁸ that what may be called an indirect impeachment (that is, an impeachment by showing declarations of the witness indicating a general belief inconsistent with that indicated by his examination in chief) is not proper. And see *Pence v. Waugh*, 135 Ind. 143, 156, 34 N. E. 860; *Ross v. Commonwealth*, 21 Ky. Law Rep. 1344, 55 S. W. 4. But the great weight of authority seems to support the proposition that if there is an inconsistency between the belief of the witness, as indicated by his previous declarations, and that which would naturally be indicated by his examination in chief, such previous declarations may be shown, although they are not directly contradictory of any specific statement made on his examination in chief: *Patchin v. Astor Mut. Ins. Co.*, 13 N. Y. 268; *Stats v. Kingsbury*, 58 Me. 238; *Handy v. Canning*, 166 Mass. 107, 48 N. E. 118; *Whipple v. Rich*, 180 Mass. 477, 63 N. E. 5; *McClellan v. Ft. Wayne etc.*

R. Co., 105 Mich. 101, 62 N. W. 1025; *Lowe v. State*, 118 Wis. 641, 96 N. W. 417; *State v. Baldwin*, 36 Kan. 1, 12 Pac. 318; *Franklin v. Commonwealth*, 105 Ky. 237, 48 S. W. 986; *Chicago etc. R. Co. v. De Clow*, 124 Fed. 142, 61 C. C. A. 34.

We think there was no error, therefore, in allowing the prosecution to inquire about and prove these prior declarations of Henry Matheson, for he had, in his examination in chief as a witness for the defendant, testified that he did not see his son, the defendant, take his pistol out of his pocket or aim it at Baker, although he was in a position to have seen such acts on the part of defendant. The whole course of the witness' testimony had tended to support the contention of defendant that the revolver was not intentionally fired, and, if his testimony was true, he must have entertained the belief that it was not thus fired, and his previous declaration that the defendant had shot Baker was inconsistent with any such belief. At least, there was such apparent inconsistency as to make it proper to admit the declarations for what they were worth.

⁴⁴⁹ This witness was also asked on cross-examination as to a previous declaration tending to indicate that the person guilty of the theft of the jewelry was a member of his own family. This was clearly improper, for such declaration could do no more than prove the belief of defendant that his son was implicated in the theft of the jewelry. But as the witness unqualifiedly denied any knowledge of making such a remark, and there was no subsequent effort on the part of the prosecution to prove that it was made, the error in allowing the question to be asked on cross-examination was perhaps without prejudice.

3. The court instructed the jury that the law presumes innocence; that it is incumbent upon the state, in order to sustain a conviction, to prove the guilt of defendant beyond any reasonable doubt, etc.; and that mere weight of evidence is not sufficient, unless it excludes all reasonable doubt, etc.—and then proceeded to define murder, manslaughter, assault, etc., saying that malice aforethought might be inferred from the kind of weapon used, and the manner and circumstances attending its use. In another instruction it is said that “the law warrants the presumption or inference that a person intends the results or consequences to follow an act which he intentionally commits which ordinarily do follow such acts,” and that “if a person makes an assault on another, and in-

dicts on him an injury of a more serious character than an ordinary battery, the presumption is warranted that he intends to inflict a great bodily injury, if there is no evidence tending to show that he intended a less injury. If you find that defendant committed the assault charged, you will determine his intent in doing so by the surrounding circumstances, and all the evidence in the case before you which tends to show the intent." A subsequent instruction with reference to accidental shooting was as follows: ⁴⁵⁰ "It is claimed by the defendant that the pistol in question, at the time and place in question, was accidentally discharged. An accident may be defined to be an event happening without the concurrence of the will of the person by whose agency it was caused. If you find from all the facts and circumstances in evidence before you that the pistol in question was discharged by the defendant, and that the said J. C. Baker was shot thereby, and that the discharge of said pistol was without the concurrence of the will of the defendant, then it was an accident, and defendant would not be guilty of any crime. If you fail to so find, then you should disregard the theory of an accident, and inquire as to the guilt or innocence of the defendant, as hereinbefore instructed."

It is to be borne in mind that the theory of the defense was that defendant was innocent of any wrongful intent, and that his revolver was accidentally discharged. This was not a defense by way of justification or excuse, but, if true, it completely negated the commission of any crime. Yet the court told the jury that, if they failed to find from the evidence that defendant's pistol was accidentally discharged (that is, without the concurrence of defendant's will), then they should disregard the theory of an accident, and inquire as to the guilt or innocence of the defendant, as already instructed.

Now, it seems to us this instruction was fundamentally wrong. Any evidence bearing on the question whether the defendant intentionally fired the pistol was evidence going to the very essence of the crime. Unless the jury found beyond a reasonable doubt that the pistol was intentionally, and not accidentally, fired, then it would be their duty to acquit; yet they are told, in effect, that, unless they find affirmatively—that is, by a preponderance of evidence—that the pistol was accidentally discharged, they are not to take into account the evidence as to an accident, but are to apply the rule as to

presumption of intent from a wrongful act which had been given in preceding instructions. In ⁴⁵¹ other words, it seems to us the effect of this instruction was to practically say to the jury that, unless the defendant proved by a preponderance of the evidence that the shooting was accidental, they should presume guilt from the fact of the discharge of the pistol and the injury to Baker. Possibly a critical analysis of the previous instructions would not necessarily lead to this conclusion, but, to avoid any such danger, the court should at least have embodied in the instruction last quoted a statement that defendant should not be convicted, if, on all the evidence, including that tending to show that the shooting was accidental, they were satisfied beyond a reasonable doubt that the pistol was intentionally, and not accidentally, discharged. This conclusion has direct support in the cases involving the question of accidents. Thus in *State v. Cross*, 42 W. Va. 253, 24 S. E. 996, it is said: "The claim that the killing was accidental goes to the very gist of the charge, and denies all criminal intent, and throws on the prosecution the burden of proving such intent beyond a reasonable doubt." Even as to self-defense, which does not negative the intentional act, but excuses it, the uniform rule in this state is that the burden of proof (providing, of course, there is some evidence tending to show that the act was done in self-defense) is on the prosecution, and that it is erroneous to instruct the jury in such a way as to throw the burden of proving self-defense by a preponderance of the evidence on the defendant: *State v. Shea*, 104 Iowa, 724, 74 N. W. 687, and cases there cited. And see *People v. Arnold*, 15 Cal. 476; *Trogdon v. State*, 133 Ind. 1, 32 N. E. 725. Even as to alibi, with reference to which a somewhat anomalous rule has been adopted by this court, the jury should be instructed that the defendant is entitled to acquittal, if, on all the evidence, including the evidence relating to an alibi, there is a reasonable doubt as to defendant's guilt: *State v. McGarry*, 111 Iowa, 709, 83 N. W. 718; *State v. Hogan*, 115 Iowa, 455, 88 N. W. 1074. Further argument is unnecessary to substantiate the proposition that the trial court erred in telling ⁴⁵² the jury that they should disregard the evidence as to accident unless they should affirmatively find that the pistol of defendant was accidentally discharged, without at least saying also that evidence of accidental shooting was to be considered in deter-

mining whether there was reasonable doubt of defendant's guilt.

4. Complaint is made of an instruction relating to evidence that defendant fled after Baker was shot, but the instruction was that such fact was a circumstance *prima facie* indicative of guilt. Such an instruction is justified by *State v. Seymour*, 94 Iowa, 699, 63 N. W. 661, and *State v. Arthur*, 23 Iowa, 430, and is not condemned in *State v. Poe*, 123 Iowa, 118, 101 Am. St. Rep. 307, 98 N. W. 587. In the case last cited it was held that it was error to charge that the jury might consider flight as evidence of guilt, but the distinction between such an instruction and one telling the jury that flight is a circumstance *prima facie* indicative of guilt was pointed out.

5. It is further urged that one of the jurors was ineligible, for the reason that his name was not upon the jury list, and that he was not called as a juror until after defendant had exhausted all of his peremptory challenges. The objection is predicated on a showing in the record that the name of the juror included in the list was John S. Davis, while the name of the juror called was Joseph S. Davis, and it further appears that there was no John S. Davis in the precinct in which Joseph S. Davis resided. It is sufficient to say that, if this discrepancy in name was a ground of challenge, it should have been ascertained on the preliminary examination of the juror, so that he could have been challenged for cause if the disqualification was made to appear. Having failed to investigate the incompetency of the juror in this respect in the preliminary examination, the defendant could not afterward complain: *State v. Pickett*, 103 Iowa, 714, 73 N. W. 346, 39 L. R. A. 302; *State v. Greenland*, 125 Iowa, 141, 100 N. W. 341.

⁴⁵³ For the error which has been pointed out in this opinion, the conviction is set aside, and the case is remanded to the lower court for a new trial.

PHOTOGRAPHS AS EVIDENCE.

I. Admissibility of Photographs in General, 438.

II. Necessity of Preliminary Proof of Their Correctness, 439.

III. Sufficiency of Preliminary Proofs, 440.

IV. Care and Skill in Taking Photographs, 440.

V. Competency of Persons Who Testify as to Correctness, 441.

VI. Discretion of Trial Court, 441.

VII. X-Ray Photographs, 442.

I. Admissibility of Photographs in General.

Photographs as evidence have engaged our attention in a prior note in this series: See the monographic note to *Baustian v. Young*, 75 Am. St. Rep. 468. It has become the settled practice of courts to recognize photography as a proper means of producing correct likenesses and representations of persons and other objects, and to admit them in evidence whenever they are relevant to the issue and calculated to aid in the solution of the issues in question: *Chicago etc. R. R. Co. v. Crose*, 214 Ill. 602, 105 Am. St. Rep. 135, 73 N. E. 865; *Huntington Light etc. Co. v. Beaver* (Ind. App.), 73 N. E. 1002; *Varnersdall's Admr. v. Louisville etc. R. R. Co.*, 23 Ky. Law Rep. 1666, 65 S. W. 858; *Babb v. Oxford Paper Co.*, 99 Me. 298, 59 Atl. 290; *Leeds v. New York Tel. Co.*, 79 App. Div. 121, 80 N. Y. Supp. 114; *Miller v. New York*, 104 App. Div. 33, 93 N. Y. Supp. 227; *Davis v. Seaboard Air Line Ry.*, 136 N. C. 115, 48 S. E. 591; *Livermore Foundry etc. Co. v. Union Storage etc. Co.*, 105 Tenn. 187, 58 S. W. 270, 53 L. R. A. 482; *Record v. Chicksaw Cooperage Co.*, 108 Tenn. 657, 69 S. W. 334; *Monson v. State* (Tex. Cr.), 63 S. W. 647; *Tracy v. Baltimore etc. R. R. Co.*, 98 Fed. 633; *Shaffer v. United States*, 24 App. D. C. 417.

In an action against a railway company for personal injuries, photographs of the scene of the accident or of the wreck, taken before the situation has changed materially, are admissible in evidence: *MacFeat v. Philadelphia etc. R. R. Co.* (Del. Super.), 62 Atl. 898; *Chicago etc. R. R. Co. v. Corson*, 198 Ill. 98, 64 N. E. 739; *Chicago etc. R. R. Co. v. Myers*, 86 Ill. App. 401; *New York etc. R. R. Co. v. Robbins* (Ind. App.), 76 N. E. 804; *Bach v. Iowa Cent. Ry. Co.*, 112 Iowa, 241, 83 N. W. 959; *Maynard v. Oregon etc. Nav. Co.*, 46 Or. 15, 78 Pac. 983; *Denver etc. R. R. Co. v. Roller*, 100 Fed. 738, 41 C. C. A. 22, 49 L. R. A. 77. In a prosecution for homicide, or other criminal offenses, photographs of the scene of the crime are competent evidence: *People v. Crandall*, 125 Cal. 129, 57 Pac. 785; *People v. Mahatch*, 148 Cal. 200, 82 Pac. 779; *State v. Rogers*, 129 Iowa, 229, 105 N. W. 455; *Commonwealth v. Chance*, 174 Mass. 245, 75 Am. St. Rep. 306, 54 N. E. 551. Photographs showing the wounds of the deceased are admissible in a murder trial: *State v. Powell* (Del.), 61 Atl. 966; *State v. Roberts*, 28 Nev. 350, 82 Pac. 100. And photographs of the persons involved in a criminal prosecution are admissible in evidence: *State v. Hasty*, 121 Iowa, 507, 96 N. W. 1115; *People v. Carey*, 125 Mich. 535, 84 N. W. 1087; *Commonwealth v. Keller*, 191 Pa. 122, 43 Atl. 198. Photographs of real property showing its situation before a change in the grade of the adjacent street are competent evidence in an action to recover damages for such change: *Village of Grand Park v. Trah*, 115 Ill. App. 291, affirmed in 218 Ill. 516, 75 N. E. 1040; *Robinson v. St. Joseph*, 97 Mo. App. 503, 71 S. W. 465. Enlarged photographs of a deed are

admissible on the issue of its alteration: *Howard v. Illinois Trust etc. Bank*, 189 Ill. 568, 59 N. E. 1106.

II. Necessity of Preliminary Proof of Their Correctness.

But photographs will not be received in evidence until they are verified or authenticated by some other evidence. There must be something aliunde to show that they are photographs of the thing in question, and are fair or truthful representations thereof, before they can be introduced in evidence: *Cunningham v. Fair Haven etc. R. R. Co.*, 72 Conn. 244, 43 Atl. 1047; *People's Gas etc. Co. v. Amphlett*, 93 Ill. App. 194; *Chicago v. Vesey*, 105 Ill. App. 191; *City of La Salle v. Evans*, 111 Ill. App. 69; *Chicago etc. R. R. Co. v. Crose*, 113 Ill. App. 547; *State v. Herson*, 90 Me. 273, 38 Atl. 160; *Martin v. Moore*, 99 Md. 41, 57 Atl. 671; *Leidlein v. Meyer*, 95 Mich. 586, 55 N. W. 367; *Baustian v. Young*, 152 Mo. 317, 75 Am. St. Rep. 462, 53 S. W. 921; *Smart v. Kansas City*, 91 Mo. App. 586; *Goldsboro v. Central R. R. Co.*, 60 N. J. L. 49, 37 Atl. 433; *Virginia-Carolina Chemical Co. v. Kirven*, 57 S. C. 445, 35 S. E. 745; *Houston etc. R. R. Co. v. Cluck* (Tex. Civ. App.), 84 S. W. 852; *Hupfer v. National Distilling Co.*, 114 Wis. 279, 90 N. W. 191.

This rule has been recognized in actions for personal injuries where photographs of the scene of the accident have been offered in evidence (*Wabash R. R. Co. v. Jenkins*, 84 Ill. App. 511; *Iroquois Furnace Co. v. McCrea*, 91 Ill. App. 337, affirmed in 191 Ill. 340, 61 N. E. 79; *Fitzgerald v. Hedstrom*, 98 Ill. App. 109; *City of Huntington v. Lusch*, 33 Ind. App. 476, 70 N. E. 402; *Dederichs v. Salt Lake City R. R. Co.*, 14 Utah, 137, 46 Pac. 656, 35 L. R. A. 802), as in case of a railway accident (*Cunningham v. Fair Haven etc. R. R. Co.*, 72 Conn. 244, 43 Atl. 1047; *Wabash R. R. Co. v. Prost*, 101 Ill. App. 167; *Hawkins v. Missouri etc. Ry. Co.* (Tex. Civ. App.), 83 S. W. 52), and in case of an accident due to a defective sidewalk or highway: *Williams v. City of Centerville*, 97 Ill. App. 160; *Sterling v. Detroit*, 134 Mich. 22, 95 N. W. 986; *City of San Antonio v. Talerico* (Tex. Civ. App.), 78 S. W. 28, 81 S. W. 518. It has also been recognized in criminal prosecutions, when photographs of the premises where the crime was committed have been introduced: *Commonwealth v. Fielding*, 184 Mass. 484, 69 N. E. 216; *Paulson v. State*, 118 Wis. 89, 94 N. W. 771; and in prosecutions for murder, where photographs are offered to show the character of the wounds of the victim: *Smith v. Territory*, 11 Okla. 669, 69 Pac. 805; *State v. Miller*, 43 Or. 325, 74 Pac. 658. Photographs of the deceased, taken two years before her alleged murder, are admissible if shown to be fair representations of her just before her death: *People v. Durrant*, 116 Cal. 179, 48 Pac. 75; *State v. McCoy*, 15 Utah, 136, 49 Pac. 420. Photographic copies of written instruments or of signatures should be supported by preliminary proofs of their authenticity: *First Nat. Bank v. Wisdom's Exrs.*, 111 Ky. 135, 63

S. W. 461; *Grooms v. State*, 40 Tex. Cr. 319, 50 S. W. 370; *United States v. Ortiz*, 176 U. S. 422, 20 Sup. Ct. Rep. 466, 44 L. ed. 529.

When it is said that there must be preliminary proof that a photograph offered in evidence is a correct representation of the object in question, we do not understand that photographs as evidence are limited to such only as represent objects which have actually been observed by witnesses who can testify that the representation is correct. The Iowa court points out in the principal case that courts take judicial knowledge that by the ordinary photographic process a representation may be secured sufficiently truthful and reliable to be considered as evidence with reference to objects which are in a condition to be photographed, without regard to whether they have been actually observed by any witness or not; and that a photograph is admissible not merely as a diagram or map representing things to which the witness testifies from his independent observation, but as direct evidence of things which have not been directly described by a witness as having come under his observation. The only preliminary proof required to support an X-ray photograph, as hereinafter pointed out, is that it was properly taken and produced by a competent person. Its accuracy cannot ordinarily be attested by the eye. No good reason is apparent why a different rule should be applied to ordinary photographs. When properly taken, they generally speak far more accurately than can a living witness to the object or scene.

III. Sufficiency of Preliminary Proofs.

It is said that the proof required of the accuracy of a photograph varies with the nature of the evidence the photograph is offered to supply. When it is offered as a general representation of physical objects as to which testimony is adduced, for the mere convenience of witnesses in explaining their statements, very slight proof of accuracy may be sufficient. But when it is offered as representing handwriting which is to be subjected to minute and detailed examination, or any object where slight differences in height, breadth, or length are of vital importance, much more convincing proof is required; for it is well known that a photograph may, through the want of skill of the photographer, or through his intentional and skillful manipulation, be inaccurate and even misleading: *Cunningham v. Fair Haven etc. R. R. Co.*, 72 Conn. 244, 43 Atl. 1047. Photographs which are stated to present a fair representation of the general features of the scene of an accident are admissible: *Warren v. Village of Randolph*, 18 App. Div. 458, 45 N. Y. Supp. 1112.

IV. Care and Skill in Taking Photographs.

Since careless, inexperienced, or interested persons may produce inaccurate and misleading photographs, it has been said that there should always be preliminary proof of care and accuracy in taking

them, before they are permitted to be used in a trial: *Beardslee v. Columbia Township*, 188 Pa. 496, 68 Am. St. Rep. 883, 41 Atl. 617. This is no doubt generally true where photographs are used as independent evidence of objects of which the human eye cannot take cognizance, for in such cases there is no way of authenticating them except by showing that they were properly taken and produced. X-ray pictures illustrate this class of photographs. And where photographs of signatures are introduced on the issue of forgery, there should be preliminary proof of care and skill in their taking: *United States v. Orliz*, 176 U. S. 422, 20 Sup. Ct. Rep. 466, 44 L. ed. 529. But it is not an unbending rule, for photographs taken by a person who is not skilled in photography are admissible in evidence, if eye-witnesses testify that it is a truthful representation of the scene or object which it purports to represent: *Mow v. People*, 31 Colo. 351, 72 Pac. 1069; *Carlson v. Benton*, 66 Neb. 486, 92 N. W. 600.

V. Competency of Persons Who Testify as to Correctness.

And the truthfulness of the representation and the accuracy of the photograph may be proved by other witnesses than the person who took and produced it: *McGar v. Bristol*, 71 Conn. 652, 42 Atl. 1000; *New York etc. R. R. Co. v. Moore*, 105 Fed. 725, 45 C. C. A. 21; *Blair v. Pelham*, 118 Mass. 420; *Nies v. Broadhead*, 75 Hun, 255, 27 N. Y. Supp. 52. In an action for personal injuries, the plaintiff may testify that a photograph is a correct representation of the scene of the accident: *Accousi v. G. A. Stowers Furniture Co.* (Tex. Civ. App.), 87 S. W. 861. But where a man, suing for a divorce, on the ground of adultery, produces a photograph of his wife with her alleged paramour, it should be identified by some person other than the plaintiff: *Pessolano v. Pessolano*, 69 N. Y. Supp. 449, 34 Misc. Rep. 16.

VI. Discretion of Trial Court.

The admissibility of a photograph in evidence is a question addressed largely to the discretion of the trial court, and its decision will seldom be reviewed by an appellate court: *Harris v. City of Ansonia*, 73 Conn. 359, 47 Atl. 672; *Lake Erie etc. R. R. Co. v. Wilson*, 189 Ill. 89, 59 N. E. 573; *Dolan v. Mutual Reserve etc. Assn.*, 173 Mass. 197, 53 N. E. 398; *Mauch v. Hartford*, 112 Wis. 40, 87 N. W. 816. Likewise, the question of the sufficiency of the preliminary proofs to identify the photograph or to show that it is a fair or accurate representation of the objects which it purports to portray is a question committed to the discretion of the trial judge: *Chicago v. Vessey*, 105 Ill. App. 191; *Carey v. Town of Hubbardston*, 172 Mass. 106, 51 N. E. 521; *Goldsboro v. Central R. R. Co.*, 60 N. J. L. 49, 37 Atl. 433; *State v. Miller*, 43 Or. 325, 74 Pac. 658. Some authorities go so far as to affirm that his determination of the question is not open to exception or to review on appeal: *Jame-*

son v. Weld, 93 Me. 345, 45 Atl. 299; Van Houten v. Morse, 162 Mass. 414, 44 Am. St. Rep. 373, 38 N. E. 705, 26 L. R. A. 430; Commonwealth v. Fielding, 184 Mass. 484, 69 N. E. 216; Pritchard v. Austin, 69 N. H. 367, 46 Atl. 188. Clearly, however, the discretion of the trial court is not unlimited, and may not be exercised arbitrarily: De Forge v. New York etc. R. R. Co., 178 Mass. 59, 86 Am. St. Rep. 464, 59 N. E. 669; Carlson v. Benton, 66 Neb. 486, 92 N. W. 600. "We do not see," to quote from the supreme court of Connecticut, "how this preliminary question differs from any other where questions of fact and law may be intermingled. Questions of general policy may be involved, and these are generally questions of law; and for other reasons the conclusions of the trial judge may be so clearly against law that we can, to a certain extent, review them, as in cases of findings in respect to reasonable notice to take depositions, or a diligent search for a lost instrument": Cunningham v. Fair Haven etc. R. R. Co., 72 Conn. 244, 43 Atl. 1047. In State v. Cook, 75 Conn. 267, 53 Atl. 589, it was held error to exclude photographs.

VII. X-Ray Photographs.

The doctrine of the principal case that an X-ray photograph showing the interior conditions of a human body or limb which are beyond the observation of the eye is admissible as independent evidence, after proof that it has been properly taken, and produced by a competent person, is supported by a number of quite recent decisions, and is undoubtedly a correct expression of the law on this question: Miller v. Minturn, 73 Ark. 183, 83 S. W. 918; Chicago etc. Ry. Co. v. Spence, 213 Ill. 220, 104 Am. St. Rep. 213, 72 N. E. 796; De Forge v. New York etc. R. R. Co., 178 Mass. 59, 86 Am. St. Rep. 464, 59 N. E. 669; City of Geneva v. Burnett, 65 Neb. 464, 101 Am. St. Rep. 628, 91 N. W. 275, 58 L. R. A. 287; Bruce v. Beall, 99 Tenn. 303, 41 S. W. 445; Miller v. Dumon, 24 Wash. 648, 64 Pac. 804; Mauch v. Hartford, 112 Wis. 40, 87 N. W. 816. And to constitute a foundation for the admission of such a photograph, it is not essential that it appear that it was taken by a competent person, nor that the condition of the apparatus with which it was taken and the circumstances under which it was taken were such as to secure accuracy, where it has been shown by the evidence of competent witnesses that it truly represents the object it is claimed to represent: Carlson v. Benton, 66 Neb. 486, 92 N. W. 600.

FIRST CONGREGATIONAL CHURCH v. TERRY.

[130 Iowa, 513, 107 N. W. 305.]

LIFE TENANT—Duty to Pay Taxes.—The life tenant of lands is charged with the duty of paying the taxes which accrue upon the property of which he is enjoying the use, rents and profits. (p. 444.)

LIFE TENANT—Sale of Land for Taxes.—A life tenant cannot exterminate the remainder by collusively permitting the property to be sold for taxes and having his wife and infant children take the accruing title in their names. (p. 446.)

LIFE TENANT—Tax Sale.—The Wife of a Life Tenant, occupying the premises with her husband as a homestead, cannot acquire a valid tax title as against him or the remaindermen. (p. 447.)

Clark & Clark, for the appellant.

Redmond & Stewart, for the appellees.

514 **WEAVER, J.** Without attempting to rehearse the pleadings, we may state the nature of the controversy as follows: In the year 1895 one Ellen S. Hale died testate, seised of a five-acre tract of land of the value of fifteen hundred dollars, in Linn county. By her will, which was duly probated, she devised a life estate in said land to her brother, Edward J. Hale, with remainder over in equal shares to the First Congregational Church, the Home for Aged Women, and the Home for the Friendless, all of Cedar Rapids, Iowa. The devisee, Edward J. Hale, took possession of said property, and, with his family, consisting of his wife, Elsie J. Hale, and children, who are interveners herein, occupied it as a homestead until his death, July 11, 1903. Said devisee failed to pay the taxes on the property for the year 1896, and for these taxes the property was sold by the county treasurer on December 6, 1897, to the defendant J. M. Terry. No redemption having been made from said sale the treasurer executed and delivered to Terry a deed of said property under date of July 19, 1901. On August 27, 1901, in consideration of a sum substantially equal to the redemption value of the tax purchase, Terry conveyed the land to the defendant William Park, who on the same day conveyed it for a similar expressed consideration to Elsie J. Hale, wife of Edward J. Hale, and to her children, who were all infants. This, it will be observed, was two years before the death of the life tenant and while he and the family were occupying the premises as their homestead. It should also be said that Terry was an old

and intimate friend of Edward J. Hale, and that Park is the father of Elsie ⁵¹⁵ J. Hale, wife of Edward. Plaintiffs seek to set aside the title on the ground: 1. That the procuring of the tax deed and the conveyance to the wife and children of Hale was accomplished by a fraudulent combination or conspiracy between Hale, Terry and Park, to enable the said life tenant, whose duty it was to pay the taxes, to defeat and destroy the interest of the remaindermen in the property; 2. That the wife and members of Hale's family residing with him on said homestead had an interest therein which would entitle them to redeem such property from tax sale, and they could not acquire a tax title thereto as against the head of the family; and that the taking of such title through Terry and Park operates in equity as a redemption from the sale for the benefit of the remaindermen; and 3. That no legal notice of the expiration of the period of redemption had ever been served as provided by law preliminary to the execution of the tax deed.

The rule that the life tenant of lands is charged with the duty of paying the taxes which accrue upon the property of which he is enjoying the use, rents, and profits, is elementary: *Olleman v. Kelgore*, 52 Iowa, 38, 2 N. W. 612; *Booth v. Booth*, 114 Iowa, 78, 86 N. W. 51; *Defreese v. Lake*, 109 Mich. 415, 63 Am. St. Rep. 584, 67 N. W. 505, 32 L. R. A. 744; *St. Paul Trust Co. v. Mintzer*, 65 Minn. 124, 60 Am. St. Rep. 444, 67 N. W. 657, 32 L. R. A. 756. It is equally well settled that with this duty resting upon him he cannot cut out or destroy the estate of the remaindermen in the property by permitting it to be sold for taxes and taking to himself the title thus accruing: *Cooley on Taxation*, 2d ed., 467; *Crawford v. Meis*, 123 Iowa, 610, 101 Am. St. Rep. 337, 99 N. W. 186, 66 L. R. A. 154. This being true, it is immaterial whether he takes the tax title direct or by conveyance from some third person who has acquired it. In neither case can he assert such title against the owners of the remainder, and his purchase will be held to operate as a mere redemption from the tax sale or payment of the taxes for which he ⁵¹⁶ was legally liable. Such would also be the necessary effect of a tax title taken by his procurement or for his use and benefit in the name of some other person. These general principles we do not understand counsel for appellee to question, but it is argued that the facts shown do not call for their application. In that view we cannot concur. Collusive and fraudulent

agreements are not often made in the presence of persons other than those participating in the fraud. In the nature of things they are difficult to prove by direct evidence, and must be established in whole or in part by proof of collateral circumstances. They are carried on under the cover of secrecy, and the participants are rarely found to be frank and candid witnesses. And while, generally speaking, fraud is not to be presumed, yet when all the circumstances combined present a showing that can be reconciled with no reasonable theory of good faith, courts will not hesitate to place the stamp of invalidity upon the transaction. In the case before us a careful examination of the abstracts and of the transcript convinces us beyond all doubt that the acquiring of the tax title was brought about by a wrongful and collusive arrangement between the life tenant, Edward J. Hale, his wife, Elsie J. Hale, his father in law, Park, and their mutual friend and confidant, Terry, with the express purpose and object of eliminating the interests of the remaindermen.

We shall not extend the opinion to state the testimony at length. It is enough to say that soon after coming into the life estate Hale began to seek the help of a friend to procure a tax title to the land, and circumstances demonstrate that Terry, an old and intimate acquaintance, was complaisant enough to serve his purpose. Hale left the tax of 1896, a matter of some twelve dollars, to become delinquent. At the treasurer's sale Terry, who never before or since purchased a piece of land for taxes, bought it in. Within a few days after the deed was procured he conveyed the property, worth one thousand to fifteen hundred dollars, ⁵¹⁷ to Park for the amount of his investment in it, less than one hundred dollars, and immediately and as a part of the same transaction and pursuant to Terry's request Park conveyed it to Hale's wife and children. Terry said that he knew the condition of the title and that from the outset he intended to do just what he did do; that is, obtain a tax title and transfer it to Hale's family. Whether Park was a party to the arrangement originally, or was called in later to serve as a conduit through which to pass the title from the purchaser to the Hales and thereby add to the difficulty of tracing the fraud, is immaterial. He does not pretend to have taken the title for any other purpose than to give the benefit of it to his daughter and her family. While Terry swears that he never mentioned to Hale the matter of his purchase of the land for taxes,

it must be presumed that Hale knew perfectly well what was going on in this respect. Notice of the impending conveyance by the treasurer was served upon him, and, if he did not rest in the certainty that the certificate was in the hands of a friend on whom he could rely, it is incredible that he would permit this valuable property which furnished him home and shelter for life to pass from his hands for the trifling sum required to redeem it. Terry's story is broken, halting, and incoherent, and in every line betrays confusion not unusual in a witness who will not willingly tell an untruth, but finds perfect frankness embarrassing. It is not at all improbable that Hale harbored the feeling that his sister ought to have devised the land to him absolutely, nor was it entirely unnatural that his personal friends should sympathize in that feeling and be easily persuaded that to assist him in cutting out the remaindermen and transmitting his life estate into a fee in himself or in members of his immediate family would be a meritorious act. But this sympathy, however amiable and pardonable in itself, cannot be allowed to disguise the legal wrong involved in evading the effect of the testator's will and diverting the property from the ⁵¹⁸ purposes to which she had dedicated it. The property was hers to give or to dispose of as she wished. Under her will the plaintiffs held the remainder by a right and title no less sacred than the right and title of Hale to a life tenancy; and equity will not look with tolerance upon any scheme or plan which would enable him to make his own wrong and neglect of duty a means by which to destroy the estate of the remaindermen. The fact that the title was taken in the name of the wife and children of the life tenant instead of his own does not serve to affect the legal phase of the transaction. The children are infants of such immature years as to have no intelligent comprehension of the deal, and no consideration was given for or by them for the conveyance in their favor. The wife did not invest a farthing in it. They were simply the passive trustees in whom the title was wrongfully placed to further the central and controlling purpose of the husband and father to exterminate the remainder which had been created in his sister's will in favor of the plaintiffs. This conclusion renders unnecessary any discussion of the other questions raised by this appeal.

We may say, however, that even in the absence of any combination or collusion between the life tenant and Terry, or

the wife of the life tenant occupying the premises with her husband as a homestead, she could not obtain a valid tax title to the property as against her husband or against those to whom he owed the duty to keep down the taxes: *Laton v. Balcom*, 64 N. H. 92, 10 Am. St. Rep. 381, 6 Atl. 37; *Chace v. Durfee*, 16 R. I. 248, 14 Atl. 919; *Rothwell v. Dewees*, 67 U. S. 613, 17 L. ed. 309; *Ward v. Nestell*, 113 Mich. 185, 71 N. W. 593; *Robinson v. Lewis*, 68 Miss. 69, 24 Am. St. Rep. 254, 8 South. 258, 10 L. R. A. 101; *Busch v. Huston*, 75 Ill. 343; *Myers v. Reed*, (C. C.), 17 Fed. 401, 9 Saw. 132; *Weller v. Rolason*, 17 N. J. Eq. 12; *Bracken v. Cooper*, 80 Ill. 221; *Williams v. Morris*, 95 U. S. 444, 24 L. ed. 360; *Burns* ⁵¹⁹ *v. Byrne*, 45 Iowa, 285. The rule of these cases as applied to husband and wife is not founded upon any real or supposed privity of estate in the property, but "upon considerations of public policy, and conclusively imputes to the one, as derived from the other, knowledge of those facts the existence of which precludes the other from action. The opportunities which would be afforded for fraudulent practices would be so numerous and the difficulty of exposing them so great that courts apply the doctrine of estoppel to both, and thus close the door to temptation": *Robinson v. Lewis*, 68 Miss. 69, 24 Am. St. Rep. 254, 8 South. 258, 10 L. R. A. 101.

It is a general and just doctrine that a person having such an interest in land as would entitle him to redeem from tax sale cannot, by taking a tax title, eliminate the rights of others jointly interested with him in such property: *Lane v. Wright*, 121 Iowa, 376, 100 Am. St. Rep. 362, 96 N. W. 902; *Cowdry v. Cuthbert*, 71 Iowa, 733, 29 N. W. 798; *Garrettson v. Scofield*, 44 Iowa, 35; *Manning v. Bonard*, 87 Iowa, 648, 54 N. W. 459. That the wife has an interest in the homestead which she is entitled to protect by redeeming from tax sale, there can be no room for doubt: *McClure v. Barniff*, 75 Iowa, 38, 39 N. W. 171; *Adams v. Beale*, 19 Iowa, 61; *Chase v. Abbott*, 20 Iowa, 154; *Sayers v. Childers*, 112 Iowa, 677, 84 N. W. 938; *Byers v. Johnson*, 89 Iowa, 283, 56 N. W. 449; *Sanders v. Ellis*, 42 Ark. 215. The homestead right is created, not for the benefit of the husband or wife alone, but for the benefit of the family, and, as a matter of first impression, it would seem that not only the husband and wife, but the children of the family as well, should be held entitled to protect their right in the homestead by redeeming from any lien

or charge which threatens to deprive them of its shelter. If such be the case, we think it must follow that when any member of the family, occupying and using the homestead in common with other members, acquires a tax title to the common home it should be held to operate as mere payment of the tax, or redemption from the sale and the holder of the apparent legal title ⁵²⁰ thus acquired be treated as a trustee for the head of the family in whom it was originally vested.

The plaintiffs were entitled to the relief demanded, and the decree of the district court must be reversed. Decree will be entered in this court, if appellant so elects, within twenty days from the filing of this opinion; otherwise, the case will be remanded for a decree in the district court.

RESPECTIVE DUTIES OF LIFE TENANTS AND REMAINDERMEN OR REVERSIONERS TO PAY TAXES.

I. Ordinary Current Taxes, 448.

II. Special Assessments for Local Improvements, 449.

III. Devises of Property for Life, 450.

IV. Tenancy by Curtesy or in Dower, 450.

V. Effect of Sale of Life Estate, 451.

VI. Remedies for Failure to Pay Taxes, 451.

I. Ordinary Current Taxes.

It is generally the duty of the life tenant, rather than the duty of the remaindermen or reversioners, to pay the ordinary taxes which accrue against the property during his tenancy, for he is, and they are not, entitled to the present enjoyment and income of the property: *Griffin v. Fleming*, 72 Ga. 697; *McCook v. Harp*, 81 Ga. 229, 7 S. E. 174; *Prettyman v. Watson*, 34 Ill. 175; *Waldo v. Cummings*, 45 Ill. 421; *Olleman v. Kelgore*, 52 Iowa, 38, 2 N. W. 612; *Johnson v. Smith*, 68 Ky. (5 Bush) 102; *Creutz v. Heil*, 89 Ky. 429, 12 S. W. 926; *Loeb v. Struck* (Ky.), 42 S. W. 401; *Fenley v. Louisville*, 27 Ky. Law Rep. 204, 84 S. W. 582; *Morrison v. Fletcher*, 27 Ky. Law Rep. 124, 84 S. W. 548; *Mehle v. Bensel*, 39 La. Ann. 680, 2 South. 201; *Barnum v. Barnum*, 42 Md. 251; *Jenks v. Horton*, 96 Mich. 13, 55 N. W. 372; *Hildenbrandt v. Wolff*, 79 Mo. App. 333; *Bone v. Tyrrell*, 113 Mo. 175, 20 S. W. 796; *Hall v. French*, 165 Mo. 430, 65 S. W. 769; *Smalley v. Isaacson*, 40 Minn. 450, 42 N. W. 352; *Disher v. Disher*, 45 Neb. 100, 63 N. W. 368; *Speich v. Tierney*, 56 Neb. 514, 76 N. W. 1090; *Pierce v. Burroughs*, 58 N. H. 302; *Holcombe v. Holcombe's Exrs.*, 27 N. J. Eq. 473; *Sillcocks v. Sillcocks*, 50 N. J. Eq. 25, 25 Atl. 255; *Deraismes v. Deraismes*, 72 N. Y. 154; *Conkie v. Grisson*, 24 Misc. Rep. 115, 52 N. Y. Supp. 500; *Sage v. Gloversville*, 43 App. Div. 245, 60 N. Y. Supp. 791; *Corbin's Estate*, 101 App. Div. 25, 91 N. Y. Supp. 797;

Willard v. Bount, 11 Ired. 624; McMillan's Lessee v. Robbins, 5 Ohio, 28; Weaver v. Arnold, 15 R. I. 53, 23 Atl. 41; Ferguson v. Quinn, 97 Tenn. 48, 36 S. W. 576, 33 L. R. A. 688; Hadley v. Hadley, 114 Tenn. 156, 87 S. W. 250; Downey v. Strouse, 101 Va. 226, 43 S. E. 348; Phelan v. Boylan, 25 Wis. 659; Patrick v. Sherwood, 4 Blatchf. 112, Fed. Cas. No. 10,804; Pike v. Wassell, 94 U. S. 711, 24 L. ed. 307.

A life tenant cannot, by paying current taxes, or by redeeming from tax sales to which he has permitted the property to go, create a claim that he can enforce against the remainderman: Hagan v. Varney, 147 Ill. 281, 35 N. E. 219. And he cannot eliminate the estate of the remaindermen by permitting the property to be sold for taxes, and then, either directly or indirectly, purchasing it himself: See the principal case; note to Cone v. Wood, 75 Am. St. Rep. 252; Blair v. Johnson, 215 Ill. 552, 74 N. E. 747; Menger v. Caruthers, 57 Kan. 425, 46 Pac. 712; Dunn v. Snell, 74 Me. 22. The purchase of a tax title by a tenant for life does not vest the fee in him as against a remainderman, and the transaction simply amounts to a redemption from the tax sale: Crawford v. Meis, 123 Iowa, 610, 101 Am. St. Rep. 337, 99 N. W. 186, 66 L. R. A. 154.

A life tenant is liable for such taxes only as accrue during his tenancy: Trimmier v. Darden, 61 S. C. 220, 39 S. E. 373. And while he must pay the taxes if there is any income from the property out of which to pay them (Newby v. Brownlee, 23 Fed. 320), his liability, as a rule, seems to be limited to the income received, or the rental value of the premises if he occupies them himself; but he is bound to keep down the taxes, not only as the profits come into his possession from year to year, but the entire profits during the tenancy are applicable to the discharge of the liability: Clark v. Middlesworth, 82 Ind. 240; Murch v. Smith Mfg. Co., 47 N. J. Eq. 193, 20 Atl. 213.

II. Special Assessments for Local Improvements.

Special assessments for local improvements which permanently enhance the value of the property should be borne ratably between the life tenant and the remainderman in proportion to the benefit accruing to each or in proportion to the respective values of their estates. Such assessments should not, like ordinary taxes, be charged to the life tenant alone. Assessments to construct a ditch or a sewer, to open, widen or extend a street, or probably to curb or pave streets, are within this rule: Williams v. Brace, 5 Conn. 190; Huston v. Trippetts, 171 Ill. 547, 63 Am. St. Rep. 275, 49 N. E. 711; Plympton v. Boston Dispensary, 106 Mass. 544; Bobb v. Wolff, 54 Mo. App. 515; Outcalt v. Appleby, 36 N. J. Eq. 73; Pratt v. Douglas, 38 N. J. Eq. 516; Miller's Estate, 1 Tuck. 346; Peck v. Sherwood, 56 N. Y. 615; Thomas v. Evans, 105 N. Y. 601, 59 Am. Rep. 514, 12 N. E. 571; Moore v. Simonson, 27 Or. 117, 39 Pac. 1105; Chambers v. Chambers, 20 R. I.

370, 39 Atl. 243; *Rhode Island Hospital T. Co. v. Babbitt*, 22 R. I. 113, 46 Atl. 403.

But a special assessment for an improvement which is not of a permanent character should be borne by the life tenant alone. And it has been held, although we regard the holding questionable, that a granite pavement to a street is not an improvement of such a permanent nature that the remaindermen should contribute to the payment of the cost thereof, but that the life tenant should pay the entire assessment: *Reyburn v. Wallace*, 93 Mo. 326, 3 S. W. 482. In *Hitner v. Ege*, 23 Pa. 305, it is decided that the cost of a brick sidewalk should be charged to the tenant for life, and in *Whyte v. Mayor etc. of Nashville*, 32 Tenn. (2 Swan) 364, it is decided that a dowress must pay the cost of a foot pavement in front of the residence occupied by her. A tenant by the curtesy is charged with the cost of reconstructing a sidewalk in *Hackworth v. Louisville Stone Co.*, 106 Ky. 234, 50 S. W. 33.

III. Devises of Property for Life.

The duty of a life tenant to keep down the ordinary current taxes exists, whether the estate comes to him by conveyance, devise, or operation of law: *St. Paul Trust Co. v. Mintzer*, 65 Minn. 124, 60 Am. St. Rep. 444, 32 L. R. A. 756, 67 N. W. 657. The law appears to be well settled that a tenant for life is required to pay the taxes out of the rents and profits, though the life estate is created by a will, unless the testament explicitly requires this burden to be paid out of the corpus of the estate: *Waldo v. Cummings*, 45 Ill. 421; *Wilson v. White*, 133 Ind. 614, 33 N. E. 361, 19 L. R. A. 581; *Smith v. Blindbury*, 66 Mich. 319, 33 N. W. 391; *Defreese v. Lake*, 109 Mich. 415, 63 Am. St. Rep. 584, 67 N. W. 505, 32 L. R. A. 744; *Garland v. Garland*, 73 Me. 97; *Clarke v. Clarke*, 8 Misc. Rep. 339, 20 N. Y. Supp. 328; *In re Burr*, 48 Misc. Rep. 56, 96 N. Y. Supp. 225; *Sidenberg v. Ely*, 90 N. Y. 257, 43 Am. Rep. 163. It has been held that no taxes should be charged against the income of a fund given to a legatee for life: *Wilson v. White*, 133 Ind. 614, 33 N. E. 361, 19 L. R. A. 581; *Crater v. Ryan*, 130 N. C. 618, 41 S. E. 800. It is doubtful, however, whether this can be affirmed as a general rule: *Clark v. Foster*, 8 Met. 568; *Holcombe v. Holcombe*, 29 N. J. Eq. 597; *In re Tuttle*, 49 N. J. Eq. 259, 24 Atl. 1; *In re Shipman*, 82 Hun, 108, 31 N. Y. Supp. 571; *Whitson v. Whitson*, 53 N. Y. 479; *In re Bailey*, 13 R. I. 543.

IV. Tenancy by Curtesy or in Dower.

A tenant by the curtesy is generally bound to pay and keep down the ordinary taxes: *Creutz v. Heil*, 89 Ky. 429, 12 S. W. 926; *King v. King*, 9 Jones & S. 516; *Wade v. Malloy*, 16 Hun, 226; and so is a tenant in dower: *Strawn v. Strawn's Heirs*, 50 Ill. 256; *King v. King*, 9 Jones & S. 516; *Bidwell v. Greenshield*, 2 Abb. N. C. 427; *Whyte v. Nashville*, 32 Tenn. (2 Swan) 364. But a widow is enti-

tled to have her dower assigned to her unburdened and undiminished by taxes and assessments payable out of her husband's estate: *Graves v. Cochran*, 68 Mo. 74; *Vanderbeck v. City of Rochester*, 122 N. Y. 285, 25 N. E. 408; *Harrison v. Peck*, 56 Barb. 251.

V. Effect of Sale of Life Estate.

It is said that the transfer of his estate by a life tenant will not release him from his obligation to the remaindermen to pay a special tax against the property, levied during his tenancy and payable prior to the transfer: *Bobb v. Wolff*, 54 Mo. App. 515. The assignee of a life estate in land subject to the payment of a stipulated rent is bound to pay the taxes assessed upon the demised premises during his tenancy, and cannot recoup or set off the same against the rent of the premises: *Prettyman v. Walston*, 34 Ill. 175. And a purchase at a sale under judgment of a life estate takes it cum onere, and must devote the rents to the payment of taxes due from such estate before the purchase as well as those subsequently imposed: *Murch v. Smith Mfg. Co.*, 47 N. J. Eq. 193, 20 Atl. 213.

VI. Remedies for Failure to Pay Taxes.

The failure of a life tenant to pay the taxes amounts to waste, and he becomes liable therefor in damages to the remaindermen: *Stetson v. Day*, 51 Me. 434; *Wade v. Malloy*, 16 Hun, 226; *Phelan v. Boylan*, 25 Wis. 679. Moreover, equity has jurisdiction over the matter, and may entertain a suit to compel him to reimburse the remaindermen for expenditures in paying assessments which he has refused to pay: *Abernethy v. Orton*, 42 Or. 437, 95 Am. St. Rep. 774, 71 Pac. 327. A receiver may be appointed to collect the rents and pay the taxes, when the life tenant refuses to pay them, if such course seems expedient to protect the estate of the remaindermen or reversioners: *St. Paul Trust Co. v. Mintzer*, 65 Minn. 124, 60 Am. St. Rep. 444, 67 N. W. 657, 32 L. R. A. 756; *Murch v. Smith Mfg. Co.*, 47 N. J. Eq. 193, 20 Atl. 213; *Cairns v. Chabert*, 3 Edw. Ch. 312; *Sage v. Gloversville*, 43 App. Div. 245, 60 N. Y. Supp. 791. In some jurisdictions, however, a receivership is not considered a proper remedy: *Jenks v. Horton*, 96 Mich. 13, 55 N. W. 372.

SEELEY v. SEELEY-HOWE-LE VAN COMPANY.

[130 Iowa, 626, 107 N. W. 380.]

RECEIVER—Recovery of Goods by Vendor.—If goods are sold to an insolvent corporation in reliance upon false representations as to its financial condition, the seller, if he promptly rescinds the sale, may recover the goods or their proceeds in hands of the receiver of the corporation. (p. 452.)

FRAUD—Insufficient Pleading—How Reached.—If a pleader has attempted to set out the facts of an alleged fraud, an objection that the pleading is not sufficiently specific must be reached by motion. (p. 453.)

SALE—Election of Remedies by Vendor.—If the vendor of goods treats the sale as valid and attempts to collect the purchase price from the insolvent vendee corporation in the hands of a receiver, after knowledge that the sale was procured by fraud, he cannot rescind the sale and recover the goods upon a failure to make the collection. (p. 455.)

ELECTION OF REMEDIES—Absence of Prejudice.—An election of remedies is final and conclusive, although no injury has been done by the choice or would result from setting it aside. (p. 456.)

Berryhill & Henry, for the appellant.

N. T. Guernsey and E. D. Sampson, for the appellee.

627 **DEEMER, J.** The questions presented are neither new nor complicated. The Seeley-Howe-Le Van Company was a corporation doing business in the city of Des Moines. Between the second day of January and the third day of March, 1902, Sweetser, Pembroke & Co. delivered to said corporation, upon an order taken in November, 1901, a large quantity of goods upon credit. It is claimed that these goods were obtained by fraud, in that the corporation, through its agents and by means of reports to a commercial agency, falsely represented its financial condition and the state of its accounts, which representations were relied upon by the intervener, and were the inducement to the sale. It is also claimed that the corporation was in fact insolvent at the time of the sale, which fact its officers knew, and that, when it purchased the goods, it did not intend to pay for them. We are constrained to hold that both of these claims are true, and that, if intervener had promptly rescinded the sale, it might have secured the goods or the proceeds thereof in the hands of the receiver. *Deere v. Morgan*, 114 Iowa, 287, is the only authority we need cite in support of this proposition, although there are many other cases equally applicable.

⁶²⁸ Appellee's contention that the petition of intervention is not sufficiently specific is without merit. There were sufficient allegations to indicate the general nature of intervener's claim, and, if the receiver desired a more specific statement, he should have moved therefor. Of course, mere general statements of fraud are insufficient. But where attempt is made to set out the exact claim made, if that be not sufficiently specific, the defect must be reached by motion, and not by such a claim as is here made in argument only.

We shall not set out the facts upon which we base our conclusion of fraud. They are many and cogent, and lead to the inevitable conclusion that a manifest fraud was attempted to be perpetrated upon the seller of the goods. So that intervener is entitled to recover, unless it be for some of the matters pleaded by the receiver in answer to the intervener's petition. These are, first, an election by the intervener with full knowledge of the facts to treat the sale as valid; and, second, acquiescence and delay on its part for such a length of time as to bar it of the remedy of rescission. As said in *Elm Creek Elevator Co. v. Union Pac. R. R. Co.*, 97 Iowa, 719, 66 N. W. 1059: "The rule in regard to the election of remedies is stated in *Thompson v. Howard*, 31 Mich. 309, as follows: 'A man may not take two contradictory positions, and where he has a right to choose one of two modes of redress, and the two are so inconsistent that the assertion of one involves the negation or repudiation of the other, his deliberate and settled choice of one, with knowledge, or means of knowledge, of such facts as would authorize a resort to each, will preclude him thereafter from going back and electing again. Any decisive act of the party, with knowledge of his rights and of the fact, determines his election, in the case of conflicting and inconsistent remedies.' " Again, the right to rescind must be exercised within a reasonable time after the discovery of the fraud: *Upton Mfg. Co. v. Huiske*, 69 Iowa, 557, 29 N. W. 621. In *Evans v. ⁶²⁹Montgomery*, 50 Iowa, 325, it is said, in speaking of rescission for fraud: "The law requires him, upon discovering the fraud, to announce and adhere to his purpose of rescinding the contract. This announcement should have been made certainly within a reasonable time. A delay of three years, and acts and declarations inconsistent with such intention, would raise the legal presumption that he had ratified the contract and waived

all right to rescind it''; citing *Rawson v. Harger*, 48 Iowa, 269. See, also, *Grymes v. Sanders*, 93 U. S. 55, 23 L. ed. 798.

We turn now to the record to discover if intervener made such an election, inconsistent with its right to rescind and recover the goods, or did such things, with knowledge of the fraud which had been perpetrated upon it, as to evince an intention to waive its right of rescission and to ratify the contract, or, as the books say, "did play fast-and-loose in the matter." The receiver was appointed on the seventeenth day of March, 1902, and on the 24th of that month one Walsh, representing the intervener, appeared in Des Moines, where the insolvent corporation had been doing business, and immediately proceeded to advise himself regarding the affairs of the corporation. His employers had already suggested to him the remedy of replevin. A motion was made to discharge the receiver, and a hearing was had, which involved an investigation of all the business affairs of the concern. Walsh was present at this hearing, and, claiming to represent one of the largest creditors of the corporation, undertook to advise the trial court as to the best course to pursue to wind up the corporate affairs. After learning all of the facts relating to the corporation, he undertook to adjust the matter of his employer's claim for the benefit, or supposed benefit, of his principal, and entered into many negotiations for the sale of the goods then in the receiver's hands. Both he and his employer knew they had the right to replevin such goods sold by them as remained in the stock, for their correspondence is conclusive on this point. Instead of immediately ⁶³⁰ repudiating the sale, they encouraged and advised the court and the receiver to make sale of the goods to the corporation then in the hands of the receiver, and consulted with both as to the best manner of making the sale. They entered into a written contract with one A. E. Seeley, the wife of C. H. Seeley, one of the members of the corporation, whereby they undertook to bid at the receiver's sale, for the goods, furniture, and fixtures, a sum not exceeding thirty-one thousand dollars, for the purpose of protecting their entire claim, amounting to something over four thousand dollars, hoping in this way to secure at least fifty cents on the dollar upon the entire claim. True, by the terms of the contract they were to resell the goods to A. E. Seeley, and she was to put up five thousand dollars of the purchase price before they made the bid, which she never in fact did. Intervener did,

however, attend the receiver's sale, and under an arrangement with another proposed purchaser bid upon the goods, its bid being within ten dollars of the highest one at the sale. It made every effort within its power to obtain a settlement of its claim, and to secure a part of it, at least, through the receivership proceedings, and at all times down to the commencement of this suit, which was on the sixteenth day of April, 1902, recognized the corporation as its debtor for the entire amount of goods shipped it, although it had full knowledge of the fraud perpetrated upon it, and of its right to bring a replevin action to recover the goods.

As it failed to get the goods at the receiver's sale, and as all of its plans and arrangements with other persons to acquire the stock and thus protect it failed, it commenced this action, which is in the nature of a replevin proceeding, claiming, not as a creditor, but as the holder of the legal title to the goods shipped by it to the corporation. It undoubtedly entertained the notion of taking such goods as it could identify, should its other plans fail, from the very beginning; but it concluded to try some other remedy first, holding the replevin proceedings in reserve in the event it failed to secure its claim or a considerable proportion thereof ⁶³¹ as a general creditor of the corporation. As a matter of fact it did not bring its action of replevin until its other plans failed and it discovered that it was not going to secure any considerable part of its claim as a general creditor. As said in *Grymes v. Sanders*, 93 U. S. 55, 23 L. ed. 798: "Where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose and adhere to it. If he be silent, and continue to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract, as if the mistake or fraud had not occurred. He is not permitted to pay fast-and-loose. Delay and vacillation are fatal to the right which had before subsisted": See, also, as announcing the same rule, *Schiffer v. Dietz*, 83 N. Y. 300; *Dennis v. Jones*, 44 N. J. Eq. 513, 6 Am. St. Rep. 899, 14 Atl. 913; *Bell v. Keepers*, 39 Kan. 105, 17 Pac. 785; *Terry v. Munger*, 121 N. Y. 161, 18 Am. St. Rep. 803, 24 N. E. 272, 8 L. R. A. 216. Indeed, this rule is unquestioned and undisputed; and the main question in the case is one of fact: Did intervener, with full knowledge of the facts, either expressly or impliedly affirm the contract of sale or recognize

it as binding? Did it place itself in a position to play fast-and-loose? Did it, by delay, vacillation, or acquiescence, for a considerable length of time after discovering the fraud so treat the transaction as to be held to a ratification of the sale? These questions were primarily for the trial court, which evidently held that there was an election on the part of the intervener to treat the sale as valid. With this finding we are constrained to agree.

Appellant says, in answer to these propositions, that it was not only a general creditor on account of goods sold which could not be identified, but as well a claimant to specific articles of goods then in stock by reason of the fraud perpetrated upon it; and that it had the right, as a general creditor, to do what it did without being held to a ratification of the entire transaction. ⁶³² There may be some doubt of this proposition of law, but, conceding arguendo its correctness, the facts are not such as to make it applicable here. Intervener did not, by any conduct on its part, indicate, when treating the sale as valid, that it was ratifying but a part of the transaction. It did not at any time separate its claim into one arising upon contract and another for tort. In all that it did as a general creditor it treated its account as an entire one, and ratified the entire transaction, if it ratified any part of it. But it is said that, as intervener took no legal steps to enforce its rights as a general creditor, the doctrine of election of remedies does not apply. This is, perhaps, technically true, but this is a case of election of rights as well as one where the doctrine of election of remedies might apply, and no action in any court need be taken as the basis for such an election. Any unequivocal act with knowledge of the fraud, whether in court or not, is sufficient.

Further, it is argued that, as no one was prejudiced, the doctrine of election does not apply. But this is not a sound proposition of law. If it were, there is enough in intervener's conduct to supply this element of estoppel. In the Elevator case (97 Iowa, 719, 66 N. W. 1059), it is said that an election once made is final and conclusive, even though no injury has been done by the choice, or would result from setting it aside: See, also, on this proposition, *Terry v. Munger*, 121 N. Y. 161, 18 Am. St. Rep. 803, 24 N. E. 272, 8 L. R. A. 210. While the delay in this case was not in itself sufficient to indicate an election, the trial court was justified in finding that it was accompanied by such acts and conduct

on the part of intervener as to evince an election on its part to treat the corporation as its debtor for the full amount of the goods shipped.

The decree of the district court seems to be correct, and it is affirmed.

A Person Entitled to an Election between inconsistent remedies will ordinarily be confined to the one which he first prefers and adopts. A suit to recover damages for a breach of warranty in a sale is an irrevocable election to affirm the sale: *Davis v. Schmidt*, 126 Wis. 461, 110 Am. St. Rep. 938, and see the cases cited in the cross-reference note thereto. And bringing an action against a building contractor for a failure to proceed with his contract after performance has been rendered impossible by a fire is a waiver of a prior breach of his contract in not completing the building before the fire: *Krause v. Board of School Trustees*, 162 Ind. 278, 102 Am. St. Rep. 203.

BEATTY v. WARDELL.

[130 Iowa, 651, 105 N. W. 357.]

HOMESTEAD—Exemption in Favor of Heirs.—A homestead purchased with pension money, though exempt from antecedent debts of the pensioner during his lifetime, does not descend to his heirs free from such debts. (p. 460.)

Cook & Cook and R. E. Leach, for the appellants.

E. B. Abbott, for the appellee.

⁶⁵¹ DEEMER, J. The property in controversy, being a lot in the city of Independence, was owned by Jane Wardell at the time of her death. It had been purchased with pension money obtained by her from the general government. Immediately after her purchase of the property ⁶⁵² she moved into the same, and had occupied it as a homestead down to her death. One of her minor children lived with her upon the property until about four months just preceding her death. Jane Wardell left surviving five children, who were all of age, save one. This one was twenty years of age. After he left his mother's home there was no one residing with her upon the property. Plaintiff holds a judgment against Jane Wardell upon debts contracted some time prior to the receipt of the pension money, and before the acquisition of the homestead. The deceased left no children under the age

of sixteen years, nor were or are any of her children dependent upon her. Defendants contend that the property is exempt to them from the debts of their mother, for the reason that it was her homestead purchased with pension money; while on the other side it is contended that the property is not exempt, and that while it may have been exempt so long as Jane Wardell lived, it did not pass to the heirs freed from the mother's debts contracted prior to the acquisition thereof.

The creation of homesteads and exemptions is the work of the legislature, and to its acts we must look in determining such controversies as this. In the code, under the title "Homesteads," we find the following provisions: "The homestead of every family is exempt from judicial sale, where there is no special declaration to the contrary": Sec. 2972. "The homestead may be sold on execution for debts contracted prior to its acquisition": Sec. 2976. "Upon the death of the wife . . . if there be no survivor the homestead descends to her issue according to the rules of descent . . . and is to be held by such issue exempt from any antecedent debts of their parents, or of their own, except those of the owner thereof contracted prior to its acquisition": Sec. 2985. Under these statutes it will be observed that the homestead while used and occupied by the family is exempt, and that it is also exempt to the heirs, except for the antecedent debts of the ancestor, ⁶⁵³ contracted prior to its acquisition. Defendants, who are the administrator and heirs at law of Jane Wardell, cannot hold the property in question as exempt under these statutes, for two reasons: First, because at the time of the widow's death she had ceased to be the head of a family; and, second, because the judgment which plaintiff is seeking to enforce was for debts contracted by the deceased owner prior to the time she acquired the property.

But they rely upon another provision of law, found in the code under the title "Executions," which reads as follows: "The homestead of every pensioner, whether the head of a family or not, purchased and paid for with pension money or the proceeds or accumulations thereof shall be exempt, and such exemptions shall apply to debts of such pensioner contracted prior to the purchase of the homestead": Code, sec. 4010. Under this section the property in question was exempt to the pensioner during her life, although she was not the head of a family, even from debts contracted by the owner thereof prior to its acquisition. So that, so long as

Jane Wardell lived, plaintiff could not have enforced his judgment against the property, although she lived upon it alone, and notwithstanding the debts for which it was rendered were contracted prior to its acquisition by her.

But the question here is, Did the heirs take the homestead free from the antecedent debts of their ancestor? There is nothing in any of these statutes which expressly so declares; and, if there be any such exemption, it must be bottomed on the thought that, as the property could not have been taken by the judgment creditor during the life of his debtor, the exemption so stamped upon it passed to the heirs or successors in interest and freed it from the antecedent debts of their mother. It is true that section 4010 provides that the homestead of every pensioner purchased and paid for with pension money shall be exempt, no matter if he be living alone, and that it shall be exempt even from debts contracted ⁶⁵⁴ prior to its acquisition; but this evidently has reference to an exemption during the life of the owner. The manifest purpose of the act was to save the homestead to a pensioner who might be living upon it alone, and to secure it to him free from antecedent debts. There may also have been the thought of preserving the property to the pensioner, even though he had invested his pension in other ways and in other things before it finally reached the homestead.

Appellant's contention, broadly speaking, is that section 4010 creates a new homestead, which is exempt in the hands of heirs, free from the antecedent debts of the ancestor. But this is evidently unsound. True, this homestead is relieved of certain rules which apply to homesteads in general; but for the rules applicable to homesteads in general we must look to the statutes and decisions relating thereto. Under the general homestead statutes, which we have quoted, this property, although homestead in character, and exempt during the life of the pensioner, did not pass to her heirs, free from her antecedent debts: Code, sec. 2985. This is the only section of the code relating to homestead exemptions after the death of the owner, and, if that is to control, the property is subject, in the hands of the heirs, to the antecedent debts of the owner. Conceding, then, that the property in question was a homestead, and exempt in the hands of the purchaser, there is nothing in the statute which declares that it shall be exempt in the hands of the heirs.

If we turn to the statute with reference to the descent of homesteads, there is nothing to indicate that it shall pass free from antecedent debts, although purchased with pension money or the avails thereof. This was a homestead during the pensioner's life, although she had no family living with her, and could not have been taken for antecedent debts; but, in order to determine the rule to be applied after her death we must look to the general statute as to the descent of homesteads. Turning to that, we discover that it is not ⁶⁵⁵ exempt in the hands of the heirs from the antecedent debts of their ancestor. As a general rule a homestead exemption is for the benefit of the occupant; and upon his death, in the absence of statute, it descends to the heirs as other property of the deceased. If there be any other rule, it is in virtue of some statute so declaring. So that the mere exemption of property as a homestead does not free it from the debts of the owner in the hands of his heirs after death. If there be any such exemption, it is by reason of some statute so stating. There is no statute which exempts any kind of homestead in the hands of heirs free from the antecedent debts of the owner contracted prior to its acquisition. Indeed, the very opposite rule is stated in the statute quoted. As the homestead exemption is in derogation of common right, it does not, in the absence of statute, descend to heirs at law, and may be subjected to the payment of the ancestor's debts: *In re Liddle*, 71 N. Y. Supp. 474; *Briant v. Lyons*, 29 La. Ann. 64. In *Perkins v. Hinckley*, 71 Iowa, 499, we had a question quite analogous to the one here involved. There the widow of one Perkins, who was a pensioner, sought to have certain pension money of her deceased husband set aside to her because it was exempt from execution. The administrator resisted her claim, and was successful in the district court. Upon appeal it was held that, although the pension money was exempt in the hands of the pensioner, the widow was not entitled to have it set off to her as exempt property, under a statute providing that property exempt to one as the head of a family should be exempt in the hands of the widow. If by reason of its exemption while in the hands of the deceased owner it passed to his widow or heirs with the same freedom from execution after his death as before, the decision must of necessity have been the other way.

Appellants rely upon a line of cases relating to exemptions of personal property to the widow under a section of the statute which says, in effect, that personal property ^{65c} exempt to one deceased as the head of a family shall pass to his widow, exempt in her hands as in the hands of the deceased. But it is evident that these are not in point, and nothing said therein gives us any help in the solution of the problem now before us. Of such cases is *Ellsworth v. Ellsworth*, 33 Iowa, 164. The other cases cited by appellant, such as *Moninger v. Ramsey*, 48 Iowa, 368, and *Kite v. Kite*, 79 Iowa, 492, decide nothing contrary to the rule here announced. Some things said in those opinions by way of argument are relied upon by appellants, and may give some color to their present claim, but the actual decisions in no manner govern this case. No reliance is placed upon the fact that the property in question is pension money or the avails thereof, it being practically conceded that, but for its homestead character, defendants would have no claim to it. Appellee's motion to strike appellant's amendment to abstract, etc., is overruled.

We are clearly of opinion that the property is subject to plaintiff's judgment, and the decree is affirmed.

Exemption Rights are personal, and ordinarily cannot be transmitted by sale or gift: *Murdy v. Skyles*, 101 Iowa, 549, 63 Am. St. Rep. 411; *Sherrille v. Chaffee*, 17 R. I. 195, 33 Am. St. Rep. 863.

CASES
IN THE
SUPREME COURT
OF
KANSAS.

**ATCHISON, TOPEKA AND SANTA FE RAILWAY COM-
PANY v. HOLLOWAY.**

[71 Kan. 1, 80 Pac. 31.]

CARRIER—Intending Passenger.—When a Person Enters a Railroad Station and purchases a ticket with the intention of taking a train soon to arrive, he acquires the status of a passenger, and it becomes the duty of the railroad company to provide him a safe approach to the train and a reasonable time and opportunity to get on board. (p. 464.)

CARRIER—Interference with Opportunity to Board Train.—The running of a freight train between a station and a passenger train, thereby blocking the access of passengers to the latter train during its stop, is negligence. (p. 464.)

CARRIER.—Boarding a Moving Train is not, under all circumstances, contributory negligence. Whether or not it is depends upon the speed of the train, the physical condition of the passenger, the apparent danger of the course, and other surrounding circumstances. (p. 468.)

EVIDENCE.—The Speed of a Train is not a Question of Science, but may be shown by an ordinary witness who has given attention to the running of trains and possesses a knowledge of time and distance. The inexperience of a witness in timing the speed of trains, or the fact that he has given the matter little attention, goes to the weight, rather than the admissibility, of his testimony. (p. 469.)

A. A. Hurd, O. J. Wood and Lambert & Huggins, for the plaintiff in error.

Kellogg & Madden, Frank P. Walsh and E. R. Morrison, for the defendant in error.

² **JOHNSTON, C. J.** James M. Holloway sued to recover damages for injuries sustained while attempting to board a train of the Atchison, Topeka and Santa Fe Railway Company at Strong City. He purchased a ticket and awaited the

arrival of a passenger train upon which he intended to take passage, but about the time the passenger train was expected a freight train pulled in on the track next to the station, and while it ³ was passing the passenger train arrived on a track beyond the one occupied by the freight train. The passenger train only stopped a brief time, and when the freight train had passed the station the passenger train was moving out. Holloway ran around the end of the freight train and undertook to board the slowly moving passenger train, but, his foot slipping into an opening in the back of the step of the car, he lost his balance, and was thrown under the wheels of the car and badly hurt.

The negligence alleged against the railroad company was that it did not provide safe means of access to the train or sufficient time and opportunity for plaintiff to board it. The running of the freight train between the waiting-room in which Holloway was seated and the passenger train, thus concealing that train and blocking the approach to it, the failure to stop the passenger train a sufficient time to permit passengers to board it, the omission to give notice of its arrival and the leaving of an unprotected opening in the steps of the car, are mentioned as specific grounds of negligence. It is alleged that, as a consequence of the railroad company's negligence, Holloway was thrown down, dragged over a hundred feet, his arm crushed so that amputation became necessary, and his right foot and ankle permanently crippled. The answer of the railroad company was that the injuries were in no way the result of its negligence, but were in fact caused by plaintiff's want of care in getting on a train while it was in motion. The verdict of the jury and the answers to special questions were in favor of Holloway.

The principal contention is that Holloway's evidence showed that the negligence of the railroad company was not the proximate cause of the injuries, but that they were due to the contributory negligence of himself, and that, therefore, the demurrer to his evidence should have been sustained.

⁴ The testimony offered in his behalf tended to show that he was fifty-six years old, in good health, strong and able-bodied; that he was engaged in traveling for a mercantile company, and had had much experience in boarding and alighting from trains; that after buying his ticket he seated himself at a window of the waiting-room to watch for the coming train; that while there a freight train came through

on the track next to the depot, and that when his attention was called to the fact that the passenger train was in he hurried around the back of the freight train, and when he reached the passenger train it was moving. He had two grips with him, which he threw upon the platform of the baggage and combination car. One of the grips remained there and the other fell to the ground. He picked up the light grip and undertook to board the train, catching the hand-rail on the end of the following coach. He attempted to step on the train when it was running about four miles an hour, but his foot slipped into the opening in the step, his hand was jarred loose, and he fell under the car and suffered the injuries which have been mentioned. His plight was seen by the conductor, who pulled the cord and stopped the train, but not until Holloway had been dragged about one hundred feet. According to the testimony, the stop made by the passenger train was very brief—placed by some witnesses at from thirty to sixty seconds, and the conductor himself fixed the length of time at from thirty to forty-five seconds. It appears that several passengers who intended to board that train were unable to do so before the second stop, which was made because of the injury to Holloway. He undertook to get on the train after it had started, but he said it was moving slowly, and that he had frequently boarded cars which were moving much more rapidly. Measuring the testimony by the rule applicable under a demurrer to evidence, we think it was sufficient to carry the case to the jury on the alleged negligence ⁵ of the railroad company, as well as on the contributory negligence of Holloway: *Brown v. Atchison etc. R. R. Co.*, 31 Kan. 1, 1 Pac. 605; *Wolf v. Washer*, 32 Kan. 533, 4 Pac. 1036; *Christie v. Barnes*, 33 Kan. 317, 6 Pac. 599; *Kansas City etc. R. R. Co. v. Cravens*, 43 Kan. 650, 23 Pac. 1044.

When Holloway entered the station and purchased a ticket with the intention of taking the coming train he acquired the status of a passenger, and was entitled to protection as such. It was the duty of the company to exercise reasonable care to provide him a safe approach to the passenger train, a reasonable opportunity to get on board, and a reasonable time to do so. The running of a freight train between the waiting-room of the station and the passenger train, thus blocking the passage to the passenger train during the entire time it stopped at the station, was manifest negligence. If,

for any reason, the passing of the freight train on the track next to the station was a necessity, the passenger train should have been held a sufficient time after the way had been cleared to afford passengers an opportunity to get on board. The freight train, however, blocked access to the passenger train during the short time that the latter stopped at the station. It is the duty of a passenger to be reasonably alert and prompt in boarding a train, but considering that the freight train concealed the coming passenger train and blocked the passage from the station to it, we cannot say that Holloway was not reasonably prompt and diligent in his efforts to get on board the cars. The stop of the passenger train was very brief—altogether too much so, considering the surrounding circumstances.

The case of *Terry v. Jewett*, 78 N. Y. 338, involved the act of running a freight train in front of a passenger train, cutting off the passage to those who were seeking to board the latter. The freight train, which was passing at a rate of six to eight miles an hour, ⁶ struck and killed a person who was endeavoring to get on the passenger train. It was held that the act of running the freight train in front of the other was an act of culpable negligence. In the course of the decision the court remarked, at page 342: "It may be assumed that a railroad corporation, in the exercise of ordinary care, so regulates the running of its trains that the road is free from interruption or obstruction where passenger trains stop at a station to receive and deliver passengers. Any other system would be dangerous to human life, and impose great risks upon those who might have occasion to travel on the railroad."

In the same case it was said that the ringing of the bell, or the sounding of the whistle, is no answer to the charge of negligence, as those signals are not intended as a notice to passengers seeking to get on a train at a station and are not likely to be noticed in the confusion of two trains passing each other under the circumstances. The court added, at page 343: "It certainly was quite an unusual occurrence and a palpable disregard of the rules which require reasonable care and diligence to avoid accident to run a freight train so as to interfere with passengers who were on their way to the cars."

The halting of the train at the station was in a way an invitation to passengers to board it. They naturally would as-

sume that a reasonable opportunity would be given them to get on board the cars, and since that was not given, and the train moved out before they had time to board it, the company had a right to anticipate that some of the waiting passengers would attempt to get on the moving train, if it appeared that it could be done without danger. There is reason, therefore, to say that the company should have foreseen that an injury would likely result from its negligence in blocking access to the cars and its failure to give a reasonable opportunity to passengers to board the train. Whether its negligence was the proximate cause of the ⁷ injury was at least a fair question for the determination of the jury.

There remains the question whether Holloway's act in attempting to board the moving train was negligence which precludes a recovery. It is insisted that we should determine, as a matter of law, that his attempt was contributory negligence. He could see that the boarding of the train while moving was attended with some danger. The boarding or alighting from a moving car is not, under all circumstances, contributory negligence: *Atchison etc. R. R. Co. v. McCandliss*, 33 Kan. 366, 6 Pac. 587; *Southern Kansas Ry. Co. v. Sanford*, 45 Kan. 372, 25 Pac. 891, 11 L. R. A. 432; *Atchison etc. R. R. Co. v. Hughes*, 55 Kan. 491, 40 Pac. 919.

Judge Thompson, in treating of this question, said: "It cannot be affirmed that a person is guilty of contributory negligence, as matter of law, from the mere fact that he attempts to board a railway train while it is in motion. If the train does not stop at the proper stopping place for a sufficient length of time to enable the passenger to get on before it starts, and the passenger, thus coerced by the negligence of the company, attempts to board the train while it is slowly moving, and is injured in the attempt, contributory negligence will not be imputed to him, but he will be allowed to recover damages": 3 Thompson on Negligence, sec. 2995.

The case of *Johnson v. West Chester etc. R. R. Co.*, 70 Pa. 357, was an action to recover damages for the injury of one who was trying to get on a moving train. It started before passengers had sufficient time to get on board, and the plaintiff, encumbered with a valise and a number of packages, missed his footing and his arm was crushed by the wheels of the car. It was insisted that it should have been declared as a matter of law that he was negligent. The court re-

marked, at page 365: "The fact appears to be clear that a reasonable time for the transfer was not given, and that the plaintiff, with all his effort to make haste, was unable to make the connection in consequence of this want of time.

⁸ Now, though the train was distinctly in motion, so that a bystander, cool and unconcerned, could see it visibly running on the track, are we to say, as a matter of law binding on the jury, that a passenger, having a right to go on the train, and seeing himself about to be left improperly by the wayside, is guilty of culpable legal negligence, if he should essay to reach his destination, no matter how slow the motion in running might be, or how little danger was apparent to him? He may be guilty of negligence, but of this the jury should judge under the circumstances."

In volume 6 of the *Cyclopedia of Law and Procedure*, at page 644, we find the following: "Usually it is said that the question as to whether, under the circumstances of the case, the passenger was negligent in attempting to get on board a moving train is one of fact, and therefore to be determined by the jury, unless the facts are so unequivocal in their character as to make it proper for the court to determine the question."

Was the attempt of Holloway one which a reasonably prudent man would have undertaken? As the authorities cited show, it is a question to be determined by the surrounding circumstances, including the velocity of the train and the apparent danger from boarding it. In its charge the court advised the jury that, where a train is moving at such a rate of speed, or where the place of the passenger's ascent to the car, or the circumstances connected with his attempt to board it, are obviously so perilous and dangerous that a person of ordinary prudence would not attempt to get on the train, the act of the person injured in so doing is such contributory negligence as will bar all recovery. The jury were also instructed that, where the company was negligent in the premises, the act of boarding a moving train is not to be regarded as an act of contributory negligence on the part of the passenger, unless the danger to be apprehended by such attempt is apparent to the mind of a reasonably prudent and careful man. In other portions of the charge ⁹ they were advised that if by the exercise of ordinary care and prudence Holloway could have seen that the train was in motion, and that he could not with reasonable safety get upon

the step, he should have desisted from the attempt and waited for the next train. The circumstances surrounding the attempt were called to the attention of the jury, and the question of Holloway's negligence was left for their decision. Among the circumstances for consideration were the facts that he was a strong, able-bodied man, accustomed to travel and to getting on and off the cars. The day was clear and the surface of the ground where the attempt was made was reasonably smooth. The train had only started and was moving at a speed about equal to a brisk walk. A lady moved along with the train and mailed a letter thereon about the time that Holloway approached it. He was anxious to go on his journey and was disturbed by the interference of the freight train and the negligence of the railroad company. He had to decide quickly whether to get on the moving cars or abandon his trip. In view of these and other circumstances we think it cannot be said, as a matter of law, that the danger was so obvious that a man of ordinary care and prudence would not have attempted the boarding of the train. Judge Thompson, in considering whether such an attempt is one of fact to be decided by a jury, or a matter of law to be decided by the court, remarked: "It may be said here that whether or not it will be deemed negligence for a person to attempt to board a train, after it has started to move from the station, will depend upon the speed at which the train is moving, the physical condition of the passenger himself, and other surrounding circumstances. It is well known that trainmen habitually board their trains after they commence to move, and that passengers frequently do so; and it would seem to follow, from the mere consideration of this fact, that negligence cannot be imputed to such an act as matter of law; though clearly it may be performed under such conditions that a jury could ¹⁰ not hesitate about the conclusion of contributory negligence": 3 Thompson on Negligence, sec. 2856. See, also, *Mills v. Missouri etc. Ry. Co.*, 94 Tex. 242, 59 S. W. 874, 55 L. R. A. 497; *Baltimore etc. R. R. Co. v. Kane*, 69 Md. 11, 9 Am. St. Rep. 387, 13 Atl. 387; *Philadelphia etc. R. R. Co. v. Anderson*, 72 Md. 519, 20 Am. St. Rep. 483, 20 Atl. 2, 8 L. R. A. 673; *Chicago etc. R. R. Co. v. Gore*, 202 Ill. 188, 95 Am. St. Rep. 224, 66 N. E. 1063; *Filer v. New York Cent. R. R. Co.*, 49 N. Y. 47, 10 Am. Rep. 327; *Distler v. Long Island R. R. Co.*, 151 N. Y. 424, 45 N. E. 937, 35 L. R. A. 762; *Fulks v. St. Louis etc. Ry. Co.*, 111 Mo. 335, 19 S. W.

818; Birmingham Ry. etc. Co. v. Brannon, 132 Ala. 431, 31 South. 523.

The objections to the testimony of witnesses as to the speed of the train cannot be upheld. The speed of a train is not a question of science, but may be shown by an ordinary witness who has given attention to the running of trains and possesses a knowledge of time and distance. The inexperience of a witness in timing the speed of trains, or the fact that he has given the matter little attention, goes to the weight, rather than the admissibility, of his testimony. Some of the witnesses whose testimony was challenged had given some attention to the speed of trains. All were competent to express their opinions, but, of course, the value of their testimony was affected by their experience, and that was something to be measured by the jury.

The charge of the court is criticised, but we think it fairly covered the facts of the case and stated the pertinent principles of law. The one relating to proximate cause may be somewhat involved, but we cannot say that it is incorrect, nor that it was in any sense misleading.

All of the errors assigned have been examined, but in none of them do we find material error, and therefore the judgment of the court is affirmed.

All the justices concurring.

A Person Becomes a Passenger, it seems, when he purchases a ticket at a railway station with the intention of taking a train soon to arrive: See the monographic note to Illinois Cent. R. R. Co. v. O'Keefe, 61 Am. St. Rep. 75-82. Consult, also, Pineus v. Atlantic Coast Line R. R. Co., 140 N. C. 450, 111 Am. St. Rep. 856.

Every Attempt to Board a Moving Train is not, per se, contributory negligence: Chicago etc. R. R. Co. v. Gore, 202 Ill. 188, 95 Am. St. Rep. 224, and cases cited in the cross-reference note thereto. Some authorities, however, take a contrary view: Boulfrois v. United Traction Co., 210 Pa. 263, 105 Am. St. Rep. 809.

FOSTER LUMBER COMPANY v. HARLAN COUNTY BANK.

[71 Kan. 158, 80 Pac. 49.]

EQUITABLE MORTGAGE—Loan to Purchase Land—Parol Promise of Security.—If one advances money to another to buy a specific tract of land, upon the oral promise of the latter to secure its repayment by a mortgage on the property when title thereto is obtained, and after a conveyance has been procured by the use of the money, the borrower refuses to execute the mortgage, equity will regard that as done which the borrower agreed to do, and will treat the transaction as creating an equitable mortgage which takes precedence over a mortgage taken by a third person with notice, and which creates a lien superior to the homestead rights of the borrower. (p. 471.)

L. H. Wilder, for the plaintiff in error.

John Everson, for the defendant in error.

¹⁵⁸ **BURCH, J.** Arthur A. Underwood held a contract of purchase from the Lincoln Land Company of certain real estate upon which there remained a balance due. He was also under obligations to various persons on account of the erection of a house and other ¹⁵⁹ improvements upon the property. For the purpose of paying the amount due on the land and procuring a deed of it, and for the purpose of discharging his obligations for improvements on the land, he borrowed nine hundred dollars of the Harlan County Bank. When the loan was made he left his land contract with the bank, and authorized it to procure a deed of the property from the land company. At the same time he agreed orally with the bank that it should hold the contract, and afterward the deed, as security for the loan until a formal written mortgage could be prepared, which he agreed to give. The bank paid the land company, obtained the deed, and paid out the remaining proceeds of the loan for the stipulated purposes. Underwood then refused to execute a mortgage to the bank, and mortgaged the property to the Foster Lumber Company. The lumber company, however, at the time it received its mortgage, had full knowledge of all the rights, claims, interests and equities of the bank, and already had received three hundred dollars of the loan direct from the bank on account of its claim for improvements. The land was the homestead of Underwood and his wife.

In an action by the bank for the recovery of a balance due upon its loan it claimed and was awarded a lien on the land superior to that of the lumber company under its mortgage. The lumber company seeks a reversal of that judgment by this proceeding in error.

It is claimed that the transaction disclosed amounted to nothing more than a deposit of title deeds as security for a loan, and, hence, that no lien resulted. The bank, however, pleaded and proved, and the court found, that the deposit of the contract of sale was accompanied by an express oral agreement to give a mortgage. The agreement furnished a sufficient basis upon which, after performance by the bank, to found a lien, and is sufficient to take the ¹⁶⁰ case entirely out of the category of equitable mortgages arising merely from a deposit of title deeds.

It is further claimed that the bank in its petition relied upon the deposit of the land contract and the taking of the deed from the land company as its security, and not upon the agreement to give a mortgage. The bank, however, simply pleaded the entire transaction as it actually occurred. The fact that the transaction may have included an attempt to create a lien by the deposit of title instruments does not alter or destroy the effect of the promise to give a mortgage. The bank's theory, in part, may have been that the deposit of the contract and the procuring of the deed to Underwood's land did give it a lien. It had the right to present the question to the courts; but it did not thereby abandon the right to claim a lien by virtue of the express contract to give a mortgage, which it fully and plainly pleaded. The two claims are not inconsistent. Both have been urged. That of an equitable mortgage is sufficient to sustain the judgment of the district court, and no occasion arises to discuss the policy of the law of this state concerning the other.

Having obtained the bank's money upon an agreement to give it a mortgage, Underwood should have executed and delivered the promised security. Equity treats that as done which a party under his agreement ought to have done: *Elston v. Chamberlain*, 41 Kan. 354, 361, 21 Pac. 259. The court had no alternative but to apply the maxim in this case: 3 *Pomeroy's Equity Jurisprudence*, 2d ed., sec. 1237; 1 *Jones on Mortgages*, 6th ed., sec. 163; 11 *Am. & Eng. Ency. of Law*, 125.

The fact that the agreement to give a mortgage was oral does not affect the validity of the bank's lien. It had fully performed its part of the agreement.

"The doctrine of equitable mortgages is not limited to written instruments intended as mortgages, but ¹⁰¹ which by reason of formal defects cannot have such operation without the aid of the court, but also to a very great variety of transactions to which equity attaches that character. It is not necessary that such transactions or agreements as to lands should be in writing in order to take them out of the operation of the statute of frauds for two reasons: First, because they are completely executed by at least one of the parties and are no longer executory, and, secondly, because the statute by its own terms does not affect the power which courts of equity have always exercised to compel specific performance of such agreements": *Sprague v. Cochran*, 144 N. Y. 104, 38 N. E. 1000.

"That statute was enacted to provide as far as possible against the perpetration of frauds; and courts of equity never allow its provisions to be perverted and made instrumental in the accomplishment of fraud. They decree the specific execution of agreements where there has been a performance on the one side, because the refusal to perform on the other side is a fraud; and they will not permit the statute designed to prevent fraud to be made an engine of fraud: *Maryland Sav. Inst. v. Schroeder*, 8 Gill & J. 93, 29 Am. Dec. 528; *Hamilton v. Jones*, 3 Gill & J. 127; *Artz v. Grove*, 21 Md. 456; *Moale v. Buchanan*, 11 Gill & J. 314": *Cole v. Cole*, 41 Md. 301. See, also, *Dean v. Anderson*, 34 N. J. Eq. 496; *Baker v. Baker*, 2 S. Dak. 261, 39 Am. St. Rep. 776, 49 N. W. 1064; *King v. Williams*, 66 Ark. 333, 50 S. W. 695; 1 *Jones on Mortgages*, 6th ed., sec. 164.

Besides, it properly may be said that the lien decreed results from the operation of the law upon the entire conduct of the parties, and hence is in terms excluded from the inhibition of the statute.

"It is claimed by counsel for plaintiff in error, substantially, that an equitable lien on real estate, where it has any real existence, is an interest in land, and cannot be created merely by parol; that the statute of frauds (Gen. Stats. 1868, c. 43, sec. 5) prohibits such a thing. All of this we agree to; but still the statute of frauds does not attempt to prohibit the creation of equitable liens by operation of law, nor does

any other ¹⁶² statute: *Stevens v. Chadwick*, 10 Kan. 406, 15 Am. Rep. 340. Such a lien should, of course, be in accordance with the contract and understanding of the parties affected by it, but still it may sometimes result by operation of law from the transactions of the parties almost wholly independent of the contract that may be made between them. It results, however, from the whole transaction, including all the contracts, agreements, and understandings of the parties, parol or otherwise": *Curtis v. Buckley*, 14 Kan. 449.

In the case of *Sprague v. Cochran*, 144 N. Y. 104, 38 N. E. 1000, it was said, at pages 112, 114: "There can be no doubt upon the authorities that where one party advances money to another upon the faith of a verbal agreement by the latter to secure its payment by a mortgage upon certain lands, but which is never executed, or which, if executed, is so defective or informal as to fail in effectuating the purpose of its execution, equity will impress upon the land intended to be mortgaged a lien in favor of the creditor who advanced the money for the security and satisfaction of his debt. This lien attaches upon the payment of the money, and, unless there is a waiver of it, express or implied, remains and may be enforced so long as the debt itself may be enforced. . . . The whole doctrine of equitable mortgages is founded upon that cardinal maxim of equity which regards that as done which has been agreed to be done, and ought to have been done. In order to apply this maxim according to its true meaning the court will treat the subject matter, as to collateral consequences and incidents, in the same manner as if the final acts contemplated by the parties had been executed exactly as they ought to have been."

This being true, the situation of the parties at the time the lumber company took its mortgage was precisely the same as if the contemplated mortgage to the bank had actually been given, and notice to the lumber company of the bank's rights was equivalent to notice of a prior unrecorded mortgage. Under the recording acts such instruments are valid between the parties, and all persons having actual notice of them: ¹⁶³ *Northwestern Forwarding Co. v. Mahaffey*, 36 Kan. 152, 12 Pac. 705. Hence, the lien of the lumber company was necessarily inferior to that of the bank: *Jones v. Lapham*, 15 Kan. 540; 11 Am. & Eng. Ency. of Law, 141.

The position taken by the lumber company is that the bank was not entitled to any lien whatever in any sum. The at-

tacks made upon the findings of fact and conclusions of law were directed to the complete annihilation of the equitable mortgage sought to be foreclosed. No effort has been made to exclude any of the items utilized in computing the amount of the lien, and the mortgage has been left to stand or fall as an entirety. If, therefore, any part of it be valid as against the claimed homestead character of the premises, the judgment cannot be disturbed.

There can be no doubt that, to the extent of the unpaid purchase price of the land, the bank's equitable mortgage was a purchase money mortgage, and, therefore, valid without the consent of Mrs. Underwood, notwithstanding the property was occupied as a homestead: Const., art. 15, sec. 9; Pratt v. Topeka Bank, 12 Kan. 570; Andrews v. Alcorn, 13 Kan. 351; Ayres v. Probasco, 14 Kan. 175; Nichols v. Overacker, 16 Kan. 54.

All other assignments of error have been examined and found to be unsubstantial. The judgment of the district court is affirmed.

All the justices concurring.

For Authorities in support of the principal case, see the monographic note to Hutzler v. Phillips, 4 Am. St. Rep. 700.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY v. ARMSTRONG.

[71 Kan. 366, 80 Pac. 978.]

RAILROADS—Cinders and Smoke as a Nuisance.—That which is done under authority of law at a place and in a manner authorized cannot be a nuisance. Hence a railroad company is not liable in damages as for a nuisance to one whose residence is permeated by smoke, cinders and gas emitted from its engines to the injury of the health of the occupants, if it constructs and operates its road where authorized and in a proper manner. (p. 477.)

RAILROADS—Liability for Smoke and Cinders.—One whose residence is permeated by smoke, cinders, and gas from railway locomotives cannot recover damages therefor, unless a recovery is authorized by some constitutional or statutory provision, if the railway company has not abused or exceeded its authority in locating, constructing or operating its road. (p. 481.)

Robert Dunlap, A. A. Hurd and Alfred A. Scott, for the plaintiff in error.

J. W. Parker and J. P. Hindman, for the defendant in error.

³⁶⁶ GREENE, J. The plaintiff sued to recover damages on two causes of action, the second being based on injuries sustained by the defendant's having deprived him of access to his property by closing an alley, and the first on injury resulting from his residence's being ³⁶⁷ permeated with cinders, smoke and gas from defendant's locomotive engines. The facts, summarily stated, are as follows: There is a block in the town of Gardner bounded by Washington street on the north, Kane street on the south, and Elm street on the west, through which there is an alley sixteen feet wide, running east and west. For the purpose of this case, it may be said that the plaintiff owns the north half, and the defendant the south half, of this block. The plaintiff has a valuable residence on the north half, facing west on Elm street. The defendant operates a line of railroad which runs across the south half in a northwesterly direction, crossing Elm street near the south line of the block. None of the land occupied by the defendant as a right of way ever belonged to the plaintiff.

Several years after the defendant built its road the plaintiff erected his residence, and, after the residence was built, the defendant lowered its roadbed through Gardner to such a depth that the smokestacks on its engines were on a line with the surface of the earth. This cut made that part of Elm street where the tracks crossed impassable. The defendant then entered into a contract with the city that, in consideration of the city's vacating a certain portion of Kane street for the company's use and giving it some other privileges, it would quitclaim certain property to the city, build a viaduct over its lines at the crossing of Elm street, and make approaches thereto from the north and south in accordance with certain specifications made by the city. An ordinance was passed containing all these conditions and specifying the width of the approach and per centum of the grade. After the ordinance was accepted by the company, the latter built the viaduct and made the approaches in accordance with its provisions. The approach on Elm street north, the same having been made in accordance with the per centum of grade established by ³⁶⁸ the city, extended past the alley in the rear of, and some distance along, the plaintiff's property in front of his residence.

The plaintiff claimed in the second cause of action of his petition that this approach deprived him of access to the

rear of his property by way of the alley; and he recovered judgment. For his other cause of action he stated that, as a result of the defendant's lowering its roadbed and tracks through Gardner, smoke, cinders and gas emitted from its locomotive engines could not rise before reaching his residence and were blown therein, thereby injuriously affecting the health of himself and family and greatly damaging and decreasing the value of his residence property. He also recovered on this cause of action. The defendant prosecutes this proceeding in error.

There are no allegations in the petition that the lowering of the track was not properly and skillfully done; that it was not a betterment of its roadbed and necessary to the proper and efficient conduct of defendant's business and operation of its trains; nor was negligence charged on the part of the defendant's locomotive engineers in the management of their engines.

By subdivision 6 of section 1316 of the General Statutes of 1901, railway companies are empowered to take and convey persons and property on their railways by the power of steam; and by section 1320 they are authorized to "change the roadbed, roadline, or any part thereof, for the purpose of shortening the line, or to overcome natural obstacles."

³⁰⁹ If the plaintiff, through the acts of defendant, was deprived of access to his premises by way of the public alley, he may recover damages therefor. Whether he was deprived of such access was a question of fact. The evidence was conflicting, some tending to show that such passage had not been materially interfered with, and some tending to prove the contrary. The jury, after hearing and weighing the evidence, found in favor of plaintiff, and this finding was approved by the trial court on a motion for a new trial. The judgment, therefore, must be sustained as to this cause of action.

When this case was first submitted, doubts were entertained of the right of the plaintiff to recover for damage to his residence by reason of its permeation with smoke, gas, and cinders. Thereupon, the court deduced from the evidence and finding the following question, and resubmitted it for argument: Where a railroad company constructs and operates its road on its own land in a proper manner, is it ever liable to the owner and occupant of adjacent property for consequential damages arising from his residence's becom-

ing permeated with smoke and offensive vapors from its engines, which injuriously affect the health of such occupants? Counsel for both parties, realizing the importance of the question and of a correct decision, have ably reargued it orally and in briefs.

The company having been specifically authorized to make the alleged improvements in its roadbed, in the absence of any charge that it was unnecessary or unskillfully done or made at a place not authorized, it is not liable for damages as for the maintenance of a nuisance. That which is done under authority of law at a place and in a manner authorized cannot be a ³⁷⁰ nuisance. Judge Cooley, at page 67 of the second edition of his work on Torts, says: "An actionable nuisance may, therefore, be said to be anything wrongfully done or permitted which injures or annoys another in the enjoyment of his legal rights."

In the case of Northern Transp. Co. v. Chicago, 99 U. S. 635, 25 L. ed. 336, it was said: "That cannot be a nuisance, such as to give a common-law right of action, which the law authorizes. We refer to an action at common law such as this is. A legislature may, and often does, authorize, and even direct, acts to be done which are harmful to individuals, and which without the authority would be nuisances; but in such a case, if the statute be such as the legislature has power to pass, the acts are lawful, and are not nuisances, unless the power has been exceeded."

Also, in the case of Hammersmith etc. Ry. Co. v. Brand, 4 Eng. & Ir. App. 171, it was said: "If the legislature authorizes the doing of an act (which if unauthorized would be a wrong and a cause of action), no action can be maintained for that act, on the plain ground that no court can treat that as a wrong which the legislature has authorized, and consequently the person who has sustained a loss by the doing of that act is without remedy, unless in so far as the legislature has thought it proper to provide for compensation to him. He is, in fact, in the same position as the person supposed to have suffered from the noisy traffic on a new highway is at common law, and subject to the same hardship. He suffers a private loss for the public benefit."

The acts of the defendant having been done under authority granted to it, in the performance of which it neither exceeded nor abused such authority, the plaintiff cannot recover his alleged damages unless a recovery is authorized by the con-

stitution or some provision of the statute. The only provision in the constitution ³⁷¹ that can have application to the question is section 4 of article 12, which reads: "No right of way shall be appropriated to the use of any corporation, until full compensation therefor be first made in money, or secured by a deposit of money, to the owner, irrespective of any benefit from any improvement by such corporation."

Section 1360 of the General Statutes of 1901 provides: "Upon application being so made in writing, such board of county commissioners shall forthwith proceed to lay off such route, sidetracks, etc., for such distance through their said county as may be so desired, and of such width, within the limits aforesaid, and upon such location, as may be desired by such corporation, having the same carefully surveyed, and ascertaining carefully the quantity of land necessary for such purposes out of each quarter section or other lot of land through which said route, sidetrack, etc., is so located, and appraise the value of such portion of any such quarter section or other lot of land, and assess the damages thereto; and when such commissioners shall ascertain that such portion of such quarter section or lot belongs to different owners, they shall appraise the value and assess the damages to each such owner's interest; all which doings the board of commissioners shall embody in a written report, and file in the office of the county clerk of such county."

The plaintiff's case is not within either of the provisions quoted. Under each there must be an actual taking before a recovery can be had; and then the owner may recover only the value of the land taken and the damage to the remainder of the tract or lot occasioned by such taking.

The damages alleged to have been sustained in this case are purely incidental and arise from a proper operation of the defendant's locomotive engines. Railroad companies are public corporations organized and maintained for public purposes. Railroads cannot be operated without causing more or less inconvenience ³⁷² to the public and discomfiture and possible damage to persons living adjacent to their lines. All such inconveniences and incidental damages must be endured by the individual for the general good. Such private inconveniences and injuries result, in a less degree, to persons who live along public highways from dust arising from the passing of teams and wagons. For such injuries the law provides no remedy.

This and similar questions have arisen in other courts of this country, and, so far as this court has been able to ascertain, a recovery has generally been denied, unless given under some constitutional or statutory provision. Some cases may be found which have construed similar injuries to be a taking. These, however, are exceptional and without the general rule. In the case of *Carroll v. Wisconsin Cent. Co.*, 40 Minn. 168, 41 N. W. 661, which was an action for a similar injury, the court said: "Railroads are a public necessity. They are always constructed and operated under authority of law. They bring to the public great benefits; to some persons more, to other persons less. The operating them in the most skillful and careful manner causes to the public necessary incidental inconveniences, such as noise, smoke, cinders, vibrations of the ground, interference with travel at the crossings of roads and streets, and the like. One person may suffer more from these than another. For instance, one whose premises lie within a hundred feet of the railroad will feel the inconvenience in a greater degree than one whose premises are at the distance of a thousand feet; and one who has to pass many times a day along a street crossed by a railroad suffers more inconvenience from it than one who seldom has occasion to pass. But the difference is only in degree, not in kind. Such inconveniences are common to the public at large. If each person had a right of action because of such inconveniences, it would go far to render the operating of railroads practically impossible."

In the case of *Parrott v. Cincinnati etc. R. R. Co.*, 10 Ohio St. 624, which ³⁷³ was an action to recover damages for obstructing the street by a railroad track, and also for damages for noises, smoke and vapor arising from the operation of the cars, it was said:

"Such owner and occupant is entitled to damages for any obstruction to the street by earth, gravel, timber or rail, substantially affecting his use of such street as an appurtenance to his premises.

"In respect to the noises, smoke, vapor, or other discomforts arising from the ordinary use of the railroad by the company, the occupant and owner of such lot and dwelling-house has no more right to recover damages of the company than any citizen who resides, or may have occasion to pass, so near the street and railroad as to be subjected to like discomforts.

"A railroad authorized by law, and lawfully operated, cannot be deemed a private nuisance."

As stated, there appears to be but little, if any, disagreement in the decisions upon this question: See, also, *Beseman v. Pennsylvania R. R. Co.*, 50 N. J. L. 235, 13 Atl. 164; *Hatch v. Vermont Cent. R. R. Co.*, 25 Vt. 49; *Dunsmore v. Central Iowa Ry. Co.*, 72 Iowa, 182, 33 N. W. 456.

Counsel for defendant in error cite us to the case of *Baltimore etc. R. R. Co. v. Fifth Bap. Church*, 108 U. S. 317, 2 Sup. Ct. Rep. 719, 27 L. ed. 739, as a decision contrary to the opinion herein expressed. That was an action to recover damages for discomforts occasioned by the erection of a building for housing the locomotive engines of the railway company contiguous to a building used for Sunday school and public worship by a religious society. It was claimed that these services were habitually interrupted and destroyed by the hammering noises made in the workshops of the company, the rumbling of its engines passing in and out of them, and the blowing off of steam; that these noises were so great at times as to prevent members of the congregation who might be sitting in parts of the church farthest from the shops³⁷⁴ from hearing what was said. The plaintiff was permitted to recover, but it was because the company had no authority to build its engine-house at the place where it did. On page 330 the court said:

"It is no answer to the action of the plaintiff that the railroad company was authorized by act of Congress to bring its track within the limits of the city of Washington, and to construct such works as were necessary and expedient for the completion and maintenance of its road, and that the engine-house and repair shop in question were thus necessary and expedient; that they are skillfully constructed; that the chimneys of the engine-house are higher than required by the building regulations of the city, and that as little smoke and noise are caused as the nature of the business in them will permit.

"In the first place, the authority of the company to construct such works as it might deem necessary and expedient for the completion and maintenance of its road did not authorize it to place them wherever it might think proper in the city, without reference to the property and rights of others. As well might it be contended that the act permitted it to place them immediately in front of the President's house or of

the capitol, or in the most densely populated locality. Indeed, the corporation does assert a right to place its work upon property it may acquire anywhere in the city."

Thus it will be observed that the court held that railroad company exceeded its authority in building its shops where it did, and on that ground permitted the plaintiff to recover.

The inconveniences and discomfitures of which the plaintiff complains are such as all persons who live along a line of railroad must endure without other compensation than the conveniences enjoyed by living in proximity to such public thoroughfare.

The judgment of the court on the first cause of action is reversed, and the cause remanded. The costs of the proceedings in this court are equally divided.

All the justices concurring.

For Authorities upon the question involved in the principal case, see the monographic note to *Smith v. St. Paul etc. Ry. Co.*, 109 Am. St. Rep. 914.

ALLEN v. RILEY.

[71 Kan. 378, 80 Pac. 952.]

PATENT RIGHT—Constitutionality of Statute Requiring Registration.—A statute requiring copies of letters patent and affidavits of their genuineness to be filed with the clerk of the district court, before selling, or offering for sale, such patent right, and also requiring all obligations for the payment of money in consideration of such a sale to have inserted therein "given for a patent right," is not invalid as an attempt to restrict the rights granted to holders of patents under the federal statutes. (p. 482.)

RESCISSIION.—Where Equity Requires the Restoration of what has been received under a contract as a condition to its rescission, it is sufficient to make the offer of restoration in the petition, and not necessarily before the bringing of suit. (p. 482.)

C. W. Reeder, S. F. Newlon, Ryan & Ryan and Loomis, Blair & Scandrett, for the plaintiffs in error.

Means & Archer and W. F. Shale, for the defendant in error.

379 MASON, J. Mrs. Frances J. Riley conveyed to E. L. Allen a tract of land in exchange for one hundred dollars

and the assignment to her of the rights held by E. W. Allen under a patent covering a washing-machine, so far as related to operations within the state of Kentucky. The transaction took place in Coffey county. No copy of the letters patent or affidavit of their genuineness had been filed with the clerk of the district court of that county, as required by the Kansas statute: Gen. Stats. 1901, secs. 4356-4358. Upon this ground Mrs. Riley brought a suit against the Allens to rescind the contract and to recover the value of the land, which had in the meantime passed into other hands, less the amount of money she had received. She recovered a judgment for twelve hundred and fifty dollars, from which error is now prosecuted.

Plaintiff in error claims that the act referred to is void, upon the ground that it attempts to restrict the right granted to the holder of a patent under the federal statute. The act has already been upheld against such attack in *Mason v. McLeod*, 57 Kan. 105, 57 Am. St. Rep. 327, 45 Pac. 76, 41 L. R. A. 548, where authorities are cited in support of the decision made, which is now reaffirmed: See, also, 22 Am. & Eng. Ency. of Law, 446; *Bohon's Assignee v. Brown*, 101 Ky. 354, 72 Am. St. Rep. 380 420, 41 S. W. 273, 38 L. R. A. 503; *State v. Cook*, 107 Tenn. 499, 64 S. W. 720, 62 L. R. A. 174.

A second objection to the judgment rendered is based upon the fact that the plaintiff did not, prior to beginning her suit, offer to restore to the defendants the patent right that had been assigned to her, although an offer to do so was made in her petition. It is urged that this omission was fatal to a recovery, or at all events should have prevented any judgment for costs against the defendants. Such a tender was not a prerequisite to the bringing of the suit. There was nothing in the character or circumstances of the case to take it out of the general rule, which is thus stated in *Thayer v. Knot*, 59 Kan. 181, 52 Pac. 433: "Where equity requires the restoration of what has been received under a contract as a condition to its rescission, it is sufficient to make the offer of restoration in the petition, and not necessarily before the bringing of suit": See, also, 24 Am. & Eng. Ency. of Law, 621.

If the defendants, upon being sued, had consented to accept the return of the patent right and make restitution upon their own part, they might well have claimed exemption from liability for costs, but in view of the fact that they contested

the rescission of the contract in the trial court, and are still contesting it in this court, they are in no position to complain of the award made.

Other assignments of error are made and argued, but they are based upon assumptions of fact that are contradicted by the findings of the jury, and need not be discussed. The judgment is affirmed.

All the justices concurring.

The Decision in the Principal Case was Affirmed by the supreme court of the United States (Allen v. Riley (U. S.), 27 Sup. Ct. Rep. 95), Mr. Justice Peckham delivering the opinion therein as follows: "The sole question for our determination in this case is concerning the constitutionality of the Kansas act." The opinion of the supreme court of the state of Kansas is reported in 71 Kan. 378, ante, p. 481, 80 Pac. 952.

*Chapter 182, Laws 1889 (paragraphs 4356, 4357 and 4358, General Statutes of Kansas, 1901), reads as follows:

"Sec. 1. It shall be unlawful for any person to sell or barter, or offer to sell or barter, any patent right, or any right which such person shall allege to be a patent right, in any county within this state, without first filing with the clerk of the district court of such county copies of the letters patent, duly authenticated, and at the same time swearing or affirming to an affidavit before such clerk that such letters patent are genuine, and have not been revoked or annulled, and that he has full authority to sell or barter the right so patented; which affidavit shall also set forth his name, age, occupation, and residence; and if an agent, the name, occupation, and residence of his principal. A copy of this affidavit shall be filed in the office of said clerk, and said clerk shall give a copy of said affidavit to the applicant, who shall exhibit the same to any person on demand.

"Sec. 2. Any person who may take any obligation in writing for which any patent right, or right claimed by him or her to be a patent right, shall form a whole or any part of the consideration, shall, before it is signed by the maker or makers, insert in the body of said written obligation, above the signature of said maker or makers, in legible writing or print, the words, 'Given for a patent right.'

"Sec. 3. Any person who shall sell or barter, or offer to sell or barter, within this state, or shall take any obligation or promise in writing for a patent right, or for what he may call a patent right, without complying with the requirements of this act, or shall refuse to exhibit the certificate when demanded, shall be deemed guilty of a misdemeanor, and on conviction thereof before any court of competent jurisdiction shall be fined in any sum not exceeding one thousand dollars, or be imprisoned in the jail of the proper county not more than six months, at the discretion of the court or jury trying the same, and shall be liable to the party injured in a civil action for any damages sustained."

"The judgment herein is founded upon *Mason v. McLeod*, 57 Kan. 105, 57 Am. St. Rep. 327, 45 Pac. 76, 41 L. R. A. 548, which case has been followed by that of *Pinney v. First Nat. Bank*, 68 Kan. 223, 75 Pac. 119.

"The defendants insist that the act in question violates article 1, section 8, of the constitution of the United States, and the federal statute passed in pursuance thereof, being Revised Statutes, section 4898, United States Compiled Statutes of 1901, page 3387. The constitution grants to Congress the right 'to promote the progress of science and useful arts by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries'; and section 4898 of the Revised Statutes provides that every patent or interest therein shall be assignable in law by an instrument in writing, which assignment is made void against any subsequent purchaser or mortgagee, for a valuable consideration, without notice, unless it is recorded in the patent office within three months from the date thereof.

"It is asserted by the plaintiffs in error that the subject of the sale or assignment of the whole or any part of an interest in a patent is derived from the laws of Congress passed with reference to the constitutional provision quoted above, and that any regulations whatever, by any state authority, in regard to such assignment or sale, and making provision in respect to them, are illegal.

"The supreme court of Kansas has maintained and upheld the Kansas act on the ground that the statute is simply a reasonable and proper exercise of the police power of the state in regard to the subject of the act: *Mason v. McLeod*, 57 Kan. 105, 57 Am. St. Rep. 727, 45 Pac. 76, 41 L. R. A. 548. That court was of opinion that the provisions of the Kansas statute did not trench upon the federal power nor interfere with the rights secured to patentees by federal law. The opinion does not assert that a state statute can interfere with the right of a patentee to sell or assign his patent, nor that it can take away any essential feature of his exclusive right, but, as stated, the provisions in the act have no such purpose or effect; that 'they are in the nature of police regulations designed for the protection of the people against imposition and fraud. There is great opportunity for imposition and fraud in the transfer of intangible property, such as exists in a patent right, and many states have prescribed regulations for the transfer of such property differing essentially from those which control the transfer of other property.' Many authorities are cited, and the opinion then continues: 'The doctrine of these cases is that the patent laws do not prevent the state from enacting police regulations for the protection and security of its citizens, and that regulations like ours, which are mainly designed to protect the people from imposition by those who have actually no authority to sell

patent rights or own patent rights to sell, should be upheld. We think the statute is valid.'

"In Indiana a statute which is like that in Kansas has been upheld by the supreme court of that state: *Brechbill v. Randall*, 102 Ind. 528, 52 Am. Rep. 695, 1 N. E. 362. That case has, since that time, been followed in Indiana: *New v. Walker*, 108 Ind. 365, 58 Am. Rep. 40, 9 N. E. 386. In Ohio a statute somewhat similar to the one in question has been upheld: *Tod v. Wick*, 36 Ohio St. 370. And the same result has been reached in Pennsylvania: *Haskell v. Jones*, 86 Pa. 173. In *Herdie v. Roessler*, 109 N. Y. 127, 16 N. E. 198, the validity of the same kind of a statute has been upheld: See, also, *Wyatt v. Wallace*, 67 Ark. 575, 55 S. W. 1105; *State v. Cook*, 107 Tenn. 499, 62 L. R. A. 174, 64 S. W. 720. The statutes in the different states are not all precisely like the Kansas law, but they make provisions in regard to the sale or assignment of rights under a patent, and sometimes in regard to notes given for their purchase, which cannot be upheld under the contention of plaintiffs in error herein, that all such provisions are in violation of, or inconsistent with, the laws of Congress on the subject. The courts of some other states, having like questions before them, have held their statutes void: *Hollida v. Hunt*, 70 Ill. 109, 22 Am. Rep. 63; *Cranson v. Smith*, 37 Mich. 309, 26 Am. Rep. 514; *Wilch v. Phelps*, 14 Neb. 134, 15 N. W. 361; *State v. Lockwood*, 43 Wis. 403, and some others.

"The circuit court of appeals of the eighth circuit, in *Ozan Lumber Co. v. Union County Nat. Bank*, 145 Fed. 344, has held a statute of Arkansas upon this same subject void because of its discrimination between articles of property of the same class or character, based only on the fact that the property discriminated against was protected by a patent granted by the United States. In the opinion in the case, authorities upon the subject are cited and commented upon. Among the cases cited are *Patterson v. Kentucky*, 97 U. S. 501, 24 L. ed. 1115, and *Webber v. Virginia*, 103 U. S. 344, 26 L. ed. 565.

"In *Patterson v. Kentucky*, 97 U. S. 501, 24 L. ed. 1115, the owner of a patent right for an improved burning oil was convicted of the violation of a Kentucky statute by the sale of the oil covered by the patent. The owner claimed the right to sell such oil notwithstanding the statute, which provided a standard below which oil was regarded as dangerous for illuminating purposes, and the sale of which was prohibited. It was admitted the patented oil did not come up to the state standard. This court held the conviction was right, and that the owner of the patent was not protected, by reason of his ownership, from liability under the state statute. That statute was held to be one passed in the legitimate exercise of the powers of the state over its purely domestic affairs,

and it was said that it did not violate either the constitution or laws of the United States, as, when property protected by patent once comes into existence, its use is subject to the control of the several states to the same extent as any other species of property.

"Webber v. Virginia, 103 U. S. 344, 26 L. ed. 565, relates also to tangible property covered by a patent, and it was held that the patent did not exclude from the operation of the taxing or licensing law of the state the tangible property manufactured under a patent. It was said in that case that 'Congress never intended that the patent laws should displace the police powers of the states, meaning by that term those powers by which the health, good order, peace, and general welfare of the community are promoted. Whatever rights are secured to the inventors must be enjoyed in subordination to this general authority of the state over all property within its limits.'

"While these two cases do not cover the one now before us, because they refer to tangible property which has been manufactured and come into existence under a patent, and the case before us relates to provisions which are to accompany an assignment of intangible rights, growing out of a patent, yet the general power of the states to legislate in order to protect their citizens in their lives and property from fraud and deceit is recognized, not as being without limit, of course, but as being properly exercised in the cases named.

"We think the state has the power (certainly until Congress legislates upon the subject) with regard to the provision which shall accompany the sale or assignment of rights arising under a patent, to make reasonable regulations concerning the subject, calculated to protect its citizens from fraud. And we think Congress has not so legislated by the provisions regarding an assignment contained in the act referred to.

"In some of the cases holding such statutes void it is said that it is unfortunately true that many frauds are committed under color of patent rights, and that the patent laws are not so framed as to secure the public from being cheated by worthless inventions; but, notwithstanding that, they hold statutes of the nature of the one under consideration to be void, as trenching upon the rights of the owner of a patent secured by the constitution and laws of the United States.

"To uphold this kind of a statute is by no means to authorize any state to impose terms which, possibly, in the language of Mr. Justice Davis, in *Ex parte Robinson*, 2 Bias. 309, Fed. Cas. No. 11,932, 'would result in a prohibition of the sale of this species of property within its borders, and in this way nullify the laws of Congress which regulate its transfer, and destroy the power conferred upon Congress by the constitution. Such a statute would not be a reasonable exercise of the powers of the state.

"In Michigan, the court, speaking through Mr. Justice Campbell, while holding the act under review in that case upon the subject invalid (*Cranson v. Smith*, 37 Mich. 309, 26 Am. Rep. 514), said: 'While we cannot but recognize the magnitude of an evil which has brought patents into popular discredit, and has provoked legislation in several states similar to that of Michigan, we cannot, on the other hand, fail to see in these laws a plain and clear purpose to check the evil by hindering parties owning patents from dealing with them as they may deal with their other possessions.' If there is a special evil, unusually frequent and easily perpetrated when parties are dealing in the sale of rights existing or claimed to exist under a patent, we do not see why a state may not, in the bona fide exercise of its powers, enact some special statutory provisions which may tend to arrest such evil, and may omit to enact the same provision concerning the disposal of other property. There is no discrimination which can be properly so called against property in patent rights, exercised in such legislation. It is simply an attempt to protect the citizen against frauds and impositions which can be more readily perpetrated in such cases than in cases of the sale or assignment of ordinary property.

"The act must be a reasonable and fair exercise of the power of the state for the purpose of checking a well-known evil, and to prevent, so far as possible, fraud and imposition in regard to the sales of rights under patents. Possibly Congress might enact a statute which would take away from the states any power to legislate upon the subject, but it has not as yet done so. It has simply provided that every patent, or interest therein, shall be assignable in writing, leaving to the various states the power to provide for the safeguarding of the interests of those dealing with the assumed owner of a patent, or his assignee. To deal with that subject has been the purpose of the acts passed by the various states, among them that of the state of Kansas, and we think that it was within the powers of the state to enact such statute. The expense of filing copies of the patent and the making of affidavits in the various counties of the state in which the owner of the rights desired to deal with them is not so great, in our judgment, as to be regarded as oppressive or unreasonable, and we fail to find any other part of the act which may be so regarded. Some fair latitude must be allowed the states in the exercise of their powers on this subject. It will not do to tie them up so carefully that they cannot move, unless the idea is that the states have positively no power whatever on the subject. This we do not believe; at any rate, in the absence of congressional legislation. The mere provision in the federal statute for an assignment and its record as against subsequent purchasers, etc., is not such legislation as takes away the rights of the states to legislate on the subject themselves in a

manner neither inconsistent with, nor opposed to, the federal statute. We think the judgment is right, and it is affirmed."

Mr. Justice White, with whom concurs Mr. Justice Day, dissenting:

"My brother Day and myself dissent. The reasons, however, which impel him are broader than those influencing me. In general terms, the Kansas statute which the court now upholds compels one selling a patent right in any county of the state of Kansas to file with the clerk of such county an authenticated copy of the patent, together with an affidavit as to the genuineness of the patent, and as to other matters. The statute, moreover, exacts that where a note is given for the purchase price of a patent right, there shall be inserted in the note a statement that it is given for a patent right, presumably to deprive the note of the attributes of commercial paper. We both think that the requirements as to recording the patent and affidavit are void, because repugnant to the power delegated to Congress by the constitution on the subject of patents, and because in conflict with the legislation of Congress on the same subject. And, for like reasons, my brother Day is also of the opinion that the provision is void which exacts an insertion in a note given for the sale of a patent right of the fact that it was given for such sale. This latter provision, in my opinion, the state had the power to make as a reasonable police regulation, not repugnant to the authority as to patents delegated to Congress by the constitution, or the legislation which Congress has enacted in furtherance thereof."

The Supreme Court of Arkansas in Woods v. Carl, 75 Ark. 328, 87 S. W. 621, upheld as constitutional a statute providing: "Any vendor of any patented machine, implement, substance, or instrument of any kind or character whatsoever, when the said vendor of the same effects the sale of the same to any citizen of this state on a credit, and takes any character of negotiable instrument in payment of the same, the said negotiable instrument shall be executed on a printed form, and show upon its face that it was executed in consideration of a patented machine, implement, substance or instrument, as the case may be, and no person shall be considered an innocent holder of the same, though he may have given value for the same before maturity, and the maker thereof may make defense to the collection of the same in the hands of any holder of said negotiable instrument; and all such notes not showing on their face for what they were given shall be absolutely void."

In support of its holding, the court cited the following cases: *Wyatt v. Wallace*, 67 Ark. 575, 55 S. W. 1105; *State v. Cook*, 107 Tenn. 499, 64 S. W. 720, 62 L. R. A. 174; *Sandage v. Studebaker Mfg. Co.*, 142 Ind. 148, 51 Am. St. Rep. 165, 41 N. E. 380, 34 L. R. A. 363; *Hankey v. Downey*, 116 Ind. 118, 18 N. E. 271, 1 L. R. A. 447; *New v. Walker*, 108 Ind. 370; *Union Nat. Bank v. Brown (Ky.)*, 41 S. W. 273; *Mason v. McLeod*, 57 Kan. 105, 57 Am. St. Rep. 327, 45 N. E. 76, 41 L. R. A. 548; *Pinney v. First Nat. Bank*, 68 Kan. 223, 75 Pac. 119; *Tod v. Wick*, 36 Ohio St. 370; *Haskell*

v. Jones, 86 Pa. 173; Patterson v. Kentucky, 97 U. S. 501, 24 L. ed. 1105. And, as opposed to its holding, the court cited: Hollida v. Hunt, 70 Ill. 109, 22 Am. Rep. 63; Cranson v. Smith, 37 Mich. 309, 26 Am. Rep. 514; Wilch v. Phelps, 14 Neb. 134, 15 N. W. 361; Crittenden v. White, 23 Minn. 24, 26 Am. Rep. 676; and in the following federal cases: Ex parte Robinson, 2 Biss. 309, Fed. Cas. No. 11,932; Woollen v. Banker, 2 Flipp. 33, Fed. Cas. No. 18,030; Castle v. Hutchinson, 25 Fed. 394; Reeves v. Corning, 51 Fed. 774; Pegram v. American A. Co., 122 Fed. 1000. The decision of the Arkansas court was affirmed by the supreme court of the United States: See Woods v. Carl, 27 Sup. Ct. Rep. 99.

SNYDER v. MILLER.

[71 Kan. 410, 80 Pac. 970.]

IF A MORTGAGE Securing a Series of Notes Due at intervals of one year provides that nonpayment of any one of them, together with nonpayment of the taxes, shall mature the entire debt, the mortgagor has an equal right with the mortgagee to insist upon the provision and to receive whatever advantages it may confer upon him. (p. 490.)

MORTGAGE—Series of Notes—Limitation of Actions.—Where a mortgage securing a series of notes due at different times provided that nonpayment of any one of them, together with nonpayment of the taxes due on the property, should mature the entire debt, and none of the notes were paid at maturity, and at the maturity of the first one the taxes were due and unpaid, which default continued until all the notes were due, and a purchaser of the property who did not assume the mortgage then paid the taxes, the statute of limitations commenced to run at the date of the default upon the first note and taxes, and the running of the statute was not suspended by the payment of the taxes, and by paying them the land owner did not lose his right to plead the statute in an action to foreclose the mortgage. (p. 499.)

Garver & Larimer and E. C. Sweet, for the plaintiff in error.

Thompson & King, for the defendant in error.

⁴¹⁰ BURCH, J. This proceeding in error grows out of a suit commenced in the district court of Ottawa county on December 12, 1903. The petition prayed for the foreclosure of a mortgage securing four promissory notes, due, respectively, on February 18, 1896, February 18, 1897, February 18, 1898, and February ⁴¹¹ 18, 1899. The mortgage contained a provision to the effect that if any one of the notes secured and the taxes upon the mortgaged premises should not be paid when due and payable, the entire mortgage debt should at

once mature. The absence of the makers of the notes from the state was pleaded to avoid the running of the statute of limitations.

The answer pleaded default in the payment of taxes for the year 1895, resulting in a tax sale of the land in 1896, followed by an indorsement on the tax sale certificate of taxes paid by the certificate holder for the years 1896, 1897, and 1898. The defendant purchased the land subject to the mortgage on November 18, 1897, and was not charged with any personal liability on the notes. Because of the default in the payment of the taxes for the year 1895, and the default in the payment of the note due February 18, 1896, he claimed the entire mortgage debt matured on the date last mentioned, and prayed the benefit of the statute of limitations.

The reply pleaded payment of the delinquent taxes by the defendant on August 21, 1899. A demurrer to the reply was sustained, and the correctness of this ruling is the matter now in question.

As long ago as 1871 this court decided that a stipulation in a mortgage of the same character as that under consideration was not a one-sided affair, vesting a mere option in the mortgagee, but that the mortgagor had an equal right with the mortgagee to insist upon it and to receive whatever advantages it might confer upon him. Mr. Justice Brewer, speaking for the court, said: "This clause is inserted in mortgages usually for the benefit of the mortgagee; but being a valid stipulation the mortgagor has equal right to insist upon it, and receive whatever advantage he can from its enforcement. When the payor at the expiration of six months failed to pay the note then due, by the ⁴¹² terms of the contract all three notes became due. The statute of limitations began to run on all, and a subsequent purchaser purchased after maturity": *First Nat. Bank v. Peck*, 8 Kan. 660.

The same rule was announced in England at least as early as 1843. A defendant gave a warrant of attorney to secure a debt payable by installments, the plaintiff having the right in case of any default to have judgment and execution for the whole as if all the periods for payment had expired. In an action of assumpsit it was held that the defendant might show, under a plea of the statute of limitations, that the first default was made more than six years before the action, and that this was a complete defense, not only as to installments

due more than six years before but also as to those due within that period. Lord Denman, C. J., said:

"We are of the opinion that the defendant is right, and that the cause of action accrued upon the first default for all that then remained owing of the whole debt. . . .

"In this case there was a default more than six years ago; and upon that the plaintiff might, if he pleased, have signed judgment and issued execution for all that remained due, or he might have maintained his action. If he chose to wait till all the installments became due, no doubt he might do so; but that which was optional on the part of the plaintiff would not affect the right of the defendant, who might well consider the action as accruing from the time the plaintiff had a right to maintain it. The statute of limitations runs from the time the plaintiff might have brought his action, unless he was subject to any of the disabilities specified in the statute; and as the plaintiff might have brought his action upon the first default, if he did not choose to enter up judgment, we think that the defendant is entitled to the verdict upon the plea of the statute of limitations": *Hemp v. Garland*, [1843] 4 Q. B. D. 519.

This case was expressly approved in 1891 by the court of appeals, on appeal from the queen's bench ⁴¹³ division, in the case of *Reeves v. Butcher*, [1891] 2 Q. B. D. 509, 511. Lindley, L. J., said: "I am of the opinion that we cannot differ from the judgment below without altering the law. The agreement is one reasonably easy to be understood. It provides for a loan for five years, subject to a provision that if default is made in punctual payment of interest the principal shall be recoverable at once. Now, the statute of limitations (21 Jac. 1, c. 16) enacts that such actions as therein mentioned, including 'all actions of debt grounded upon any lending or contract without specialty,' shall be brought 'within six years next after the cause of such action or suit, and not after.' This expression, 'cause of action,' has been repeatedly the subject of decision, and it has been held, particularly in *Hemp v. Garland*, 4 Q. B. 519, decided in 1843, that the cause of action arises at the time when the debt could first have been recovered by action. The right to bring an action may arise on various events; but it has always been held that the statute runs from the earliest time at which an action could be brought."

The reason for allowing the debtor to take advantage of the stipulation was well stated by the supreme court of Texas in the case of *Harrison Machine Works v. Reigor*, 64 Tex. 89, as follows:

"The purpose of statutes of limitation is to 'compel the settlement of claims within a reasonable period after their origin, and while the evidence upon which their enforcement or resistance rests is yet fresh in the minds of the parties or their witnesses': Wood on Limitations, sec. 5.

"If the holder of a note may, at his option, treat the claim as due at a later date than the maker has agreed that it shall mature, and thus prescribe a different date at which it shall be barred, the evidence for its enforcement may be preserved, whilst that for its resistance may be destroyed, and thus the purpose of the statute be wholly defeated. . . .

"Here no option was left to the creditor; he was forced to treat the debt as due. It is true he was not obliged to bring suit upon it upon default in payment of the first note; neither is any creditor compelled to sue upon a claim so soon as it becomes due. But the ⁴¹ statute was put in motion without consulting his wishes, by the very terms of the contract, which neither party had any right to change without the consent of the other."

So in *Noell v. Gaines*, 68 Mo. 649, it was said: "It cannot, with any show of reason, be urged that the notes could, under the terms of the contract, fall due for one purpose, and not for another. If they fell due when the contingency happened, and because it happened, and because the parties upon valid consideration had thus contracted, it must needs follow that the face of the notes under the circumstances mentioned ceased to furnish any guide as to their maturity."

The benefit to be derived by sureties from a contract providing that nonpayment of a part of the debt shall mature the whole was forcefully stated by the Kentucky court of appeals as follows: "It is easy to conceive that a surety might require such a clause as a condition for his own protection. He might be unwilling to bind himself for five years unconditionally, whereby he might be compelled to pay, at the end of that time, both the principal and interest, and might very prudently say: 'Insert a clause which requires the interest to be paid quarterly, and which provides that, if not so paid, the debt is to become due, so that, if not paid, I will

have the right to pay it or secure myself'": *Ryan v. Caldwell*, 106 Ky. 543, 50 S. W. 966.

The reasoning of these cases applies with peculiar force to the situation of one who has purchased subject to a mortgage that he has not assumed, and especially so if the mortgagors have left the state and he may be deprived of their aid in making proper defenses to a belated claim. When on the United States circuit bench Mr. Justice Brewer said: "Now, here, according to the averments of this petition, this mortgage and this deed of trust were executed at the same time, and to secure these notes; they were parts and parcels of one transaction, and are to ⁴¹⁵ be construed as one instrument; and if there were but one instrument, and that containing a promise to pay money at three separate times, with a proviso that, upon a failure to pay the first sum at the time named, all should become due, I cannot see how, logically, we can escape the conclusion that the parties have made an absolute, unconditional stipulation, operative under all circumstances and for all purposes. I had occasion when I was on the supreme bench of my own state to consider this matter in two or three cases, and that was the conclusion I then came to, and it is unchanged. I am aware that Judge Hough in his dissenting opinion suggests certain contingencies in which the application of this rule, where there are several negotiable promissory notes secured by mortgages or deeds of trust, might work out some embarrassments; but still I do not think that the possibility of such embarrassments can avoid the clear force of the language the parties have used. I do not see why they cannot make such a contract; and if they make it, and its language is clear, I do not see why the courts should not give force and effect to it": *Wheeler & Wilson Mfg. Co. v. Howard*, 28 Fed. 741.

Although the courts of some of the states and some of the federal courts have taken a different view, the doctrine propounded in *First Nat. Bank v. Peck*, 8 Kan. 660, has been steadily adhered to by this court. It has been carried to the extent of holding that a tender of delinquent taxes, the non-payment of which constituted the sole breach of the contract, and the payment of all accrued costs, would not, after suit had been commenced, discharge the default and re-instate the contract as to notes otherwise not due for a long period of time: *Standlift v. Norton*, 11 Kan. 218. The legis-

lature has not seen fit to interfere, and the rule thus early announced is now definitely established as a part of the law of this state: *Darrow v. Scullin*, 19 Kan. 57; *Meyer v. Graeber*, 19 Kan. 165; *Elwood v. Wolcott*, 32 Kan. 526, 4 Pac. 1056; *Lewis v. Lewis*, 58 Kan. 563, 50 Pac. 454; *Douthitt v. Farrell*, 60 Kan. 195, 56 Pac. 9; *Kennedy v. Gibson*, 68 Kan. 612, 75 Pac. 1044.

⁴¹⁶ At a date earlier than that of the decision in *First Nat. Bank v. Peck*, 8 Kan. 660, this court held: "As a general rule, when a statute begins to run, it continues to run until the demand is barred. This principle is laid down with great uniformity in all the authorities, and may be considered as settled. Undoubtedly the legislature may prescribe differently, and in this state several exceptions are made, but none such as is claimed in this case": *Green v. Goble*, 7 Kan. 297.

By applying the rules recognized in these cases to the facts of the case under consideration it becomes plain that the demurrer to the reply was properly sustained; but the defendant claims that the court should have been guided by the case of *Douthitt v. Farrell*, 60 Kan. 195, 56 Pac. 9, the syllabus of which reads as follows: "Where a promissory note was given, by the terms of which the principal became due in five years from date, with interest payable semi-annually, and a real estate mortgage securing it was given, which provided that upon default in payment of any of the interest when due and the taxes on the mortgaged premises when due, the whole indebtedness should mature, and both such defaults occurred, and the statute of limitations thereupon commenced to run against the indebtedness, but the delinquent taxes were thereafter paid by the mortgage debtor, held, that the running of the statute in his favor was ended by his voluntary correction of the one default, and, although more than five years elapsed from the occurrence of the two defaults mentioned, the cause of action on the note and mortgage was not barred."

This decision was based upon the case of *Smalley v. Ranken*, 85 Iowa, 612, 52 N. W. 507; *Smalley v. Ranken* refers, in turn, to *Watts v. Creighton*, 85 Iowa, 154, 52 N. W. 12, and *Watts v. Creighton* discusses and expressly rejects the doctrine of *First Nat. Bank v. Peck*, 8 Kan. 660. The argument in the *Smalley* case was as follows: "What did the parties stipulate that the taxes should ⁴¹⁷ be paid by defendant for?

To protect the plaintiff from the loss or impairment of his security. At the filing of the amendment every right of the plaintiff in this respect was fully protected. The object of the condition of the mortgage was to enable the plaintiff to treat the debt as due, and save himself from loss because of the default. After the payment of the taxes, all such liability for loss was at an end. His situation was exactly as if there had been no default as far as the conditions for forfeiture were concerned. To justify a forfeiture under such circumstances would work an injustice that the court ought not to permit."

This reasoning proceeds upon premises wholly incompatible with those employed in the decisions of this court already quoted and cited. Stipulations for the acceleration of the maturity of debts do not provide penalties or forfeitures.

"It is therefore settled by the overwhelming weight of authority that if a certain sum is due and secured by a bond, or bond and mortgage, or other form of obligation, and is made payable at some future day specified, with interest thereon made payable during the interval at fixed times, annually, or semi-annually, or monthly, and a further stipulation provides that in case default should occur in the prompt payment of any such portion of interest at the time agreed upon, then the entire principal sum of the debt should at once become payable, and payment thereof could be enforced by the creditor, such a stipulation is not in the nature of a penalty, but will be sustained in equity as well as at law. In exactly the same manner, if a certain sum is due and is secured by any form of instrument, and is made payable in specified installments, with interest, at fixed successive days in the future, and a further stipulation provides that in case of a default in the prompt payment of any such installment, in whole or in part, at the time prescribed therefor, then the whole principal sum of the debt should at once become payable, and payment thereof could be enforced by the creditor, such stipulation has nothing in common with a penalty, and is as valid and operative ⁴¹⁸ in equity as at law": 1 Pomeroy's Equity Jurisprudence, 2d ed., sec. 439.

"Provisions such as that under consideration are not in the nature of penalties, nor have they anything in common with forfeitures, but are to be regarded as nothing more than agreements between the parties, fixing the time and the con-

ditions upon which the whole debt may become due. Such an agreement may be as advantageous to the payor as to the payee: *Buchanan v. Berkshire Life Ins. Co.*, 96 Ind. 510; *Malcolm v. Allen*, 49 N. Y. 448; 1 *Pomeroy's Equity Jurisprudence*, sec. 439; 2 *Jones on Mortgages*, sec. 1186": *Moore v. Sargent*, 112 Ind. 484, 14 N. E. 466.

Indeed, the supreme court of Iowa itself in a later case has expressly held that such stipulations are not to be regarded as providing for penalties or forfeitures: *Swearingen v. Lahner*, 93 Iowa, 147, 57 Am. St. Rep. 261, 61 N. W. 431, 26 L. R. A. 765.

But a more fundamental consideration is that the parties made the contract and the courts cannot make another to take its place. Its language excludes the idea that the creditor may or may not "treat the debt as due." It becomes due in fact. If an election were all that the parties intended, words appropriate to that purpose should have been used.

"It is not necessary to assume that the parties to such a contract intended to provide for none but wrongful refusals to pay installments. It might happen that the debtor upon good grounds would afterward deny his liability upon the contract and therefore refuse to pay installments, in which case the provision would serve him a useful purpose in bringing the question at issue to a prompt test and not leave it entirely with the creditor to delay until perhaps evidence of the defense had been lost. The question at last is one of construction of the language used, and that which makes it mean just what it says is not without reason or good authority to support it. Where the purpose is only to give the option to the creditor, language expressive of it may be easily inserted": *San Antonio etc. Building etc. Assn. v. Stewart*, 94 Tex. 441, 86 Am. St. Rep. 864, 61 S. W. 386.

⁴¹⁹ This distinction was recognized, and indeed controlled the decision, in the very recent case of *Kennedy v. Gibson*, 68 Kan. 612, 75 Pac. 1044. The opinion reads: "The note provided that a default should mature the entire debt, at the option of the holder, while the provision in the mortgage was that a default made the whole debt due, regardless of an election by the holder. Which of these provisions should control? In the absence of an option clause in the note, the stipulation in the mortgage would have operated to mature the whole debt upon a default, and the mortgagors could have

taken advantage of the stipulation: *First Nat. Bank v. Peck*, 8 Kan. 660. The stipulation in the note as to default, however, conflicts with that of the mortgage, and, of necessity, the former controls. The note contains the obligations of the mortgagors, and the mortgage, concurrently executed, is an incident to and security for the note. The stipulation in the note must therefore prevail, and unless the holder exercised the option and elected to declare the whole debt due, the statute would not run earlier than the time originally fixed for the maturity of the note."

Such being the established position of this court, the *Smalley* case must be eliminated as a support for the conclusion reached in *Douthitt v. Farrell*, 60 Kan. 195, 56 Pac. 9.

In deciding the *Douthitt* case the court, in effect, declared reciprocal estoppels against the parties. The debtor lost the right to plead that the statute was running on account of his default, and the creditor lost the right to sue on account of the same default. The wound was healed without a scar. The condition in the mortgage that the creditor could, under certain circumstances, insist upon payment of the note before maturity according to its terms was restored to the status of an unbroken covenant for the future protection of the indebtedness secured, and the indebtedness itself was restored to the status of an unmatured claim. The opinion reads: "We have no doubt but that the voluntary payment of the taxes by the debtor was a waiver by him of ⁴²⁰ the conditions under which the statute of limitations was running in his favor, and was a restoration by him of the plaintiff to the status of a holder of an unmatured indebtedness."

Manifestly, no such rehabilitation of rights could be accomplished in this case. The last note had matured by its own terms six months before the taxes were paid. The plaintiff could not be reinvested with the rights of a holder of an unmatured indebtedness, and the mutual modification of the legal relations of the parties adverted to in the *Douthitt* case was impossible. True, the term "voluntary waiver" is used in that decision, but, as already observed, the waiver was of such a character that it necessarily worked a change in the rights of the opposite party.

That the conduct of a single party to the contract may have such a far-reaching effect, unless the other party has been influenced in some manner by it, is not conceded by

those courts that enforce the rule of peremptory maturity adopted in this state. Thus, in the case of *San Antonio etc. Building etc. Assn. v. Stewart*, 94 Tex. 441, 86 Am. St. Rep. 864, 61 S. W. 386, it was said: "It is not in the power of the creditor by his acts alone to change the rights of the parties resulting from the maturity of the debt. But both parties, by their joint action, may so alter such rights that the creditor would no longer have the right to demand nor the debtor to pay the entire indebtedness. . . . While neither party by his separate action or nonaction could impair the rights of the other, each could waive his own rights as they accrued from the default in payment of an installment so as to estop him from relying upon such default. To accomplish this, it would only be necessary that each should so act as to justify the other in believing and acting upon the belief that the effect of the failure to pay an installment was to be disregarded and that the contract should stand as if there had been no default."

Likewise, in the case of *Moore v. Sargeant*, 112 Ind. 484, 14 N. E. 466, it was said: "The provision in the mortgage for accelerating the ⁴²¹ time when the whole debt should become due and collectible did not make the maturity of the debt evidenced by the second note depend upon the election of the mortgagee. The second note became absolutely due upon failure to pay the first note at maturity. According to the terms of the contract, upon the happening of that event, the whole debt became as effectually and absolutely due as if further credit had not been, in any contingency, agreed upon. The mortgagor had then the right to pay or tender the whole debt, and by that means suspend the accumulation of interest. The acceptance of a part by the mortgagee did not defeat the right of the mortgagor to pay or tender the balance at once, nor did it, without a new agreement, extend the time or prevent the former from enforcing payment of what remained unpaid. . . . Under a provision which gives the creditor the exclusive right to elect, within a time fixed, whether or not he will treat the whole debt as due in case the debtor makes default in paying interest, it may well be that the unconditional acceptance of interest by the creditor, after the expiration of the time, without notice of the election, would waive the default: 2 Jones on Mortgages, sec. 1186. Or if the default was induced by the fraudulent or inequita-

the conduct of the creditor, or by any agreement or promise upon which the debtor might rely which operated to mislead or throw the debtor off his guard, a court of equity would interfere to stay proceedings, or the action might be abated upon the facts being properly pleaded."

Under either theory the judgment of the district court in this case was correct because the condition in the mortgage now in controversy had spent its force when the taxes were paid. No acceleration of the maturity of the notes secured could occur by virtue of it; failure to comply with it could not start the running of the statute, and a payment of taxes could not stop the statute from running. No rights could be gained or lost on account of the stipulation.

On February 18, 1896, a cause of action accrued in plaintiff's favor, and the statute of limitations then commenced to run against it. From February 18, ⁴²² 1896, until the notes matured by their terms the plaintiff had an indisputable right to bring suit upon them, and during all that time the statute of limitations continued to run. After the notes matured by their terms the cause of action continued to exist unimpaired, and the statute continued to run. The payment of taxes on August 21, 1899, could not prevent suit on the notes, and hence could not suspend the operation of the statute, and it continued to run after that date as before. Such having been the condition of affairs for more than five years before suit was commenced, the right to recovery was then barred. The taxes were paid by one who bore no privity to the debt, and owed the mortgagee no duty concerning it. His conduct implied no recognition either of the existence of the notes or of the right to enforce them. It was entirely independent of, and unrelated to, any cause of action the plaintiff might have. It had, and could have, no effect whatever upon the conduct or rights of the mortgagee, and waiver cannot be predicated upon it.

The judgment of the district court is affirmed.

All the justices concurring.

The Question of Who may Plead the Statute of Limitations is discussed at length in the monographic note to Hopkins v. Clyde, 104 Am. St. Rep. 742-770.

STEPHENSON v. CORDER.

[71 Kan. 475, 80 Pac. 938.]

NEGLIGENCE—Runaway Team—Proximate Cause.—If a farmer leaves his team standing in front of a store, having tied one of the horses to a hitching rail with a halter apparently in good condition, while he goes back and forth from the wagon to the store unloading his produce, and a boy in turning over the hitching rail strikes one of the horses, which causes them to break loose and run away, resulting in injury to a third person, the striking of the horse by the boy is the proximate cause of the accident. (p. 506.)

Herrick & Herrick and Ivan D. Rogers, for the plaintiff in error.

Charles E. Elliott, for the defendant in error.

475 CUNNINGHAM, J. This was an action to recover for personal injuries caused by a runaway team. There was no material conflict of the evidence as to ⁴⁷⁶ the facts of the case. Mr. Stephenson was a market gardener living about seventeen miles from the city of Wellington, to which city during the season for marketing fruit and vegetables, for the term of over twelve years, he drove two or three times a week with his loads of produce. For four years of this time prior to August 5, 1901, he drove the same team that he did upon that day. It consisted of a horse and a mare, each eleven years old. They had been raised and broken by Mr. Stephenson and used upon his farm and for road purposes. His young daughters were accustomed to drive the team, and they were considered safe and trustworthy by him. On one occasion, two years prior to the date above named, a team consisting of the mare in question and another horse, while standing unhitched in a field, became frightened at the sudden appearance through a near-by hedge of Mr. Stephenson's young daughter, and ran off with a plow to which they were attached. On another occasion the same mare with another horse, becoming unhitched in some unknown way in the town of Belle Plaine, ran about a block and a half. No other instances of misconduct or viciousness by this team or either of them were shown. They were well broken and quiet, and had never been known to pull at the halter when hitched.

On August 5, 1901, Mr. Stephenson, in accordance with his custom, drove to Wellington with a load weighing from eigh-

teen hundred to two thousand two hundred pounds and stopped in front of a grocery store in order to unload his produce. He drove up in an angling direction toward the hitching-rail, so that, the mare being on the inside and nearest the rail, he hitched her only. The headstall of the halter with which she was hitched was made of one and a quarter inch leather; the hitching part was a rope a half-inch or more in diameter. It was a halter which he had been in the habit of using, but for how long does not appear; it was apparently ⁴⁷⁷ in a fair condition. When he drove up he noticed some boys standing around. They not infrequently came to him to get such damaged fruit or melons as he might wish to give them, and for that purpose frequently climbed upon the hind part of the wagon.

After hitching the team he proceeded to unload his produce, passing back and forth from the wagon to the grocery. While he was in the grocery on one of these trips a boy, in turning over the hitching-rail, or, as the witness termed it, making a "flip-flop," struck the mare on the nose with his foot, frightening the team, and causing them to rear back with such force as to break the chin-strap of the halter with which the mare was hitched. The team broke loose, ran down the street and collided with a buggy in which Miss Corder was riding, threw her out, and very severely injured her. Before the boy struck the mare with his foot the team had been standing quietly. It was accustomed to being hitched in this manner and place. A verdict was returned in favor of the plaintiff below and judgment entered thereon.

Many errors are assigned, some of which might serve to reverse the judgment and remand the case for a new trial. We prefer, upon the plain facts of the case, to address ourselves to vital questions, rather than to mere matters of practice. The basis of defendant's liability, of course, was his alleged negligence in leaving his team standing insecurely hitched or fastened. The only delinquency in this respect which can be claimed from the evidence is that the chin-strap of the halter was not sufficient, and the only evidence to support such a claim is that it broke. It may well be questioned whether under the evidence in this case the fact that it broke draws with it any presumption that the strap was so defective as to make its use under ordinary circumstances negligence. In *Missouri etc. Tel. Co. v. Vandervort*, 71 Kan.

⁴⁷⁸ 101, 79 Pac. 1068, where a neck-yoke strap was broken by the sidewise plunge of a frightened team, this court said: "There is no evidence from which the jury might have found that the harness was defective, the only evidence being that of the plaintiff himself, where he said 'my harness had been used about five months, or scarcely that.' "

There was little, if anything, more shown in the case at bar.

Ordinary care is all that was required of the defendant, and ordinary care does not require that all possible means for avoiding accident should be used. Quite true, the accident would not have occurred had the horses been hitched to an unbreakable rack with an unbreakable chain; nor would it have occurred had not the defendant driven to the city on that day; but ordinary care does not require the use of such precautions. If it did, it would, in the language of this court in *Cleghorn v. Thompson*, 62 Kan. 727, 64 Pac. 605, 54 L. R. A. 402, "paralyze human effort and action on all lines." What the defendant was doing at the time was what he had done many times before without injury, and apparently what he or any reasonably prudent man would have done under the circumstances. It is suggested that the fact that he saw boys about there ought to have warned him that some of them might do the thing that the boy in question did. We hardly think this suggestion can be seriously urged; certainly it cannot be seriously entertained. Nor do we see anything in the character of the team which warranted any extraordinary precaution in the matter of fastening them. Whatever of dereliction was shown was not because of their breaking loose when tied, but because the mare had run away on two separate occasions upon sufficient provocation, or otherwise. Ordinarily the team was roadworthy, being well broken and quiet, and it is shown that neither ⁴⁷⁹ of them had ever been known to pull at the halter when hitched.

Did affirmance rest upon a sufficient showing of defendant's negligence we should greatly hesitate. The further question of the proximate cause of the injury, however, demands our attention. The jury, in answer to one of the special questions, and in exact accordance with the evidence, found that the horses were frightened and caused to run away by the boy's striking with his foot the one that was tied. So, granting that the team was not tied as securely as ordinary care would have required, we are confronted with the fact

that this neglect did not cause the accident, and it is well settled that it is the proximate cause of an injury which must bear the burden of the result. Many law-writers and courts have attempted to give us a fairly intelligible definition of proximate cause which should be of such flexibility as to be adapted to general application. They have indifferently succeeded. A definition from one of the most recent authors and, perhaps, from all considerations one of the fairest, is the following: "Negligence is the failure to exercise the ordinary care of prudent men under all the attending circumstances. It follows that the negligence of a person cannot be the proximate cause of a harm to another following it, unless, under all the attending circumstances, ordinary prudence would have admonished the person sought to be charged with the negligence that his act or omission would probably result in injury to some one. The general test as to whether negligence is the proximate cause of an accident is therefore said to be whether it is such that a person of ordinary intelligence should have foreseen that an accident was liable to be produced thereby. Proximate cause is, therefore, probable cause, and remote cause is improbable cause": 1 Thompson's Commentaries on the Law of Negligence, sec. 50.

This court early attempted to analyze the philosophy and make a definition of proximate cause. It ⁴⁸⁰ said in the case of Atchison etc. R. R. Co. v. Stanford, 12 Kan. 354, 15 Am. Rep. 362, in speaking of a wrongdoer: "He is responsible for any number of injurious results consecutively produced by impulsion, one upon another, and constituting distinct and separate events, provided they all necessarily follow from the first wrongful cause. Any number of causes and effects may intervene between the first wrongful cause and the final injurious consequence; and if they are such as might, with reasonable diligence, have been foreseen, the last result, as well as the first, and every intermediate result, is to be considered in law as the proximate result of the first wrongful cause. But whenever a new cause intervenes which is not a consequence of the first wrongful cause, which is not under the control of the wrongdoer, which could not have been foreseen by the exercise of reasonable diligence by the wrongdoer, and except for which the final injurious consequence could not have happened, then such injurious consequence

must be deemed to be too remote to constitute the basis of a cause of action."

The court in *Wright v. Chicago etc. Ry. Co.*, 27 Ill. App. 200, quoted the foregoing with approval, and added that the words in italics point out the correct distinction. In the case of *Chicago etc. Ry. Co. v. Bell*, 1 Kan. App. 71, 41 Pac. 209, the law relative to proximate cause was stated as follows: "Before an act of negligence can be made the basis for a recovery of damages it must appear that such act was the natural and proximate cause of the injury, or directly contributed thereto."

In the case of *Cleghorn v. Thompson*, 62 Kan. 727, 64 Pac. 605, 54 L. R. A. 402, the following from *City of Allegheny v. Zimmerman*, 95 Pa. 287, 40 Am. Rep. 649, was quoted with approval: "One is answerable in damages for the consequences of his faults only so far as they are natural and proximate, and may therefore have been foreseen by ordinary forecast, and not for those arising from a conjunction ⁴⁸¹ of his own faults with circumstances of an extraordinary nature."

In the case of *Missouri Pac. Ry. Co. v. Columbia*, 65 Kan. 390, 69 Pac. 338, 58 L. R. A. 399, this court gave its most recent views upon the question. In its ultimate conditions it bears a strong analogy to the one at bar. In the syllabus the court announced the law as follows:

"In a case where two distinct, successive causes, wholly unrelated in operation, contribute toward the production of an accident resulting in injury and damage, one of such causes must be the proximate, and the other the remote, cause of the injury.

"A prior and remote cause cannot be made the basis of an action for the recovery of damages if such remote cause did nothing more than furnish the condition, or give rise to the occasion, by which the injury was made possible, if there intervened, between such prior or remote cause and the injury, a distinct, successive, unrelated and efficient cause of the injury.

"In a case where it is either admitted, or from the facts as found established, that two distinct, successive causes, unrelated in their operation, conjoined to produce a given injury, the question of remote and proximate cause becomes one of law for the decision of the court, and not of fact for the

determination of the jury, and the determination of this question of law by the jury is not binding or conclusive on the court."

In the body of the opinion this further discussion was had:

"The existence or nonexistence of negligence in any given case, wherein the facts are disputed, is a question of fact to be determined by the jury. When the facts are undisputed, and only one inference or deduction is to be drawn from them, a question of law is presented for the court: *Dewald v. Kansas City etc. R. R. Co.*, 44 Kan. 586, 24 Pac. 1101. However, it is not every act of negligence that furnishes a basis for recovery of damages sustained. In the case of *Cleg-horn v. Thompson*, 62 Kan. 727, 64 Pac. 605, 54 L. R. A. 402, this court held: 'Negligence, to be actionable, must result in damages to some one, which ⁴⁸² result, in the absence of wantonness or malus animus, might have been reasonably foreseen by a man of ordinary intelligence and prudence, and be the probable result of the initial act. The allegation of negligence is not sustained by evidence of acts resulting in damage to another, which result is not the reasonable and ordinary outcome of such acts, and which would not have been foreseen or anticipated by the exercise of ordinary prudence and foresight under all the circumstances of the case. . . . Negligence is not the proximate cause of an accident unless, under the circumstances, the accident was a probable as well as natural consequence thereof—one which might reasonably have been foreseen by a man of ordinary intelligence and prudence': *City of Allegheny v. Zimmerman*, 95 Pa. 287, 40 Am. Rep. 648.

"In cases of this character where two distinct, successive causes, unrelated in operation, to some extent contribute to an injury, it is settled that where there is an intervening and direct cause, a prior and remote cause cannot be made the basis for recovery of damages, if such prior cause did no more than furnish the condition, or give rise to the occasion, by which the injury was made possible. It seems to be sound in principle and well settled by authority that where it is admitted or found that two distinct, successive causes, unrelated in their operation, conjoin to produce a given injury, one of them must be the proximate, and the other the remote, cause of the injury, and the court, in passing on the

facts as found or admitted to exist, must regard the proximate as the efficient and the consequent cause, and disregard the remote cause."

Now, if we grant that the chin-strap of the halter was defective and that this sufficiently appeared in the evidence, and that Stephenson knew of this defect, can it be said, in view of the law heretofore laid down by this court, that such defect was the proximate cause of the accident? The injurious result would not have followed had not the new and independent cause intervened. This new cause had no causal connection with the negligence of Stephenson. The hitting of the mare on the nose by the boy was not caused by ⁴⁸⁸ the defect in the halter, nor was it under the control of Stephenson; nor can it be said with the slightest fairness that it could have been foreseen by the exercise of reasonable diligence on his part. The most that can be said is that the defect, if any, in the halter and the frightening of the team were two distinct, successive causes, wholly unrelated in operation, which contributed to the production of the accident resulting in the injury and damage; and, therefore, the frightening of the team, being the immediate and probable cause, was the proximate cause, and the defect in the halter, being the secondary and improbable cause, was the remote cause. This being so, the defendant was not liable for the unfortunate accident, and his request that the jury be so instructed should have been granted.

The judgment is reversed, and the case remanded for further proceedings.

All the justices concurring.

The Doctrine of Proximate and Remote Cause is the subject of an extended note to *Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 807-861. The proximate cause of an injury is that act or omission which immediately causes or fails to prevent the injury; an act or omission occurring or concurring with another which, had it not happened, the injury would not have been inflicted: *Chattanooga Light etc. Co. v. Hodges*, 109 Tenn. 331, 97 Am. St. Rep. 844. The proximate cause is the superior or controlling agency as contradistinguished from those causes which are merely incidental or subsidiary to the principal or controlling cause: *Snyder v. Philadelphia Co.*, 54 W. Va. 149, 102 Am. St. Rep. 941; *Georgetown Tel. Co. v. McCullough*, 118 Ky. 182, 111 Am. St. Rep. 294.

STATE v. KANSAS NATURAL GAS, OIL, PIPE-LINE
AND IMPROVEMENT COMPANY.

[71 Kan. 508, 80 Pac. 962.]

HIGHWAYS—Use for Pipe-lines by Gas Company.—A corporation organized to transport and distribute natural gas for fuel, light, and power may, as against the state, bury its pipe-lines in the public highways, if public travel is not thereby interfered with. (pp. 508, 509.)

C. C. Coleman, attorney general, Mayo Thomas, J. H. Dana, W. E. Ziegler and Waggener, Doster & Orr, for the state.

John J. Jones, F. J. Fritch, H. C. Dooley, J. K. Cubbison, C. E. Benton, Lee & Mackey, S. H. Piper, Cornelius D. Scully and M. E. Williams, for the defendant.

⁵⁰⁸ **GREENE, J.** This is an original proceeding in quo warranto, brought on the relation of the attorney general against the Kansas Natural Gas, Oil, Pipe-line and Improvement Company, a private corporation organized under the laws of Kansas for the transportation and distribution of gas for light, fuel, and power, to oust it from burying its pipe-lines in the public highway. The defendant bases its claim of right thus to occupy the public highway on permission obtained from the abutting fee owners. The gas company has filed a motion to dismiss this proceeding for the reason that quo warranto will not lie, but, in our opinion, this contention cannot be sustained, and the motion is denied.

⁵⁰⁹ The right of the gas company to bury its pipes in the public highway for the transportation and distribution of gas depends largely upon the effect such use would have on the subsequent use of the highway as a thoroughfare for public travel. It may be said that the gas company could not, and did not, as against the state, obtain from the abutting fee owners any right to use the public highway for any purpose. Its use belongs to the public and not to the owners of adjoining property. It is true that there are some privileges which such an owner may exercise for the betterment of the adjacent estate, but he has no power to transfer to another any right to occupy the highway for any purpose.

By the provisions of section 1 of chapter 128 of the Laws of 1901 (Gen. Stats. 1901, sec. 1366), companies organized

for the purpose of piping and distributing gas for light, fuel and power are given authority to exercise the right of eminent domain. The privilege thus conferred stamps them as quasi public corporations. It was said in the case of *La Harpe v. Elm Twp. etc. Gas Co.*, 69 Kan. 97, 76 Pac. 448, that "the production and distribution of natural gas for light, fuel and power is a business of a public nature." Public highways are arteries of communication and of intertraffic in the commodities of the country. The means to accomplish these purposes change with the advance of civilization.

A public road, as a way of traffic and transportation, must, so far as possible, meet the demands of the people, and is subject to be used for such purposes by any means not destructive of its use as a public thoroughfare. When such ways first came into use the means of travel were on foot or on the backs of beasts; later, articles of traffic were transported by wheeled vehicles drawn by horses and oxen, and that is the general method employed to-day. It could not, however, be held that the highway could not be used for the transportation of passengers and for traffic by automobiles.

⁵¹⁰ The contention of the state is that the use which the gas company is making of the highway is exceptional, and may be exercised only under a franchise from the state, mediate or immediately. We think this is an overstatement of the proposition. The use is not exceptional. The transportation of commodities on the highway is one of the uses for which it has always been maintained. The means, however, used by the gas company in the transportation of its gas are exceptional. A demand for this method has not heretofore existed in this state; but shall this fact alone deprive the defendant of the use of the highway for a usual and proper purpose, unless such use necessarily obstruct, seriously inconvenience or endanger public travel? In *McCann v. Telephone Co.*, 69 Kan. 210, 76 Pac. 870, 66 L. R. A. 171. it was held that the use of a rural highway by a telephone company was not an additional servitude for which the owner of the fee could recover compensation. Speaking of the general use of a highway, the court said: "It is variously defined or held to be for passage, travel, traffic, transportation, transmission, and communication. . . . The use is not to be measured by the means employed by our ancestors, or by the conditions which existed when highways were first devised. The design of a highway is broad and elastic enough

to include the newest and best facilities of travel and communication which the genius of man can invent and supply."

The public highway is maintained for the transportation of the commodities of the country, and the means employed for such purpose need only be such as not to interfere with public travel to the extent hereinbefore stated. It is not shown that such privilege has been abused by the defendant in this case, nor is it claimed that the use by the gas company has or will incommode or obstruct public travel. Judgment for plaintiff is therefore denied.

All the justices concurring.

For Authorities bearing upon the decision in the principal case, see the monographic note to *Mordhurst v. Ft. Wayne etc. Co.*, 106 Am. St. Rep. 266.

ABERCROMBIE v. SIMMONS.

[71 Kan. 538, 81 Pac. 208.]

DEEDS.—In Construing a Doubtful Description in a conveyance, the court must keep in mind the position of the contracting parties and the circumstances under which they acted, and interpret the instrument in the light thereof. (p. 511.)

DEEDS—Indefiniteness of Description.—A Deed to a Right of Way to a railroad company describing the land as all of a specified quarter section "lying within fifty feet of the center line of the main track of said railroad," is not void for indefiniteness of description, if the railroad had been surveyed and staked out prior to the conveyance, though it was never constructed, and a few days after the conveyance a map and profile of the road were made by the company and subsequently filed with the county clerk. (p. 511.)

DEED OF RIGHT OF WAY—Nature of Title Conveyed.—An instrument in form a general warranty deed conveying a strip of land to a railroad company for a right of way does not vest an absolute title in the grantee. The interest conveyed is limited by the use for which the land is acquired, and upon the abandonment of that use the property reverts to the adjoining owner. (pp. 515, 516.)

Frank A. Lutz and F. J. Knight, for the plaintiff in error.

Burnham & Dashiell, for the defendants in error.

⁵³⁸ **JOHNSTON, C. J.** This was an action of ejectment to recover a strip of land one hundred feet wide that had been obtained from Joseph Simmons by the Chicago, Kansas and Western Railroad Company, and subsequently ⁵³⁹ sold

by the railroad company to John H. Abercrombie. In 1887 the railroad company surveyed and staked out a route for a railroad through Mitchell county, and on July 13th of that year, when about to begin construction of the railroad over the land owned by Joseph Simmons, it purchased from him the strip of land that is the subject of this action. The conveyance that he made was in form a general warranty, wherein the property was described as "all the land in the southwest quarter of section fifteen (15), township nine (9) south, of range seven (7) west, lying within fifty feet of the center line of the main track of said railroad, and containing six and twenty-three hundredths (6.23) acres, more or less." A week later—on July 20, 1887—the railroad company made a map and profile of the route intended to be adopted, which was subsequently filed in the office of the county clerk. The railroad was never constructed, nor even graded, over the Simmons land. The entire quarter section was inclosed and cultivated by Joseph Simmons while he lived, and it has remained in the exclusive possession of J. N. Simmons and Laura Simmons, who became the owners of the tract. The railroad company, however, paid taxes on the strip of land until April 28, 1898, when it executed a deed purporting to convey the strip to the plaintiff, describing it as it was described in the deed from Simmons to the railroad company.

Later, in 1903, the plaintiff asserted a claim of ownership to the strip of land through the quarter section, and as his claim was denied he brought this proceeding to enforce it. The trial court found upon the facts, which were mainly agreed to, that the strip of land was conveyed by Simmons and received by the railroad company for use as a right of way for a railroad, and that the plaintiff was not entitled to recover.

It is insisted by the plaintiff that the railroad company ⁵⁴⁰ acquired an absolute title to the strip of land, and that nothing less was conveyed to him. The defendants contend, first, that the deed of Simmons to the railroad company was so indefinite in the description of the property conveyed as to be defective, and, second, that if the description be held to be sufficient and the instrument valid it did not convey anything more than a right of way, and hence when it was not used for that purpose it reverted to the original owner, or to those holding under him.

It is claimed that it was impossible to locate or identify the land from the description given; that the description of a part of a quarter section "lying within fifty feet of the main track of the railroad" furnished no means of identification, where, in fact, no railroad had been built. The agreed facts, however, show that prior to the execution of the deed the company contemplated the construction of a railroad over this land, and had actually surveyed and staked out a route and line. The map and profile of the route was in the course of preparation, and was completed a few days later, and this was the one that was filed with the county clerk. The company was negotiating for land upon which to construct and operate a railroad. It had marked out on the face of the land the line or track where it proposed to build. The owner sold it to the company for that purpose, and obviously both parties contracted with reference to these facts. In construing a doubtful description in a conveyance the court must keep in mind the position of the contracting parties and the circumstances under which they acted, and interpret the language of the instrument in the light of these circumstances. When so construed we may fairly say that, as the only way of locating the strip was by a resort to the line that had been surveyed and staked out by the company as the statute authorized, the parties contracted with reference to this survey and it may be looked to as a part of the ⁶⁴¹ description. Under the principle that that will be considered certain which can be made certain we can look not only to the survey but also to the map and profile made by the company.

In *Denver etc. Ry. Co. v. Lockwood*, 54 Kan. 586, 38 Pac. 794, the court considered a description in a deed that was attacked for indefiniteness, and which purported to convey fifty feet on each side of a center line of a route that had been surveyed, staked and located. It was said that "the law will not declare a deed void for uncertainty when the light which contemporaneous facts and circumstances furnish renders the description definite and certain," and following this rule the court held the deed to be valid: *Tucker v. Allen*, 16 Kan. 312; *Seaton v. Hickson*, 35 Kan. 663, 12 Pac. 22; *Thompson v. Southern C. Motor Road Co.*, 82 Cal. 497, 23 Pac. 130; *Pennsylvania R. R. v. Pearsol*, 173 Pa. 496, 34 Atl. 226; *Crafts v. Hibbard*, 4 Met. (45 Mass.) 438;

Oxford v. White, 95 N. C. 525; Horton v. Murden, 117 Ga. 72, 43 S. E. 736; Armstrong v. Mudd, 10 B. Mon. 144, 50 Am. Dec. 545; Lohff v. Germer, 37 Tex. 578; McPike v. Allman, 53 Mo. 551.

Was the interest that the railroad company acquired by the deed one that it could convey to plaintiff? The general rule is that in the absence of charter or statutory restrictions corporations may take, hold and convey land for any purpose not inconsistent with the objects for which they were created. It is competent for the legislature to prescribe the purpose for which land may be acquired and held by corporations, and in this state the legislature has conferred on such corporations the power "to take and hold such voluntary grants of real estate and other property as shall be made to it to aid in the construction, maintenance and accommodation of its railway; but the real estate received by voluntary grant shall be held and used for the purpose of such grant only, and to purchase ⁵⁴² and hold, with power to convey, real estate, for the purpose of aiding in the construction, maintenance and accommodation of its railway": Gen. Stats. 1901, sec. 1316. Aside from this provision there is in the same section authority given to enter upon the lands of others for the purpose of selecting and surveying a route for a proposed railway, and in that connection to lay out a road not exceeding one hundred feet in width, and a greater width where the proper construction of the road requires it. It is provided, too, that a map and profile of the route intended to be adopted shall be made, and that notice shall be given to all occupants of lands on the designated route that have not been purchased or donated: Gen. Stats. 1901, secs. 1318, 1319. There is another provision for obtaining land for a right of way by compulsory process under the power of eminent domain: Gen. Stats. 1901, secs. 1359-1365.

The statutes recognize that land for a right of way may be acquired by purchase as well as by compulsory proceedings. When so purchased for that purpose does the railroad company hold a higher or better right than where it is acquired by virtue of eminent domain? May a railroad company purchase a strip of land extending a great distance through the country and over many farms, abandon the enterprise, and then sell the strip to those who will put it to a wholly different use—one that might be both obnoxious and

menacing to the adjoining owners? Where an absolute and unqualified fee simple title is acquired by a railroad company, it may, of course, in the absence of express or implied restrictions, be conveyed to another. After stating this rule Judge Elliott remarks: "But where there is an implied restriction, as is often the case in regard to the right of way, or the like, of a railroad company, the grant does not ordinarily vest a fee in the company, but vests such an estate, usually an easement, as is requisite to effect ⁵⁴³ the purpose for which the property is required. Where the grant is of 'surplus real estate,' as it is often called, that is of real estate not forming part of the railroad or its appendages, a deed effective to vest a fee in a natural person will vest that estate in a railroad company": 2 Elliott on Railroads, sec. 400.

The fact that the deed contains covenants of warranty, or that the right acquired is designated as a fee, is not necessarily controlling. In *Jones v. Van Bochove*, 103 Mich. 98, 61 N. W. 342, consideration was given to a conveyance of a strip of land that was described as a right of way for a railroad between certain points, and although the instrument was in the form of a warranty deed it was held that an absolute title was not conveyed. In *Cincinnati etc. Ry. Co. v. Geisel*, 119 Ind. 77, 21 N. E. 470, there was a deed releasing and quitclaiming to a railroad company a right of way eighty feet wide through a certain tract of land, and it was held that the company did not acquire the fee of the land. In the opinion it was said: "It does not follow that because a railroad company may take an estate in fee, or a right of way of a defined width, it does take such an estate, or such a right of way, for parties may by their contract create a less estate than a fee, or a right less in extent than that which the law authorizes the grantee to acquire: *Indianapolis etc. R. R. Co. v. Reynolds*, 116 Ind. 356, 19 N. E. 141."

In the case of *Hill v. Western Vermont R. R. Co.*, 32 Vt. 68, it was said: "A contract to convey land for a particular use, or to a party having capacity to acquire a certain estate in land for a particular use, must of necessity carry the implication of such limitation upon the estate to be conveyed."

In *Norton v. London etc. Ry. Co.*, L. R. 9 Ch. D. 623, the railroad company acquired a fee to a strip of land for a

right of way. A ⁵⁴⁴ question arose as to the right of the railroad company to erect a blind, or barrier, to obstruct the view from a building of an adjoining owner, and it was held that although the company held the fee to its right of way it held it "in that qualified manner in which land taken for particular purposes is taken," and that "they had only a right to the fee simple of the land for the purpose for which they acquired it, namely, the construction and perpetual working of the railway," and for that reason the right to build the barrier and obstruct the plaintiff's view was denied. In the same case it was also held that an abandonment of a portion of the right of way operates to vest that portion in the owner of the adjoining land.

In the case of New York etc. R. R. Co. v. Aldridge, 135 N. Y. 83, 32 N. E. 50, 17 L. R. A. 516, a dispute arose between a land owner who had conveyed land along a waterfront in fee to a railroad for a right of way and the railroad company—whether such owner of the land not conveyed was a riparian owner, or whether the right had passed to the railroad company. The decision was against the railroad company, and the court held that although the railroad company received title to its right of way "in fee simple by the voluntary grant of the former owners, . . . by the provisions of the statute it holds such real estate and can use it only for the purposes expressed in its charter, that of the maintenance, construction and accommodation of the railroad. For this purpose only the land can be used, and although the title granted to the company is a fee, yet as thus burdened and restricted, we think the grantor in conveying the strip did not thereby cease to be the owner of the upland within the meaning of the statute.

"The conveyance to the railroad of the strip in question is in its effects entirely unlike the conveyance to a private individual in fee simple. In the latter case, it may well be, the grantor even of so narrow a strip would lose his character of riparian owner and the grantee would acquire it. But when we consider ⁵⁴⁵ the purpose of the conveyance to the railroad and the limitations to its use which the statute itself placed upon the company, it becomes entirely plain that the grantor ought not to lose his character of riparian owner where he retains the property immediately adjoining that which he conveys."

In *Chouteau v. Missouri Pac. Ry. Co.*, 122 Mo. 375, 22 S. W. 458, 30 S. W. 299, land was conveyed to a railroad company by general warranty deed for railroad purposes, and it was held that the company did not acquire a fee in the land, and, further, that the conveyance by the husband extinguished the inchoate right of dower of the wife in the land, although she did not join in the conveyance. In effect this was a following of the ruling made in *Kellogg v. Malin*, 50 Mo. 496, 11 Am. Rep. 426.

In *Uhl v. Railroad Co.*, 51 W. Va. 106, 41 S. E. 340, there was a contract for the execution of a deed conveying a strip of land for a right of way in fee simple, and it was held that the words "right of way" in a grant to a railroad company mean an easement and do not pass the absolute title, and that the railroad company did not take oil or other minerals under the land.

The supreme court of Iowa, in *Ottumwa etc. Ry. Co. v. McWilliams*, 71 Iowa, 164, 32 N. W. 315, held that a contract that recited that certain land was to be conveyed to a railroad company for a right of way, and also that it should be conveyed by deed in fee simple, was a contract for a right of way merely, and not for a fee simple title to the land: See, also, *People v. White*, 11 Barb. (N. Y.) 26; *Cleveland etc. R. W. Co. v. Coburn*, 91 Ind. 557; *Pipe Line Co. v. Delaware etc. R. R. Co.*, 62 N. J. L. 254, 41 Atl. 759.

Now, as we have seen, the deed and those things to which we may look in its interpretation plainly ⁵⁴⁶ show that the strip was sold on the one part, and purchased on the other, as and for a right of way for a railroad. This use, being within the contemplation of the parties, is to be considered as an element in the contract, and limits the interest that the railroad acquired. It took the strip for a specific purpose, and could hold it so long as it was devoted to that purpose. Whether the right of way purchased should be designated as an easement or as a qualified or determinable fee may not be very important. A right of way, although commonly designated as an easement, is an interest in land of a special and exclusive nature, and of a high character. In speaking of its character the supreme court of the United States said: "A railroad right of way is a very substantial thing. It is more than a mere right of passage. It is *more* than an easement. We discussed its character in New Mexico

v. United States Trust Co., 172 U. S. 171, 19 Sup. Ct. Rep. 128, 43 L. ed. 407. We there said (page 183) that if a railroad's right of way was an easement it was 'one having the attributes of the fee, perpetuity and exclusive use and possession; also the remedies of the fee, and, like it, corporeal, not incorporeal, property'": Western Union Tel. Co. v. Pennsylvania R. R., 195 U. S. 540, 25 Sup. Ct. Rep. 133, 49 L. ed. 312.

Whatever its name, the interest was taken for use as a right of way, it was limited to that use, and must revert when the use is abandoned.

We are not called upon to decide, nor do we intend to express an opinion, as to the rule applicable where lands are purchased or obtained without regard to the use to be made of them, or where there is nothing in the contract or conveyance indicating that they have been purchased for a right of way. Lands may be acquired by donation or by voluntary grant for aid in the building of railroads, and railroad companies may doubtless acquire lands for various uses in connection with railroad business that could not be taken by virtue of eminent domain, and as to these different ⁵⁴⁷ rules may apply. It is intended to confine the decision to cases where the contract or conveyance shows that the land was sold and received for use as a right of way for a railroad. The conclusion is that the plaintiff acquired no interest in these lands by the attempted conveyance by the railroad company to him, and, therefore, that the judgment of the district court is affirmed.

All the justices concurring.

Clark A. Smith, J., not sitting, having been of counsel.

A Conveyance to a Railroad Company of a strip of land for a right of way is generally regarded as vesting only an easement and not the fee in the grantee: Smith v. Holloway, 124 Ind. 329, 24 N. E. 886; Vermilya v. Chicago etc. Ry. Co., 66 Iowa, 606, 55 Am. Rep. 279; Jones v. Van Bochove, 103 Mich. 98, 61 N. W. 342; ChoctEAU v. Missouri Pac. Ry. Co., 122 Mo. 375, 30 S. W. 299; Blakely v. Chicago etc. Ry. Co., 46 Neb. 272, 64 N. W. 972. In some cases, however, the fee itself is held to be conveyed: Ballard v. Louisville etc. R. R. Co. (Ky.), 5 S. W. 484; Philadelphia etc. R. R. Co. v. Obert, 109 Pa. 193, 1 Atl. 398.

WELD v. WELD.

[71 Kan. 622, 82 Pac. 183.]

THE STATUTE OF FRAUDS does not Render Void the verbal contracts to which it refers; they are valid for all purposes except that of suit. (p. 518.)

STATUTE OF FRAUDS.—If a Woman Marries a man in consideration of his parol agreement that the marriage shall operate as a satisfaction of her debt to him, the agreement is fully performed when the marriage takes place, and is not thereafter affected by the statute of frauds. (p. 519.)

V. D. Bullen and B. T. Bullen, for the plaintiff in error.

John C. Hogin, for the defendants in error.

⁶²² BURCH, J. Judith R. Kidder executed and delivered to Augustus Weld her promissory note for a sum of money, and secured its payment by a mortgage upon her real estate. Subsequently she married him in consideration of his parol agreement that the marriage should operate as a satisfaction of the note. Still later he brought a suit against her to recover on the note and to foreclose the mortgage. She pleaded payment, and upon a trial the jury returned a general verdict in her favor, and made answers to special questions as follow:

"1. Did the plaintiff and the defendant Judith R. Weld (then Judith R. Kidder), before they were married, and after the note in suit had been given, enter into a parol contract or agreement whereby it was mutually agreed between them that in consideration that said Judith would thereafter marry the plaintiff the note in suit should, upon such marriage, be by the said parties mutually regarded as paid or satisfied? A. Yes.

"2. If you answer the preceding question 'yes,' then did the defendant Judith R. Weld, in pursuance ⁶²³ of such alleged contract and as a performance thereof on her part, marry the plaintiff? A. Yes."

Judgment was rendered for the defendant for costs. It is now urged that the evidence supporting the plea of payment was inadmissible because the contract, being oral, is within the statute of frauds, and marriage is not a sufficient part performance to remove the bar, and that the evidence admitted was not sufficient to sustain the verdict.

It is true the statute of frauds provides that no action shall be brought to charge any person upon any agreement made upon consideration of marriage unless the agreement upon which the action is brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person by him or her lawfully authorized: Gen. Stats. 1901, sec. 3174.

It is likewise true that authorities may be found to the effect that generally marriage is not a sufficient part performance to avoid the effect of the statute; but there is no question of part performance in this case. The contract was fully executed when the defendant married the plaintiff. Nothing further was to be done by either party to satisfy its obligations. The agreement was not that the plaintiff would after marriage deliver money or property or securities to the defendant in consideration of the marriage, or that he would after marriage execute and deliver to her legal documents affecting her property rights. It simply was that the debt should be paid when they were married.

Some of the evidence on behalf of the defendant, as given by different witnesses, is as follows:

"They were out in the yard, and they came into the house, and he put his hand on her shoulder and said: 'Well, Anna, you needn't worry about the debt; after we are married the debt will be paid.'

"About three weeks after they were married they came back to our house. She and I were preparing ⁶²⁴ something for dinner. We were in the dining-room, and he was outside pitching a tent. He came into the room. He slapped her on the shoulder, and he said to me: 'Anna need not worry no more about the debt; her mortgage is paid.'

"We were talking, he and I and his wife, about the indebtedness on the place. My recollection is now that he told her that there was no indebtedness on the place. Right then I said to him that to protect Anna, his wife, he ought to cancel the mortgage. He said that would be the first thing to do when they got home."

The statute of frauds does not render void the verbal contracts to which it refers. They are valid for all purposes except that of suit: *Stout v. Ennis*, 28 Kan. 706. The parties may perform them if they desire, and when performed the statute has no application to them: 29 Am. & Eng. Ency. of Law, 829, 941.

The plaintiff argues the case as if the contract were that he should enter of record a satisfaction of the mortgage. Such, however, was not the tenor of the agreement, and that duty followed, upon demand being made, whenever the debt was paid: Gen. Stats. 1901, sec. 4224. Since the parol evidence introduced established a contract fully performed, it was competent.

The evidence might perhaps have been made the basis of different conclusions as to the existence of the contract relied upon as a defense to the suit. It was, therefore, properly submitted to the jury for interpretation. The jury has performed its duty in that respect, and the trial judge has approved the result. Hence, this court will not interfere.

Other assignments of error all converge in the proposition first discussed above, and need not be separately considered.

The judgment of the district court is affirmed.

All the justices concurring.

The Performance of a Contract in full takes it out of the operation of the statute of frauds: *Larsen v. Johnson*, 78 Wis. 300, 23 Am. St. Rep. 404. The statute has no application to executed, but only to executory, contracts: *Merrill v. Witherby*, 120 Ala. 418, 74 Am. St. Rep. 39; *Bates v. Babcock*, 95 Cal. 479, 29 Am. St. Rep. 133; *Norris v. Lilly*, 147 Cal. 754, 109 Am. St. Rep. 188. On part performance of oral contracts as taking them out of the operation of the statute, see the recent cases of *Chase v. Hinckley*, 126 Wis. 75, 110 Am. St. Rep. 896; *Hall v. Misenheimer*, 137 N. C. 183, 107 Am. St. Rep. 474; *Cooper v. Colson*, 66 N. J. Eq. 328, 105 Am. St. Rep. 660.

HARTLEY v. HARTLEY.

[71 Kan. 691, 81 Pac. 505.]

CONFLICT OF LAWS.—Damages Recovered for a wrongful act committed in Iowa and resulting in the death of a resident of Kansas are to be distributed according to the law of the domicile of the deceased, the Iowa statutes providing that "when a wrongful act produces death, damages recovered therefor shall be disposed of as personal property belonging to the estate of the deceased." (p. 523.)

H. L. Alden, for the plaintiff in error.

Hale & Maher, for the defendants in error.

⁶⁹² BURCH, J. Walter E. Hartley, a citizen and resident of Wyandotte county, Kansas, sustained fatal injuries in the state of Iowa under circumstances warranting an action under the laws of Iowa for damages resulting from his death. A representative of his estate was appointed by the probate court of his domicile, who collected damages for his death from the party committing the wrongful act, and the question to be decided is, How shall the fund be distributed? Of course, the statutes of Iowa must be examined in order to arrive at an answer: 2 Wharton on Conflict of Laws, 3d (Parm.) ed., sec. 480d, p. 1129; 13 Cyc. 382; 22 Am. & Eng. Ency. of Law, 1356.

The agreed facts show that in Iowa an action for damages resulting from death by wrongful act may be brought by the legal representative of the deceased, but unlike the statutes of Kansas and of many other states, the Iowa law does not in terms designate the persons for whose benefit the action may be brought and prescribe the manner in which the amount recovered shall be divided among them. It merely provides that "when a wrongful act produces death, damages recovered therefor shall be disposed of as personal property belonging to the estate of the deceased, but if the deceased leaves a husband, wife, child or parent, it shall not be liable for the payment of debts."

When, therefore, the damages in controversy came ⁶⁹³ into the hands of the administratrix of the deceased they bore the same relation to his estate as money belonging to him at the time of his death kept in a safe or safety deposit vault in the state of Iowa (leaving out of account the exemption from liability for the payment of debts). Such money, being personal property, and belonging to the estate of the deceased, would be disposed of according to the law of his domicile: Moore v. Jordan, 36 Kan. 271, 59 Am. Rep. 550, 13 Pac. 337; Wilkins v. Ellett, 76 U. S. 740, 19 L. ed. 586; 2 Wharton on Conflict of Laws, 3d (Parm.) ed., sec. 576a; 14 Cyc. 21. So these damages, being treated for purposes of disposition as personal property belonging to the estate of the deceased, should be distributed according to the law of his domicile.

It is contended, however, that the statute of Iowa already quoted must be interpreted as if it read "personal property belonging to the estate of a deceased resident of the state of Iowa." This interpretation would make the statute of de-

scents and distributions of the state of Iowa applicable, but it would affix a limitation upon the law which its language does not warrant.

Quite analogous suggestions relating to other provisions of this class of statutes have been rejected by high authority. Thus it has been claimed that when such statutes provide for a recovery by the personal representative of the deceased they refer only to a personal representative appointed in the state giving the right of action. Upon this subject Justice Miller, speaking for the supreme court of the United States, said:

"But it is said that, conceding that the statute of the state of New Jersey established the liability of the defendant and gave a remedy, the right of action is limited to a personal representative appointed in that state and amenable to its jurisdiction.

"The statute does not say this in terms. 'Every ⁶⁸⁴ such action shall be brought by and in the names of the personal representatives of such deceased person.' It may be admitted that for the purpose of this case the words 'personal representatives' mean the administrator.

"The plaintiff is, then, the only personal representative of the deceased in existence, and the construction thus given the statute is, that such a suit shall not be brought by her. This is in direct contradiction of the words of the statute. The advocates of this view interpolate into the statute what is not there, by holding that the personal representative must be one residing in the state or appointed by its authority. The statute says the amount recovered shall be for the exclusive benefit of the widow and next of kin. Why not add here, also, by construction, 'if they reside in the state of New Jersey'?

"It is obvious that nothing in the language of the statute requires such a construction": *Dennick v. Central R. R. Co.*, 103 U. S. 11, 26 L. ed. 439.

To the same effect is a decision of the court of appeals of the state of Missouri: "But it is argued that the legislature of Illinois could not have intended to give such a right of action to a foreign administrator—to an administrator appointed in a state other than the state of Illinois. It is argued that the words 'personal representative,' in the Illinois statute, must be limited in their meaning to an executor or an administrator appointed in that state. Why should we so hold?

The statute does not say so. If the domicile of the deceased person was in Missouri, if his general estate is here, why should it be held necessary for his next of kin to cause ancillary administration to be taken out in Illinois, and to go to the expense of prosecuting an action there, at a place distant, it may be, from their own domicile? This whole branch of the argument proceeds in the very face of the statute. It says that the action shall be brought by the personal representative of the deceased; the plaintiff is that personal representative, and yet the contention is that he shall not be allowed to maintain the action": *Stoeckman v. Terre Haute etc. R. Co.*, 15 Mo. App. 503.

Following the thought expressed in *Dennick v. Central R. Co.*, 103 U. S. 11, 26 L. ed. 439, it may be said that advocates of the view referred to interpolate into the statute of Iowa what is not there by holding that "personal property belonging to the estate of the deceased" means "personal property belonging to the estate of a deceased resident"; and they might as well add by construction to the words of the next clause, "husband, wife, child or parent," the limitation "if they reside in the state of Iowa."

When properly discriminated, the decided cases and the statements of text-writers based upon such cases which have been cited in favor of disposition according to the statute of descents and distributions of Iowa are not controlling.

In the District of Columbia and in the state of North Carolina there are special legislative directions that the fund shall be divided according to the law of descents and distributions: 23 U. S. Stats. at Large, 307, c. 126, sec. 3; *Stewart v. Baltimore etc. R. R. Co.*, 168 U. S. 445, 18 Sup. Ct. Rep. 105, 42 L. ed. 537; North Carolina Code, secs. 1478, 1500; *Hartness v. Pharr*, 133 N. C. 566, 98 Am. St. Rep. 725, 45 S. E. 901.

The statute of Illinois, interpreted by the courts of Kentucky and Missouri in the case of *McDonald v. McDonald's Admr.*, 96 Ky. 209, 49 Am. St. Rep. 289, 28 S. W. 482, and *Stoeckman v. Terre Haute etc. R. Co.*, 15 Mo. App. 503, differs from that of Iowa in two particulars. It first designates specifically the persons who are to receive the fund, and then it refers to the law of descents and distributions for the rule by which the proportion of each shall be ascertained. It is not necessary to canvass the entire list of cases cited for the purpose of distinguishing them.

The statute of Iowa is unambiguous. It clearly places damages recovered on account of death occasioned by wrongful act in the category of ordinary personal property belonging to the estate of the deceased. The statute of descents and distributions of ~~the~~ that state has no application to personal property belonging to the estate of a deceased nonresident. Therefore the fund in controversy is to be distributed according to the law of the domicile of the deceased.

The judgment of the district court is reversed, with direction to enter judgment for the plaintiff in error upon the agreed facts.

All the justices concurring.

Porter, J., not sitting.

For Authorities bearing upon the principal case, see Estate of Coe, 130 Iowa, 307, ante, p. 416, and cases cited in the cross-reference note thereto.

WELLINGTON NATIONAL BANK v. ROBBINS.

[71 Kan. 748, 81 Pac. 487.]

BANKING—Forged Indorsement—Recovery of Money Paid.—If an indorsement is forged on a check, and the check is paid by a bank which then indorses it and collects it from the drawee bank, and thereafter the payee recovers judgment against the drawee bank on account of the payment, the latter may recover from the other bank the amount of such judgment, together with the expenses and reasonable attorney fees incurred in defending the suit, it having notified such bank of the suit and requested it to come in and defend, which it neglected to do. (p. 525.)

Ed. T. Hackney, for the plaintiff in error.

C. E. Elliott, for the defendant in error.

740 SMITH, J. On the 5th of September, 1898, Kettering & Sons were indebted to the Parkhurst-Davis Mercantile Company in the sum of two hundred and forty-nine dollars and seventy-one cents, and had on deposit in the plaintiff bank sufficient funds to pay this sum. On that day they drew their check on plaintiff for that amount and delivered it to one F. H. Teale, a salesman of the mercantile company. Teale indorsed the check "Parkhurst-Davis Mercantile Company,

per F. H. Teale, salesman," presented the same to the defendant bank, and received from it thirty-two dollars in cash and a draft for the balance, payable to the order of the mercantile company. Teale forwarded the draft to the mercantile company with instructions to credit it on two accounts other than that of Kettering & Sons, and converted the thirty-two dollars cash to his own use. The defendant indorsed the check "The Farmers' Bank, Wellington, Kan., paid September 6, 1898," delivered it to the plaintiff, and received full payment thereof.

The mercantile company, after learning of the transaction, claimed that the indorsement of the check by Teale was a forgery, that he was not authorized to indorse any check payable to them, and demanded full ⁷⁵⁰ payment of the check from the plaintiff, and, upon refusal, brought an action against the plaintiff for the sum of two hundred and forty-nine dollars and seventy-one cents. The plaintiff informed the defendant of the bringing of the action, and requested it to come in and defend, to which the defendant paid no attention. Plaintiff defended, and the action resulted in a judgment in favor of the mercantile company against the plaintiff for the sum embezzled by Teale, which, with interest, amounted to thirty-nine dollars and forty-seven cents, and costs, aggregating eighty-five dollars and twelve cents.

The plaintiff paid the judgment of the mercantile company and demanded payment from the defendant, which was refused, and thereupon brought this action for the amount so paid, and fifty dollars attorney's fees, aggregating one hundred and thirty-five dollars and twelve cents. The defendant answered by a general denial, and alleged negligence on the part of the plaintiff in failing to discover and notify defendant of the forgery. An agreed statement of facts was made in open court, embodying substantially the foregoing statement, with the additional agreement that the plaintiff had paid fifty dollars attorney's fees in the action against it by the mercantile company and that the amount so paid was reasonable.

Plaintiff was given judgment for thirty-nine dollars and forty-seven cents, with interest, to which it excepted. The plaintiff's motion for a new trial was denied, and it brings the case here for review, alleging error by the court in the amount of the judgment and rulings upon the evidence.

Under the agreed statement of facts in this case the defendant was responsible to the plaintiff for the money it paid out upon the check with the forged indorsement. The rule, as laid down in a note to *People's Bank v. Franklin Bank*, 88 Tenn. 299, in ⁷⁵¹ volume 17 of the *American State Reports*, page 898, reads: "Money paid upon a forged indorsement of a check or draft may be recovered back. The bank or drawee is not bound to know the signature of an indorser. And the holder, whether he indorses the instrument or not, warrants the genuineness of all prior indorsements. If, therefore, a check or draft upon which the name of a prior indorser has been forged is paid, the amount may be recovered back from the party to whom it has been paid, or from any party who indorsed it subsequent to the forgery."

The case of *Corn Exchange Bank v. Nassau Bank*, 91 N. Y. 74, 43 Am. Rep. 655, cited by the defendant, sustains this doctrine, but in that case it was held that the drawee was not entitled to recover the expenses of the suit, for the reason that it had not discharged its duty to the defendant as a depositor. In the case at bar, however, the plaintiff, upon being sued for the entire amount of the check, notified the defendant in writing and requested it to assume and take charge of the defense of the case. This it was the defendant's duty to do, and it neglected to do it. The owner of the defendant bank, however, testified as a witness in that action, and had every opportunity to have any defense made that it could have made if it in fact had been a party. It was the duty of the defendant to see the plaintiff harmless on its contract of warranty that the indorsement of the mercantile company on the check was genuine, and it ill becomes the defendant to say that when the plaintiff was sued it should have paid the full amount claimed and then sought to recover it from the defendant. The plaintiff defended in good faith, employed counsel in good faith and at an agreed reasonable price, and saved the defendant over two hundred dollars, and is entitled to recover the full amount claimed. The agreed statement of facts embraces every question material to the determination of the case, and the evidence offered and introduced by the defendant devolved ⁷⁵² neither upon the trial court nor upon this court the weighing of evidence to determine the facts.

In the case of *Bank v. Williams*, 62 Kan. 431, 63 Pac. 744, the court quotes from section 58 of *Sutherland on Damages*, second edition, as follows: "If one's property is taken, injured or put in jeopardy by another's neglect of duty imposed by contract, or by his wrongful act, any necessary expense incurred for its recovery, repair or protection is an element of the injury. It is often the legal duty of the injured party to incur such expense to prevent or limit the damages; and, if it is judicious and made in good faith, it is recoverable, though abortive."

At the trial, after the agreement as to the facts given in the statement, the plaintiff rested. The defendant then offered evidence, over the objection of the plaintiff, of the custom between the banks at Wellington, and of the understanding of the cashier of the defendant bank as to the meaning of the indorsement placed by it upon the check, all of which we think was incompetent.

The act of the plaintiff in defending the action of the mercantile company was in good faith, and was not abortive, but resulted in great good to the defendant. By so much more ought the plaintiff to recover.

The judgment of the district court is reversed, and the case is remanded with instructions to enter judgment for the plaintiff for one hundred and thirty-five dollars and twelve cents, with interest at the rate of six per cent per annum from November 19, 1901, and for costs.

All the justices concurring.

The Rights and Remedies of the several parties when a forged check has been paid are discussed in the monographic note to *People's Bank v. Franklin Bank*, 17 Am. St. Rep. 889-899; and the liability of one receiving payment of a check on a forged indorsement is discussed in the monographic note to *First Nat. Bank v. City Nat. Bank*, 94 Am. St. Rep. 641-650. For subsequent decisions on these questions, see *Farmers' etc. Bank v. Bank of Rutherford*, 115 Tenn. 64, 112 Am. St. Rep. 817; *Land Title etc. Co. v. Northwestern Nat. Bank*, 211 Pa. 211, 107 Am. St. Rep. 565.

SOUTHWORTH v. PERRING.

[71 Kan. 755, 81 Pac. 481.]

PARTY-WALL—Covenant Running with Land.—If the respective owners of two adjoining lots enter into an agreement, expressly binding their heirs and assigns, which provides that the wall of a building one of them is about to erect shall be placed upon the dividing line, and that when the other builds he shall use it as a party-wall and pay the first party one-half its value, and after the building is erected both lots are conveyed, the grantee of the vacant lot who builds thereon and makes use of the wall must make payment therefor to the grantee of the improved lot. (p. 532.)

Hurd & Hurd and Humphrey & Humphrey, for the plaintiff in error.

S. S. Smith, for the defendant in error.

⁷⁵⁵ MASON, J. In 1885 the respective owners of two adjoining lots entered into a written contract, by the terms of which it was agreed that one of them, who was about to erect a brick and stone building upon his lot, should place one of the walls upon the dividing line, and that when the other should build he would use this wall as a division wall, and pay him half its value. The agreement concluded with these words: "The parties hereto bind and obligate their heirs, executors, administrators and assigns to the fulfillment of all the terms and covenants of this agreement."

The building was accordingly erected. In course of time the lot on which the building stood was conveyed to Hiland Southworth and the other lot to E. L. ⁷⁵⁶ Perring. In 1901 Perring built upon his property, and made use of the party-wall. Southworth then demanded of him pay for half its value, and upon payment being refused brought action to enforce it. Judgment was rendered against the plaintiff, who prosecutes error.

As appears from this statement the questions involved are: (1) Whether the right to compensation provided for in the contract, under the circumstances stated, remains with the individual who constructed the wall, or has passed to Southworth in virtue of his being the owner of the lot upon which the first building was erected at the time the wall was made use of by the adjoining proprietor; (2) whether the liability to pay a part of the value of the wall still exists against the original owner of the second lot, who made the contract,

or has shifted to its present owner, who made use of the wall. Similar contracts have been a fruitful source of litigation, and the question whether they are to be treated as purely personal to their makers or may be regarded as creating covenants running with the land is one upon which there is much diversity of opinion and conflict of authority. The adjudicated cases are so completely gathered and so thoroughly digested in a note to *Cook v. Paul*, 4 Neb. (unofficial) 93, 93 N. W. 430, published in volume 66 of the *Lawyers' Reports, Annotated*, page 673, that there would be little purpose in attempting to add to the presentation there made of the state of the law on the subject, as disclosed by the decisions of the courts. An editorial note on the subject in volume 89 of the *American State Reports*, page 941, gives a concise but comprehensive review of the arguments and authorities by which the various theories adopted are supported, introduced by the following paragraph: "The question whether the grantee or assignee of the builder can recover on a covenant for contribution for the cost of a party-wall, and whether the grantee or assignee of the covenantor is liable on such covenant, ⁷⁵⁷ is one upon which much learning and research have been spent, and upon which the decisions are in irreconcilable conflict, and almost equally divided. Even in the same state different results have been reached under facts almost similar, and prior rulings are distinguished in a manner beyond the comprehension of the ordinary person."

Collections of pertinent decisions are also to be found in volume 38 of the *American Digest*, Century edition, columns 1907-1912, and in volume 22 of the *American and English Encyclopedia of Law*, pages 255, 256. An English case, decided in 1900 (*Irving v. Turnbull*, 2 Q. B. 129), bears upon some aspects of the matter.

In New York the extreme position is maintained that a contract of this character is so entirely personal in its nature that it cannot be made to run with the land in any aspect, even if the parties desire it and clearly so express themselves. This view is thought by the author of one of the notes cited to be the result of a misinterpretation of an early case: 66 L. R. A. 677, 678. In Illinois it is held that the obligation to pay for the wall whenever used runs with the land of the nonbuilder, and lodges against the owner who erects the second building and joins to the wall, but that the right to re-

ceive the compensation is personal and remains with the individual who built the wall, notwithstanding any agreement the parties may have made to the contrary, on the ground that the agreement in this respect is of such a nature that the law does not permit it to be attached to the real estate: *Gibson v. Holden*, 115 Ill. 199, 56 Am. Rep. 146, 3 N. E. 282. Elsewhere, however, it is generally conceded to be competent for the parties to make the privilege as well as the duty created by such an agreement follow the ownership of the land, and the disputed question in each case is whether they have done so, the conflict of authority arising upon the interpretation of the language employed. Different conclusions ⁷⁵⁸ as to the intentions of the parties are reached by different courts upon substantially the same state of facts, according to the view taken of the general nature of such contracts. A court that regards them as closely related to the real estate, and inherently adapted to run with it, will be persuaded that it was the intention of the parties that they should do so upon much less evidence than would convince another court that considers them as essentially personal.

In the brief of the defendant in error much reliance is placed upon the opinion in *Cook v. Paul*, 4 Neb. (unofficial) 93, 93 N. W. 430, 66 L. R. A. 673, which was also referred to approvingly by the trial court in announcing its judgment. There, after an extended discussion covering the whole scope of the inquiry, the conclusion is reached that "the more accurate statement of the law is still the one announced by the learned editor of the *American Decisions* [Mr. Freeman] in volume 92, page 301, of that series, as follows: 'The majority of the authorities maintain that these covenants are not of the nature of covenants running with the land, and that the grantees of the original parties cannot, by reason of their holding the adjoining lots, take advantage of the benefit, or be subjected to the burden, of the covenant to pay for one-half of a party-wall, but that the right of recovery is personal to the builder, and the obligation to pay, except in certain cases, rests upon the covenantor only; and an agreement of the parties that the covenant shall be binding upon their heirs or assigns, etc., or even that it shall run with the land, is ineffectual.' "

The cogency of the reasoning employed in that case, of course, cannot be affected by any outside consideration, but

its force as an authority is seriously impaired by a later expression of the same court: *Loyal Mystic Legion v. Jones* (Neb.), 102 N. W. 621, where this language was used: "In a later case—*Cook v. Paul*, 4 Neb. (unofficial) 93, 93 N. W. 430, 66 L. R. A. 673, not officially reported—it is said [quoting the extract just given]. This doctrine is broader than the rule laid down by the prior decisions ⁷⁵⁹ of this court. *Cook v. Paul* is one of the class of cases known in this state as 'unofficial'; and, as is said by Holcomb, C. J., in *Flint v. Chaloupka* (Neb.), 99 N. W. 825, speaking of opinions of this character, 'the court is not necessarily bound by anything said therein, nor to the propositions of law enunciated on which the conclusions are predicated. It approves only the conclusions.' We do not, therefore, consider it as in any way establishing the legal proposition contained in the opinion. In most of these cases the question was as to the liability of the party using the wall, and the view taken by the court was that the contract, so far as affects the obligation of the subsequent user of a party-wall to pay for the same, usually runs with the land. But in the instant case the question is different. It is, To whom is the money payable? It will be observed that this court has heretofore adhered to the doctrine that such covenants run with the land, at least so far as the obligation of the user of the wall to pay for the same is concerned."

The court then decided that under the terms of the contract there involved the payment was required to be made between the persons owning the lots when the second building was constructed. As suggested in that case, the question whether the right to receive payment on account of the party-wall passes with successive grants of the land is a more difficult one than whether the obligation to make the payment devolves upon the person who joins to the party-wall. It is easier to find support in reason and authority for holding that the obligation to make payment runs with the land than for holding that the right to receive payment does. The important inquiry in the present case is, therefore, whether Southworth is entitled to collect payment for half the value of the wall. If he is not, the judgment must be affirmed. If he is, the same considerations that justify that conclusion will necessarily compel also the determination that Perring is the person who must make the payment, and the judgment must be reversed.

In the note in volume 89 of the American State Reports, ⁷⁶⁰ page 941, to which reference has already been made, the reasoning in support of the doctrine that the right to demand payment from the second builder passes with each conveyance of the land of the first builder is thus presented: "It seems to us that the more reasonable rule is that an agreement between the owners of adjoining premises, whereby one is to build a party-wall, one-half on the land of each, and the other to pay for one-half of its construction when he uses the wall, creates cross-easements as to each owner, running with the land, with or without notice to the grantee, and is binding on all persons succeeding to the estates to which such easement is appurtenant, and that a purchaser of the estate of an owner so contracting must be required to pay one-half of the cost of the wall, if it is unpaid for at the time of his purchase, and he afterward avails himself of its benefits [citing cases]. Under this view the title to the whole wall may be regarded as appurtenant to the lot of the builder, and so passes by every conveyance of it until the severance of the one-half by the payment of the purchase money. The sale of the one-half of the wall does not occur, nor the title to it pass, until the payment is made, and thus, necessarily, it is constructively a sale by the assignee of so much of the wall. His right to the purchase money is not because he is assignee of a covenant running with the land, necessarily, but because he is a vendor of so much of the wall, for which the party using it is liable."

With regard to the effect of the decisions bearing upon the question the note continues: "Quite a respectable number of well-considered cases maintain the doctrine that the right to that portion of a party-wall resting on the lot of an adjoining owner is not personal to the owner of the lot on which the building is erected, but one running with the land, and that a conveyance of the lot on which the building is erected passes to the grantee the right to recover of the adjacent owner the value of one-half of the wall when used by him [citing cases]. And this rule has been enforced especially under agreements wherein ⁷⁶¹ the covenantor has covenanted for himself, his executors, heirs, or assigns." (Page 942.)

These expressions are perhaps entitled to peculiar weight from the fact that the note in which they occur bears internal evidence of being a revision of the note in volume 92 of the American Decisions, from which was taken the extract quoted

in *Cook v. Paul*, 4 Neb. (unofficial) 93, 93 N. W. 430, 66 L. R. A. 673.

Without attempting to declare what general principles relating to the question presented are sustained by the greater number of decisions, we shall decide it upon these considerations: We regard contracts of the character of that here involved as in their nature so related to the real property affected, and so adapted to impose their obligations and bestow their benefits upon the successors in title of the land owners by whom they are made, that the purpose that they shall have that effect is readily to be inferred from the employment of language having any substantial tendency in that direction. In the present case we hold that the use of the clause making the terms of the contract binding upon the heirs, executors, administrators and assigns of the parties sufficiently indicates that intention. What the effect of the omission of that provision might have been we do not now determine.

The judgment is reversed, with directions to render judgment for the plaintiff.

All the justices concurring.

OPINION DENYING A PETITION FOR REHEARING.

Per CURIAM. In a motion for a rehearing the defendant in error very forcibly urges a reconsideration of the decision in this case, contending that the conclusion reached by the court is not only against the weight of authority but is supported by but one case—that of *Sharp v. Cheatham*, 88 Mo. 498, 57 Am. Rep. 433. The motion includes a review of the cases cited ⁷⁶² in that part of the editorial note from volume 89 of the American State Reports, page 941, which is quoted in the foregoing opinion. In the course of this review it is pointed out that some of these cases do not at all sustain the proposition in support of which they are cited; that others—those from New York and Illinois—are against the law as it is now established in those states; that others—those from Pennsylvania and Iowa—are controlled by special statutes; that others originate in contracts containing express provisions that their covenants run with the land; that one of them—an Ohio case—is based in part upon New York decisions that have since been overruled. The note in question was quoted chiefly for its clear statement of the argument in favor of what may be called the cross-easement theory. In

this view it is unaffected by the considerations just noted, but so far as it purports to exhibit the law as settled by adjudication its force is to some extent diminished by them. It must be conceded also that none of the cases in which the right to receive compensation from one using a party-wall already built is held to pass to the grantee of the builder arose upon a contract precisely like the one here involved. Nevertheless the fact remains that the weight of authority supports the view that party-wall contracts may be so drawn as to have this effect, and that in each case the question is whether such is the intention of the parties, as shown by the language used. Moreover, there is abundant authority for the proposition that this intention may be inferred from a provision that the money shall be paid to the first builder or his assigns: See 66 L. R. A. 678, note, and *Platt v. Eggleston*, 20 Ohio St. 414. In *Loyal Mystic Legion v. Jones* (Neb.), 102 N. W. 621, the use of the word "grantees" in this connection is held to be evidence of such intention, while the word "assigns" is said not to be sufficient for that purpose, because it is better adapted to describe one who acquires ⁷⁶³ personalty by assignment than one who takes realty by deed. It is true that "grantees" is a less equivocal word than "assigns," but the latter is held rather to indicate the successor in title to real property than the assignee of a personal right. In *Bouvier's Law Dictionary* (title "Assigns") it is said that it is now seldom used except in the phrase in deeds, "heirs, executors, and assigns." In *King v. Wight*, 155 Mass. 444, 29 N. E. 644, it was said: "It is expressly provided that the agreement shall be binding on them [the parties] and their heirs and assigns forever, meaning clearly that the heirs and assigns of each shall succeed with the estate to the same rights and liabilities under the agreement which their predecessor in title had or might have."

In *Adams v. Noble*, 120 Mich. 545, 79 N. W. 810, the court said: "It is insisted . . . that a distinction is to be made between the cases where the covenant to reimburse is personal to the party who built the wall, and those where the covenant to reimburse is by one party, his heirs, executors, administrators, or assigns, to the other party, his heirs, executors, administrators, or assigns, and that this contract belongs to the last-named class. It is urged that, when this distinction is borne in mind, the conflict between the authorities is more ap-

parent than real. It is difficult to harmonize all the authorities, but we think they may fairly be divided into two classes—one class holding that the covenant for payment is personal, and does not run with the land, when it is apparent from the contract that the payment should be made to the party building the wall, and there are no words indicating that the right to receive payment shall pass to his assigns; the second class holding that the covenant runs with the land, and passes to the purchaser or assignee, when the contract evinces such intention, and where the language used is between the parties and their assigns, and the contract declares the covenant shall be perpetual, and binding upon the parties and their heirs and assigns.”

⁷⁶⁴ Likewise it was said, in *Conduitt v. Ross*, 102 Ind. 166, 26 N. E. 198: “It is apparent, too, that it was the intention of the parties that the covenant to pay should run with the land. The words used in that connection are those usually and aptly employed for the purpose: ‘John Hauck hereby binds himself, his heirs, executors, administrators and assigns that whenever, after the erection of said wall or walls by the party of the second part, said Hauck, his heirs, executors, administrators or assigns shall, in any building he or they may erect,’ etc., they will pay, etc. A continuing covenant may exist without the word ‘assigns,’ or ‘grantees,’ but when these or equivalent words are used they become persuasive of the intent of the parties.”

The effect of the concluding paragraph of the contract, which is quoted in the opinion, may be better determined upon a consideration of the entire instrument. It reads as follows:

“This agreement, made and entered into this twenty-second day of July, A. D. 1885, by and between G. W. C. Rohrer, and Maggie A. Rohrer, his wife, J. E. Bonebrake, and Elvira A. Bonebrake, his wife, of Abilene, Kan., parties of the first part, and W. S. Hodge and Laura T. Hodge, his wife, of Abilene, Kan., parties of the second part:

“Witnesseth, that whereas, the parties of the first part are the owners of lot seven (7), and the parties of the second part are the owners of lot six (6), in Henry, Hodge & Reed’s subdivision of Thompson & McCoy’s addition to the city of Abilene, Dickinson county, Kansas, now, therefore, the parties of the first part, for and in consideration of the promises and agreements of the parties of the second part hereinafter

contained, hereby grant and give to the parties of the second part the right and privilege to build the west wall of a two-story brick and stone building on the line separating said lots in said subdivision from each other—that is to say, one-half of said west wall of said building to be located on said lot seven (7). Said wall shall be of the following material and dimensions, to wit: The base shall be of stone, and be three ⁷⁶⁵ feet wide and ten feet high; the first-story wall shall be brick, and be sixteen inches wide and sixteen feet high; the second-story wall shall be brick, and be twelve inches thick and ten feet high; all of said wall to extend the full length of said lots on said separating line.

“And the said parties of the first part further promise and agree that when they shall build on their said lot seven (7) they will pay to the said parties of the second part one-half the value of said west wall, and use the same as a division wall; the value of the same to be fixed by three appraisers, to be selected, one by the parties of the first part, one by the parties of the second part, the two so chosen to select a third.

“The parties of the second part, for and in consideration of the promises and agreements of the parties of the first part, as herein contained, do hereby promise and agree to build said wall on the location, and of the materials and dimensions, hereinbefore described and set out, and, when said parties of the first part build on their said lot, to take one-half of the value of said wall, to be fixed and determined as hereinbefore provided, and permit the said parties of the first part to use the same as a division wall.

“The parties hereto bind and obligate their heirs, executors, administrators and assigns to the fulfillment of all the terms and covenants of this agreement.”

If the last paragraph, as contended by the defendant in error, means only that the personal obligations assumed by the parties shall be binding upon their respective estates, then, as said in the motion for a rehearing, it expresses absolutely nothing that the law does not imply, and is utterly without force. It should not be so treated if there is a reasonable and natural construction available that will give it some effect. We interpret it as in substance a stipulation that the covenants of the agreement shall run with the land. It is not expressly said that the benefits of the contract shall accrue to the heirs, executors, administrators and assigns of

the builders of the wall, but there is an express reference to the heirs, executors, ⁷⁶⁶ administrators and assigns of all the parties, and the provision that all the terms of the contract shall be binding upon them clearly indicates an intention to establish a permanent status between the respective owners of the two lots with reference to the party-wall. In the body of the contract the reading is that the first parties shall pay the money to the second parties, no mention being made of the heirs, executors, administrators or assigns of either. But the second parties affirmatively agree not only to build the wall according to certain specifications, but to take one-half the value, to be fixed in a prescribed manner, and to permit the first parties to use it as a division wall. These agreements are by the very letter of the contract made binding upon the heirs, executors, administrators and assigns of the second parties. This shows that it was within the contemplation of the parties that the payment should be made to the successors in interest of the builders of the wall quite as explicitly as though their assigns were mentioned each time they were themselves referred to in the contract.

The case of Thomson v. Curtis, 28 Iowa, 229, although turning upon the interpretation of a statute, is not without value here as illustrating a view of the relations of adjoining owners with regard to a party-wall, whether arising from statute or contract. The statute there construed provided that the owner of a building lot might rest one-half of his wall on his neighbor's land, and that the neighbor should have the right thereafter to make it a wall in common by paying half its value to the "person who built it." In the opinion it was said: "We hold that the right to the half of the wall resting upon the adjoining lot is, under our statute, a right running with the land. This holding is grounded upon both the language and the reason of the law. . . . A party who is not a neighbor—an adjoining owner—has no right to rest a half wall upon another's ⁷⁶⁷ property. This right exists only in a neighbor, and when he ceases to be a neighbor the right in him must cease also, or pass to him who becomes a neighbor in his stead. Since it is a right, privilege or easement existing in favor of an owner or neighbor, it must pass when the ownership or neighborhood passes, or it must abate entirely. It cannot exist as a separate property. The phrase, 'person who built it,' contained in the statute, can only mean

the owner, whether he became such by building the wall in person, or hiring it done by another, or by purchasing it with the lot after it is built."

The motion for a rehearing is denied.

The Question Involved in the Principal Case will be found discussed in the monographic notes to *Dunscomb v. Randolph*, 89 Am. St. Rep. 939-945; *Geiszler v. De Graaf*, 82 Am. St. Rep. 679-681; *Bloch v. Isham*, 92 Am. Dec. 301.

CASES
IN THE
SUPREME COURT
OF
LOUISIANA.

CROCHET v. McCAMANT.

[116 La. 1, 40 South. 474.]

COMMUNITY PROPERTY.—Property Bought Before Marriage
Under a Suspensive Condition remains the property of the spouse who bought it, though the condition is realized after the marriage. (p. 545.)

COMMUNITY PROPERTY.—Federal Homestead.—As soon as a husband enters upon land to acquire a homestead under the laws of the United States, he acquires a conditional ownership, and when he performs all the conditions, the title relates to the date of such entry, and it becomes community property, though, in the meantime his wife dies before he makes final proofs or becomes entitled to a patent. (pp. 546, 547.)

Fournet & Fournet, for the appellants.

McCoy & Moss, Pujo & Moss and Gorham & Gorham, for the appellees.

*** PROVOSTY, J.** Under the federal homestead law, any head of a family, or person twenty-one years old, who is a citizen of the United States, or has filed his declaration of intention to become such, as required by the naturalization laws, may acquire one hundred and fifty acres, or less, of public land without purchasing the land, but by simply paying certain fees and fulfilling certain conditions. First, he must enter the land, as the expression is; that is to say, he must apply at the local public land office for permission to enter the land, pay five dollars if he enters eighty acres or less, and ten dollars if he enters more, and make and file an affidavit that he possesses the qualifications mentioned above, and that he makes the entry for his own exclusive use and benefit, and for

the purpose of actual settlement and cultivation. He must then reside upon and cultivate the land for the five years immediately following, without changing his residence or abandoning the land for more than six months at any time. At the end of the five years, and within two years thereafter, he may, upon taking an oath of allegiance to the government of the United States, and making affidavit that he has not alienated any part of the land, and proving by two credible witnesses his residence upon and cultivation of the land for the five years, obtain a certificate, and, finally, on the strength of the certificate, obtain a patent.

Taking advantage of this law, Magloire Crochet entered one hundred and fifty-two acres and lives upon and ⁴ cultivated the same for the five years following. He did this in the lifetime of his wife, between whom and himself the community of acquets and gains existed. After the death of his wife he made the final proofs, as they are called; that is to say, he took the oath of allegiance, made the affidavit of nonalienation, and made the required proof, by two credible witnesses, of residence and occupation, and paid the fees of the officers of the land office, amounting to eight dollars. He then sold the property as belonging in its entirety to himself. His children bring the present suit against his vendees, claiming that, the land having been acquired during the existence of the community of acquets and gains, it fell into the community, and that they, as heirs of their mother, are owners of an undivided half of the same. They rely upon article 2402 of the Civil Code, reading as follows:

“This partnership or community consists of the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, of the produce of the reciprocal industry and labor of both husband and wife, and of the estates which they may acquire during the marriage, either by donations made jointly to them both, or by purchase, or in any other similar way, even although the purchase be only in the name of one of the two and not of both, because in that case the period of time when the purchase is made is alone attended to, and not the person who made the purchase.”

Defendants contend that the land was acquired after the dissolution of the community by the death of the wife, and that consequently it did not fall into the community; that

the acquisition of the land by the homesteader dates from the making of the final proofs, or, rather, from the issuance of the certificate of their having been made; and that these final proofs were made after the death of the wife.

Naturally, on the question thus raised, the governing law is the homestead statute itself. Our laws can have sway only in the silence of the homestead statute, or from the point where the homestead statute ceases to ⁵ operate. Defendants do not impugn the correctness of the decisions heretofore rendered by this court, to the effect that the property acquired under the federal homestead law during the existence of the community falls into the community: *Brown v. Fry*, 52 La. Ann. 58, 26 South. 748.

In support of their contention defendants say that, until the certificate has issued, the homesteader cannot dispose of any part of the land by sale, mortgage or lease, and it is not liable for his debts, and in case he dies no interest in it remains in his estate; and they argue that until then he cannot be said to be owner. They invoke the decision of this court in the case of *Richard v. Moore*, 110 La. 435, 34 South. 593, where it was held that in case the homesteader dies before the expiration of the five years, and his widow continues to reside upon and cultivate the land for the remainder of the time, and makes the final proofs, the title vests exclusively in her, and not in the community of acquets and gains which existed between her and her husband.

That argument is only specious, and the decision is not in point. The government, in offering to the homesteader the opportunity to acquire the property, is at liberty to impose such conditions as it chooses, and one of the conditions expressly imposed is that in case he dies before the making of the final proofs whatever rights exist under the entry and the occupation and the cultivation shall pass to his widow, and in her default to his heirs, and only in default of such heirs to his devisees. The homesteader takes the land subject to that express condition. The decision in the case of *Richard v. Moore*, 110 La. Ann. 435, 34 South. 593, enforced that provision of the statute, and both it and the statute it enforces are totally inapplicable to a case like the present one, where the homesteader has not died. It is not true that the homesteader has no interest in the land, since, in default of widow or heirs, the statute expressly permits him to ⁶ devise an

interest in it. He could not devise an interest in the land if he had none. It is not true that he may not mortgage: 27 Am. & Eng. Ency. of Law, 412. Nor is it true he may not lease any part which he himself is not occupying and cultivating, or sell his interest, such as it is.

Section 2297 of the Revised Statutes of the United States (U. S. Comp. Stats. 1901, p. 1398) provides that under certain contingencies the land "shall revert to the government." Now it is not possible for the land to "revert to the government" unless it has passed out of the government and to the homesteader. To that effect is an opinion given by Attorney General McVeagh to the Secretary of War as follows:

"It is true a certificate of entry is not then given, the certificate being, under section 2291 of the Revised Statutes of the United States (U. S. Comp. Stats. 1901, p. 1390), withheld until the expiration of five years from the date of such entry, at the end of which period, or within two years thereafter, upon proof of settlement and cultivation during that period, and payment of the commissions remaining to be paid, it is issued; but upon entry the right in favor of the settler would seem to attach to the land, which is liable to be defeated only by failure on his part to comply with the requirements of the homestead law in regard to settlement and cultivation. This right amounts to an equitable interest in the land, subject to the future performance by the settler of certain conditions (in the event of which he becomes invested with full and complete ownership), and, until forfeited by failure to perform the condition, it must, I think, prevail, not only against individuals, but against the government. That, in contemplation of the homestead law, the settler acquires by his entry an immediate interest in the land, which, for the time at least, thereby becomes severed from the public domain, appears from the language of section 2297 of the Revised Statutes of the United States, wherein it is provided that in certain contingencies 'the land so entered shall revert to the government': 1 Copp. Pub. Land Laws 1882, p. 388.

"Section 2288 of the Revised Statutes of the United States (U. S. Comp. Stats. 1901, p. 1385) provides that before the expiration of the five years the homesteader shall have the right to sell any portion of the homestead for church, cemetery, or school purposes, or for a right of way to a railroad. The statute provides that such sale 'shall in no way vitiate

the right to complete and perfect the title.' None but an owner can sell. Hence the allowance or recognition of such a right is entirely inconsistent with a negation of the ownership of the homesteader; and none but one who has a title of some kind can 'complete and perfect his title.' "

7 Under the statute, therefore, there comes into existence, in favor of the homesteader, as an effect of the entry, a certain right which, in the language of Attorney General McVeagh, "attaches to the land"; that is to say, there is established between the homesteader and the land a direct relation, by virtue of which he is invested with the moral power of holding it as against the whole world, the government included, and of appropriating the fruits, and by virtue of which he is further invested with the absolute right to a patent upon fulfilling certain conditions entirely potestative on his part—a right defeasible only in the event that before the fulfillment of the conditions he dies, leaving a widow or heirs. Now, if this relation between the homesteader and the land be not an ownership, what is it? If not an ownership, how is it to be classed in our system of land tenure? Evidently it is what is described by our code as an imperfect ownership, by which is meant an ownership which does not invest the titular with the right to use, enjoy and dispose of the property in an unlimited manner. It is furthermore a conditional ownership. But an imperfect conditional ownership under our code, is an ownership; and under our code the accomplishment of a condition has a retroactive effect to the moment of the birth of the conditional right, whereby matters are placed in the situation in which they would have been, if, from the beginning, the right had been absolute.

The articles of our code on the subject of imperfect ownership, and of conditional obligations or contracts or rights, are the following:

"Article 490. Ownership is divided into perfect and imperfect.

"Ownership is perfect when it is perpetual and when the thing is unencumbered with any real right toward any other person than the owner.

"On the contrary, ownership is imperfect, when it is to terminate at a certain time or on a condition; or if the thing which is the object ^s of it, being an immovable, is charged with any real right toward a third person; as a usufruct, use or servitude."

"Article 492. Imperfect ownership only gives the right of enjoying and disposing of the property, when it can be done without injuring the rights of others; that is, of those who may have real or other rights to exercise upon the same property."

"Art. 2021. Conditional obligations are such as are made to depend on an uncertain event. If the obligation is not to take effect until the event happens, it is a suspensive condition; if the obligation takes effect immediately, but is liable to be defeated when the event happens, it is then a resolutory condition.

"Art. 2022. Conditions, whether suspensive or resolutory, are either casual, potestative or mixed.

"Art. 2023. The casual condition is that which depends on chance, and in no way in the power either of the creditor or of the debtor.

"Art. 2024. The potestative condition is that which makes the execution of the agreement depend on an event, which it is in the power of the one or the other of the contracting parties to bring about or to hinder.

"Art. 2025. A mixed condition is one that depends at the same time on the will of one of the parties and on the will of a third person, or on the will of one of the parties and also on a casual event."

"Art. 2028. The contract of which the condition forms a part is, like all others, complete by the assent of the parties; the obligee has a right by which the obligor cannot deprive him; its exercise is only suspended, or may be defeated, according to the nature of the conditions."

"Art. 2041. The condition, being complied with, has a retrospective effect to the day that the engagement was contracted; if the creditor dies before the accomplishment of the condition, his rights devolve on his heirs."

Examples of such imperfect and conditional and defeasible ownerships readily suggest themselves. The ownership subject to usufruct, or that is burdened with servitude, or subject to the right of redemption, are instances of imperfect ownership; and the following are instances of conditional ownerships: Where the purchaser at a sheriff's sale does not pay the price, the situation, so far as the title to the property is concerned, is just as if he had not bought it at all, and yet, if he pays the price, his ownership dates from the adjudication. And so with the heir who purchases at the succession sale, and

• avails himself of the privilege extended to him by article 1343 of the code, of withholding the price until a partition of the estate can be made. His title is conditional upon payment of the price, and if he fails to pay, his title fails, and all the encumbrances he may have put upon the property fail with it: *People's Bank v. David*, 49 La. Ann. 136, 21 South. 174. A still more striking example of an infirm title is that of a purchaser at a sale, made under act 82, page 104, of 1884, of land acquired by the state at tax sales. If he fails to pay the taxes which accrued on the property subsequent to December 31, 1879, he virtually has no title at all (*Remick v. Lang*, 47 La. Ann. 914, 17 South. 461); but he may pay these taxes at any time, and thereby perfect his title (*Muller v. Mazerat*, 109 La. 116, 33 South. 104). In this last instance the purchaser has the mere shell of a title without the substance. An example of his having all the substance of the title, and not its shell, would be if he paid the price and went into possession before the act had been passed. It goes without saying that in a sale by private contract the parties may stipulate such conditions and modifications as they please, so long as they do not offend good morals or public policy, or seek to create tenures reprobated by our laws. For instance, they might agree that the sale should be subject to the same conditions as are imposed by the homestead law upon the homesteader. In all the foregoing cases the property must be considered to have been acquired at the time that the imperfect conditional title, such as it was, became vested in the purchaser subject only to the conditions imposed upon the title, and these conditions, when accomplished, have, in the language of article 2041 of the Civil Code, "a retroactive effect to the day that the engagement was contracted"; that is to say, to the day that the conditional right had its birth.

Treating of the effects of conditions, Marcade, in his commentary on article 1179 of the Code Napoleon, says:

¹⁰ "The conditional obligation, and, for the matter of that, every conditional right, whatever may be its nature, is not a right which will exist, or will not exist (in the future), accordingly as such an eventuality may or may not come to pass. It is a right which, under the contemplated condition, exists, or does not exist, at the present time. The right has not, and will never have, any existence, if the condition is not accomplished. It has, on the contrary, an actual existence, if the

condition is subsequently accomplished. The formula of the conditional obligation is not, 'I will owe you if but it is, 'I owe you if ' The obligation which would come under the formula, 'I will owe you, if ' would be not alone conditional, but also with a term. The accomplishment of the condition has, then, a retroactive effect to the moment itself of the contract."

"After the happening of the condition the situation is the same as if the obligation had come into existence at the moment of the contract and had been at once perfect": 2 Bandry-Lacantinerie, Obl., p. 35, No. 809.

"The right resulting from the engagement is considered as having vested in the contractee from the moment of the contract": Pothier, Obl. No. 220, p. 112.

A claim due only conditionally belongs to the community, even though the condition is not accomplished until after the dissolution of the community: 14 Duranton, No. 109; 12 Toullier, No. 109; 1 Troplong, No. 365; 1 Rodiere et Pont, No. 366.

Property bought before the marriage under a suspensive condition by one of the spouses remains his or her separate property, though the condition is realized after the marriage: Pothier, Communauté, n. 157; 14 Duranton, n. 171; 1 Rodiere et Pont, n. 518; 21 Laurent, n. 290; 53 Bandry-Lacantinerie, No. 54.

The same effect of retroactivity attends the accomplishment of the suspensive condition as of the resolutory. Article 2041 makes no distinction in that regard. "L'art. 1179 étant conçu dans les termes les plus généraux, le principe de la rétroactivité s'applique dans le système de notre code civil que la condition soit suspensive ou qu'elle soit résolutoire": 2 Bandry-Lacantinerie, Des Obl. p. 39, No. 810. But as a matter of fact the conditions attached by the homestead ¹¹ law to the ownership acquired by the homesteader by his entry are resolutory, and not suspensive. The government does not say, "The land will go from me to you, if you do these things," but it says, "The land shall revert to me, if," etc.

If the ownership, such as it is, were intended to be suspended until the accomplishment of the conditions, the homesteader would not be permitted to exercise the right of occupying and enjoying the property, and making the fruits his own and, under limitations, to dispose of it.

In the case of *United States v. Ball* (C. C.), 31 Fed. 667, 12 Saw. 514, the court said, "In this matter the United States is to be regarded as any other vendor of real property, and the settler, prior to the issue of the certificate, as a vendee of such property, in possession under an uncompleted contract of purchase."

In the case of *United States v. Turner* (C. C.), 54 Fed. 228, the court said: "It is clear to me that he has the right to grant any part of his possession and equitable interest to any other persons for their use and enjoyment, so long as they do no damage to the freehold or contingent reversionary interest of the government."

Under the interpretation contended for by defendant the homesteader would have acquired nothing by the entry, nothing by his five years of work. The fruits of the labor and industry of the spouses for five long and arduous years would not have fallen into the community; but thereafter, suddenly, the making of certain proofs—the fulfillment of a formality, the work of a brief hour—would endow the husband alone with what it had taken all this time and labor to earn. This would accord too little with the equities of the situation. The five years' occupation and cultivation of the land is in the nature of a price paid for it. The settler pays no money, but he pays by means of his five years' services bestowed upon the improvement of the land. The well-known object which the government has in view is the opening up and settlement of the waste ¹² places of the country. That is what it gets in return for the conveyance of the land. Now, during these five years the wife and partner in community was a colaborer by the side of the homesteader, and she, by her coequal services, earned one-half the property. This five years' residence is the consideration which the government exacts for the land. The final proofs are but matter of form—of essential form, it is true, still of mere form—the passing of the act of sale, as it were, after the contract itself has come into existence and had full operation.

As stated by Chief Justice Marshall in *Delassus v. United States*, 9 Pet. 117-133, 9 L. ed. 71: "No principle is better settled in this country than an inchoate title to lands is property."

Our conclusion is that from the moment of the entry Magloire Crochet had a conditional ownership of the land,

and that the accomplishment of the conditions under which he held it retroacted to the date of the entry, and that consequently the land was acquired during, and fell into, the community.

Magloire Crochet suffered more than seven years to elapse between his entry and the final proofs, and it is argued that he thereby forfeited his rights under the entry, and, as a consequence, acquired the land solely by the effect of the patent; but, plainly, if he acquired the land at all, it was under the homestead law, and as an effect of the entry and the five years' occupation and cultivation.

The defendants are Joseph Bertrand for fifty acres of the land, and George G. McCamant for the remainder.

McCamant has called his vendors, Isaac D. L. Williams and John H. Cooper, in warranty, and has prayed that in case he is evicted he be given judgment against his said vendors for the price he paid them for the property, three thousand three hundred and sixty dollars, together with interest thereon at the rate of six per cent from February 23, 1901, the date of his acquisition of the property.

Joseph Bertrand calls his vendor in warranty,¹³ and urges many defenses, but presumably has abandoned the case, as he has made no appearance in this court.

McCamant, not having asked that the sale by which he acquired the property should be dissolved, is entitled to recover from his warrantors only for the part from which he is evicted; that is to say, one-half. He is entitled to recover interest only in the event he is ever called upon to restore the fruits and revenues.

The suit has been dismissed as to the interest of Augustin Crochet in the fifty acres held by Joseph Bertrand.

It is therefore ordered, adjudged, and decreed that the plaintiffs, Emerand, Emile, Joachim, Augustin and Odressy Crochet, and Lyskda Crochet, wife of Jean Simon, have judgment against George McCamant for the one undivided half of the following described property situated in the parish of Calcasieu, to wit: Fractional southwest quarter and the fractional south half of the northwest quarter of section 14, township 8 south, range 3 west, except forty acres of the north part of said south half of the northwest quarter of said section 14, containing one hundred and twelve acres, more or less, and be put in possession thereof as owners.

It is further ordered, adjudged and decreed that the same above-named plaintiffs, except Augustin Crochet, have judgment against Joseph Bertrand for six-sevenths of the undivided one-half of the following described property situated in the parish of Calcasieu, to wit: Fifty arpents of land in the south half of the northwest fractional quarter of section 14, township 8 south, range 3 west, and be put in possession thereof as owners.

It is further ordered, adjudged and decreed that George McCamant have judgment against Isaac D. L. Williams and John M. Cooper jointly, as warrantors, for the sum of sixteen hundred and eighty dollars, with right reserved to the said George McCamant to claim interest on said sum from the date of his purchase, in case he is ever required to pay rents and revenues for ¹⁴ the land whereof he is evicted by the present judgment.

It is further ordered, adjudged and decreed that the call in warranty and the reconventional demand of Joseph Bertrand herein be dismissed as in case of nonsuit.

It is further ordered, adjudged and decreed that the defendant George McCamant pay one-half of the costs of this suit, and have judgment against his said warrantors jointly for like amount.

It is further ordered, adjudged and decreed that Joseph Bertrand pay one-half of the costs of this suit, with reserve of right to claim reimbursement from his warrantors.

Breaux, C. J., concurs in the decree.

A Rehearing was Granted, but the decision thereon did not involve or disturb anything determined in the original opinion, but related solely to questions of pleading and practice, and to the right and extent of the recovery of a warrantee against his warrantor. The opinion on rehearing is therefore omitted.

If, While a Husband and Wife Reside on Public Lands, and he has a preferential right to make a homestead thereon when they are surveyed, she is granted a divorce from him, she does not have any right, so it has been held, in such lands, entitling her to an interest therein on their being patented to him on his compliance with the homestead laws: Hall v. Hall, 41 Wash. 186, 111 Am. St. Rep. 1016, and see the cases cited in the cross-reference note thereto.

SCHNEIDER v. LOCAL UNION NO. 60.

[116 La. 270, 40 South. 700.]

LABOR UNIONS—Construction of Pledges or Obligations of Members.—The obligations or pledges of members of a labor union on their initiation must be construed with reference to the declared purposes of the organization, and are binding only in so far as their purposes are lawful and are to be attained by lawful means. (p. 557.)

PUBLIC POLICY.—Agreements Tending to Injure the Public Service are against the policy of the law and will not be enforced by the courts. Instances of such agreements include those to use one's influence to secure the selection of another for a public office and those restricting the exercise of a discretion vested in a public officer. (p. 558.)

LABOR UNIONS—Attempts to Compel Their Members to Aid in Securing Appointments of Certain Persons to Public Office.—The attempt of a labor union, by threats and by imposing fines, to coerce some of its members to vote for certain persons for a public office is a violation of law, whether such members had committed themselves to such voting or not. (p. 559.)

LABOR UNIONS cannot Compel Their Members Improperly Fined or Expelled to Seek Redress Solely Within the Order when there is no provision in the constitution or by-laws of the union or association for the trial of such matters, and attempts made to secure the necessary provisions proved futile. (p. 561.)

LABOR UNIONS.—The Damages Recoverable for the Unlawful Fining and Expulsion of a Member of a Labor Union may, in addition to his loss of wages, include punitive damages. (p. 561.)

William Sterling Parkerson, for the appellants.

Boatner & Manion and Wynne Gray Rogers, for the appellees.

272 MONROE, J. The two plaintiffs above named, alleging similar causes of action against the same defendants, filed separate suits, which were subsequently consolidated and tried together, with the result that separate judgments were rendered against the defendants, by whom separate appeals were taken, which have been brought before this court in the same transcript and docketed under the same number.

Plaintiffs allege that they have been members, in good standing, of Local Union No. 60 (of this city) of the United Association Journeymen Plumbers, Gas Fitters, Steam Fitters, and Steam Fitters' Helpers of the United States and Canada; that in 1902 the General Assembly of this state adopted act No. 194 providing for a board of examiners of plumbers for the city of New Orleans, pursuant to the provisions of

which the mayor named three master and two journeymen plumbers to constitute said board, and that the board as thus constituted organized upon August 26, 1903, and elected a plumbing inspector. Plaintiffs further allege that at a meeting of Local Union No. 60, held upon August 28th following, a resolution was adopted imposing upon them each a fine of twenty-five dollars, with a threat of raising it to one hundred and fifty dollars, and instructing the other members of the union not to work with them, as a consequence of which they were thrown out of employment and have so remained for the greater part of the time since then, thereby sustaining a loss in wages, each, of two hundred and fifty-nine dollars.

They further allege that they were not informed of or summoned to answer any charges, and, though they have demanded the same, have been unable to obtain either a statement of such charges or a hearing ²⁷³ thereon, and that their appeals to the United Association for redress have been fruitless. They further allege that, being dependent upon their labor, they gave to the proper officer orders covering the amounts of the fines imposed upon them, but that the union refused to receive them; that they have not violated the constitution or by-laws of the union; but that said union and the officers (naming them) have illegally and maliciously, and in violation of said constitution and by-laws, and of the laws and public policy of the state, thus fined and suspended them, with the purpose of injuring and preventing them from making a living. They further allege that their membership in said union is worth to each five thousand dollars, that the unlawful action complained of, in addition to loss of wages, has injured them in feelings and reputation to the extent of two thousand five hundred dollars, and that a continuance of the boycott against them will work injury that will be irreparable. Wherefore they pray that the defendants be enjoined from interfering with them in their business and from prohibiting or discouraging others from working with them, and that there be judgment maintaining said injunction, remitting the fine imposed upon them, reinstating them in the union, and condemning the defendants, in solido, in the sum of five thousand two hundred and fifty-nine dollars.

A preliminary injunction having issued as prayed for, the defendants answered, denying the allegations of the plaintiffs, save as specially admitted; admitting the imposition of the fines as alleged, but alleging that the same were imposed in accordance with the law of their organization; and praying that the injunction be dissolved and the suit dismissed.

It is undisputed that the plaintiffs were members in good standing of Local Union No. 60, which, in turn, was and is a member of the "United Association of Plumbers," etc. It is a fact that in 1902 the General Assembly passed a law for the establishment of ²⁷⁴ a board of examiners of plumbers in cities having thirty thousand or more inhabitants, each board to consist of five plumbers (including two journeymen), together with the health officer and engineer of the city in which it is established, the members, other than those last above mentioned, to be appointed by the mayor, with the consent of the council of such city. The act further provides that each board so constituted shall appoint one or more inspectors, to whom certain duties are assigned, and it contains other provisions which need not be here enumerated. It appears that, in July, 1902, immediately after the act in question became a law, Local Union No. 60 held a meeting at which the following action, as recorded in the minutes, was taken, to wit: "We have a secret ballot. Theodore Correjолles, Peter Llibert, E. Schekeler, E. C. Hawley, and Frank Robinson were placed in nomination, which resulted in Frank Robinson and Peter Llibert elected to act as board of examiners, and Theodore Correjолles to act as reserved member. Brothers Wm. McGilvray, Wm. Price, and E. Glennon were placed in nomination. Brother McGilvray was elected as chief inspector. Carried."

It seems, however, that the mayor and council of New Orleans were indisposed to be controlled in selecting their appointees, for they tendered the petitions of journeymen members of the board to Messrs. Patterson and Ybos, who were also members of Local Union No. 60, and thereupon, in December, the organization resolved and ordered that "any member accepting positions on plumbers' board except regular appointed members of Local No. 60, be fined one hundred dollars and be expelled from the union," to which was added, "We tender Brothers Patterson and Ybos a vote of thanks for declining positions on plumbing board."

Thereafter, whether at the request of the mayor, or of its own motion, does not appear, on March 25, 1903, Local No. 60 sent its roster to the mayor (to quote the minutes), "so he can select two members for the ²⁷⁵ plumbing board"; the original motion to that effect having been amended to read (quoting again from the minutes): "We leave out the following four names: Theodore Correjollles, Frank Robinson, W. Patterson, and L. Ybos."

So the mayor received the roster of the union, less the names of Patterson and Ybos, who had already, in view of the persuasive action of the union, declined the appointments, and those of Correjollles and Robinson, whom he had already declined to appoint, and he selected therefrom the names of the plaintiffs, to whom he gave the appointments, which action was approved by the union on April 9, 1903; the minutes of the meeting of that day reading: "The names selected by the mayor of the two members of Local No. 60 to act as members of plumbing board be indorsed by this local. Carried."

It further appears that the union afterward found some reason to doubt whether the plaintiffs, who had thus become public officials, would see their way, in the discharge of the obligations which they had assumed to the community at large, to voting for McGilvray as inspector, and it accordingly on April 23, 1903, resolved that "Brother Schekeler and Brother Schneider be instructed to vote for Local No. 60's candidate for inspector," to which was added: "We give Brother McGilvray credentials as candidate No. 60 for plumbing inspector." And this, apparently, not producing the desired effect, the union, on August 25, 1903 (the night before that upon which the board was to select the inspector), adopted the following: "Motion by Knable, and seconded by Sutherland, that the two members of L. U. No. 60 who were appointed on the plumbing board be fined twenty-five dollars, and, with the sanction of the executive committee of the U. A. the fine be increased to one hundred and fifty dollars, if they do not vote for Brother William McGilvray as inspector of plumbing for the city of New Orleans. Any other member outside of McGilvray, taking the position of plumbing inspector, be fined same as two members of plumbing board. Any member taking ²⁷⁶ position of plumbing inspector be expelled from local."

The plaintiffs, nevertheless, persisted in ignoring McGilvray, and voted for men who (plaintiffs say) were, in their opinions, better qualified for the position; Schekeler voting for one O'Dowd, and Schneider voting for Glennon, lately president of the union. The union thereupon (on August 27th) ordained that "the constitution and by-laws be enforced in regard to Brothers Schekeler and Schneider in regard to their action on the board of examiners," and on September 14th it became more explicit, as will appear from the following excerpt from its minutes, to wit: "President De Leon ruled that members who worked in shops with E. Schekeler and S. Schneider, after knowing that said men were working in said shops, be fined not less than five dollars. So ordered. Brother William O'Brien appealed from the decision of the chair, after which a vote was taken, and the chair was sustained by a vote of 32 to 5. So ordered. Moved and seconded that Brothers who had worked with E. Schekeler and S. Schneider on Monday, September 14th, be fined the amount of two days' wages, and if they continued to work with said men on Tuesday, September 15, 1903, they be fined the sum of twenty-five dollars each additionally. Amendment. That fine so collected be paid to brothers who quit work on account of Schekeler and Schneider," etc.

This action resulted in the discharge of the plaintiffs by their employers, and they then busied themselves in an effort to obtain relief, first through Local Union No. 60, and later through the United Association, as follows:

1. On August 29th a petition bearing the signatures of six members in good standing was addressed to the officers and members of the union praying that a special meeting be called on August 31st to reconsider the action taken in the case of Brothers Schekeler and Schneider.

2. On September 1st a petition bearing the signatures of twelve members in good standing was addressed to the officers and members of the union praying that a special meeting be called for September 2d to receive communication and committee from the ²⁷⁷ board of examiners of plumbers.

3. A petition, the date of which does not appear, bearing the signatures of twenty-nine members in good standing, was addressed as the others had been, praying that a special meeting of the union be called for September 4th to receive committee and communication from the board of examiners of

plumbers, and also to reinstate Messrs. Schekeler and Schneider and allow them to pay the fine of twenty-five dollars each under protest, and appeal their case to the executive board. In this connection it is proper to note that, shortly after the fines were imposed, the plaintiffs each gave to the authorized officer of the union an order upon his employer for the amount of the fine, which orders were returned to them, by instructions from those higher in authority, and by the same authority the boycott against them was thereafter persisted in. The first of the petitions above mentioned was given to William Donegan, one of the defendants, and is not otherwise accounted for. The petition next mentioned, signed by twelve members, was delivered to the secretary of the union, and, no action having been taken, the plaintiffs on inquiry were informed by the president and acting president that the meeting would not be called because there was a counter petition out, signed by seventeen members. The petition last mentioned, signed by twenty-nine members, was delivered to the secretary and (to quote the testimony of the plaintiff, Schekeler, corroborated by Schneider and contradicted by no one):

"A special meeting was called to meet at the Odd Fellows Hall. When they assembled there it was found that they had no room to meet in. I think Mr. Matthews and other members went to a hall in Exchange Alley and hired it, and said, 'Go there.' But the acting president at the time, Mr. De Leon, says, 'This is where the meeting is to be called for.' I didn't hear it myself, because I was at the corner. (Objection.)

"Q. You were not invited to proceed down to Exchange Alley, were you? A. No, sir.

"Q. Was there a meeting held that night? A. No, sir.

"Q. Was that due to any fault of yours? A. No, sir.

....
"Q. You were ready to attend any meeting? A. Yes, sir. I ²⁷⁸ was standing half a block away, waiting for the meeting to be called. There were about twenty men with me.

"Q. How many men were there ready to attend the meeting? A. I guess nearly all the association, seventy-five or eighty.

"Q. And no meeting was held that night? A. No, sir."

Schneider estimates the number present at a somewhat lower figure, and otherwise corroborates the testimony of Schekeler, and states that he, like Schekeler, was on hand. No further steps were taken by the officers to convene the union, and on September 3d plaintiff's counsel (Mr. Manion) wrote a long letter to the general secretary of the United Association, fully explaining the situation and asking that the matter be acted on. To this letter he received a reply, dated September 8th, in which the writer (the secretary and treasurer of the United Association), after acknowledging Mr. Manion's letter and the receipt of a copy of the act of 1902, said: "Before we can proceed with this case, it will be necessary to consult the other side, which will be done by this mail. As soon as a reply is received, you will be promptly informed."

Hearing nothing more from either the union or the association, the plaintiff Schekeler, on September 16th, wired the general secretary: "Cannot get the union to act in my case. Can get job in nonunion shop; shall I take it till my case is finally decided by you. Wire answer at once. Collect."

And to this telegram the secretary replied, September 16th: "Can't find anything on file about your case. Letter follows, also inquiry to Local 60."

On September 25th plaintiff's counsel, who had been temporarily absent, wrote to the secretary (after referring to the telegram of September 15th), saying: "To their [plaintiffs'] surprise, you answer on the 16th inst., 'Can't find anything on file about your case. Letter follows, also inquiry to Local 60.' And on the same date your note that nothing could be found on your files concerning the case was a piece of information sufficient to astound and force them to relinquish all hope of redress, in face of yours, dated 8th inst., addressed to me, wherein you ²⁷⁹ acknowledged receipt of mine of 23d ult., with copy of Act No. 194. In this letter I placed the whole matter before you."

The writer then restates the case, and concludes as follows: "We want fairness, and do not wish to be driven to the courts for redress; . . . but the time is rapidly approaching when we will have to call the union into court."

The matter, it seems, finally reached the executive board of the United Association, which disagreed about it on a tie vote and referred it to the president, who remitted it back to

the secretary, with a suggestion that it be reopened, and the secretary, on October 7th, wrote to Schekeler: "I will be greatly obliged if you will present this letter to Mr. Schneider, and then have him write up a statement of his side in the case, and you write up another, and I will ask No. 60 to write up their side, and we will make a new proposition of it to the board."

Mr. Manion, for the plaintiffs, accordingly forwarded another statement of the case to the secretary, but "No. 60," instead of "writing their side," invited the plaintiff, Schekeler, to make a statement of his case, in the presence of their (the union's) executive committee; but, as Schekeler proposed to make the statement through his local adviser, and the committee declined to receive it in that way, the matter ended, and on October 22d the union adopted a resolution that "letter from Martin H. Manion, in regard to Schekeler and Schneider case, be thrown into the waste basket"; the letter in question containing an offer to submit the matter to arbitration, the union to name one arbitrator and to select the other from six persons to be named by plaintiffs. Finally, reaching the conclusion that no relief would be afforded them, the plaintiffs, upon November 19th, brought these suits.

In addition to the facts thus stated it may be said, upon the authority of their constitution, by-laws, etc., that the declared purpose of the members of the union in effecting their organization is to protect themselves from ²⁸⁰ unjust and injurious competition, and to secure, through the power of organization, a steady demand and fair compensation for their labor and a position in society to which as wealth producers and citizens they are entitled. The pledge required of all initiates, and taken by the plaintiffs, is as follows:

"I, ———, in the presence of the members of this association, do truly promise and pledge my word of honor that I will yield obedience to all laws and legal summons that may be sent, said, or handed to me. I will not do any act in any way prejudicial to the best interest of this association, but will at all times endeavor to promote its prosperity and usefulness. I will at all times assist members of this association to the extent of my ability, defend them when unjustly treated or slandered, and cultivate for each and every member the warmest friendship and brotherly love. I will assist unfortunate or distressed members to procure employment

and to secure just remuneration. I do further promise that I will never reveal any of the signs or workings of this association that may be now or hereafter confided to me, except in a lawful and authorized manner. I take this obligation voluntarily, without any mental reservation, and bind myself until death or honorable withdrawal, under the penalty of the scorn due to moral perjury and violated honor, as one unworthy of trust or assistance."

Upon the facts thus stated (and possibly a few others which may be hereafter referred to), the judge a quo gave judgment in favor of the plaintiffs, respectively, and against the defendants, Local Union No. 60 and various named officers of said association who participated in the action complained of, maintaining the preliminary injunction which had been issued, ordering that the plaintiffs be reinstated in said Local Union No. 60, and the fines imposed upon them set aside, and condemning said defendants in solido, in favor of the plaintiff Schekeler in the sum of four hundred and eighty-two dollars, with interest from the rendition of the judgment, and in favor of the plaintiff Schneider in the sum of four hundred and sixty-six dollars with interest. And from the judgments so rendered the defendants have appealed.

The obligation which initiates of Local Union No. 60 are required to take is to be ²⁸¹ construed with reference to the declared purposes of the organization, and is binding on the initiate only in so far as those purposes are lawful and are to be attained by lawful means. When the union attempts the accomplishment of an object which is foreign to those purposes, or attempts the accomplishment of those purposes by unlawful means, the initiate may properly say: "I entered into no such contract." The union's rules of order specifically provide that "partisan politics or sectarian discussion shall not be permitted in the meetings under any circumstances." The introduction of a resolution committing the organization to the support of particular political party or a particular dogma of religion would therefore be a violation of a fundamental law of the union, as construed by the union, and its adoption would impose no obligation on its members, and it must be read into those rules that the introduction of a resolution which is violative of the fundamental law of the land has no better foundation and its passage no greater effect. "The courts will not enforce an agreement

the object of which is forbidden by law or is opposed to the policy of the law. . . . The following are the leading classes of agreements contrary to the policy of the law: (1) Agreements which tend to injure the public service. Of this character is an agreement to use one's influence to secure the election or appointment of a person to a public office: *Gaston v. Drake*, 14 Nev. 175, 33 Am. Rep. 548; *Nichols v. Mudgett*, 32 Vt. 546; *Gray v. Hook*, 4 N. Y. 449; *Filson's Trustee v. Hines*, 5 Pa. 452, 47 Am. Dec. 422": Benjamin on Principles of Contracts, pp. 89, 90.

This elementary doctrine is more fully stated in the brief of the counsel for the plaintiffs in the form of excerpts from what we take to be a recent work on Public Policy (Greenhood) as follows: "Any contract which contemplates conduct which will amount to an imposition upon a public officer in the exercise of his discretion ²⁸² is void. . . . Any contract by one acting in a representative capacity, which restricts the free exercise of a discretion vested in him for the public good, is void. . . . Any contract to appoint to a public office, or involving the sale of a public office, or quasi public office, or to do anything in consideration of the promisee exchanging offices, or securing an office for the promisor, or recommending him for such office, or resigning any office, is void. . . . It is the duty of the officer, having a power of appointment, to make the best appointment in his power, at the time when he makes the appointment. The public have a right to demand this, and it is against public policy that he should be deprived of the exercise of his best judgment by a contract previously made. If he has promised the office to one person, and has since discovered that the public will be better served by another, he must be at liberty to make the better appointment, and that, too, although no such absolute disqualification may exist in regard to the person to whom it was first promised as would constitute a defense to an action in damages if such action could be maintained on the promise. Whatever may be the practice, appointments are, in theory, made for the public good. That is the reason why the appointee may not purchase the office. In a similar way, though not to the same extent, the public good would be injured if a promise to make an appointment were held to be legally binding, so as to control the exercise of that judgment which the appointing officer ought to exercise when he makes

the appointment. The right of appointment is not the property of the appointing officer, and he has no right to barter it or to dispose of it. It is merely a political power intrusted to him to be exercised, not to be sold. . . . Any contract by which . . . the liberty of an elector to vote according to his conscience is restricted, or which contemplates the use of improper influence upon such elector, or is calculated to exercise an injurious influence over the purity of elections in the state, or in another state, is void."

Referring to Greenhood on Public Policy, pages 336-339, 387.

If, therefore, the appointment of McGilvray, rather than of some other and perhaps more competent man, to the position of inspector, could be considered as furthering the purposes for which the defendant herein was established, nevertheless the attempt to secure that appointment by threatening and imposing fine and suspension, in their capacity as members of the union, upon public officials charged with such appointment, was a violation of law; and this, whether those officials, as members of the union, had committed ²⁸³ themselves to McGilvray's candidacy or not. But we are unable to concur in the view, relied on by the learned counsel for the defendant, that the plaintiffs had so committed themselves. The union, in July, 1902, adopted a resolution indorsing McGilvray for the position of inspector. It is not altogether certain that the plaintiffs were present when that action was taken, and, if we assume that they were, we may also assume (in view of the fact that there were two other candidates, including Glennon, for whom one of the plaintiffs, as a member of the board of examiners, subsequently voted), that the plaintiffs voted against him, thereby expressing the opinion that, even as between the three whose names were presented, he was not the best man for the place. At that time, however, it does not appear that the selection of the plaintiffs to membership of the board having the appointing power was in contemplation, and the proposition that, by being absent from the meeting or by voting against the indorsement of McGilvray, they committed themselves to the position that, if they should at any time thereafter attain such membership, they would vote for him is untenable, since they knew, and the union knew, that the power to place them on the board was not vested in the union; that when, if ever, they should be

placed there, it would be as public officials, assuming and owing a paramount duty with respect to the selections of an inspector to the community at large; and that they could not, legally or morally, tie themselves up in such a manner as to prevent their discharging that duty by exercising their best judgment in the matter of such selection. We infer that, as the ultimate result of its action, in July, 1902, the union suggested the appointment of Correjollès and Robinson as members of the board of examiners, and the record shows that the mayor declined to appoint them and tendered the appointments to Patterson ²⁸⁴ and Ybos, who were compelled by the union to decline them. Some seven or eight months later (in March, 1903), the union sent to the mayor its roster in order to enable him to select from it, for himself, the two appointees for whom he was looking. Whether the roster was sent at the request of the mayor, or by the union of its own motion, we are not informed; nor do we know but that the mayor was provided, at the same time, with the names of all the non-union plumbers in the city, since there is nothing in law which excludes them from the board. However that may be, it is quite certain that the union understood that the mayor would make his own selection, and that all he needed from it was the names of its members. Under these circumstances, there was nothing for the union to do but send a correct roster, or none, since to have sent an incorrect one would have been to have practiced a fraud. The plaintiffs were therefore under no obligation to the union in that connection, as their names were on the roster as a matter of right, and not of favor, and the union in sending the roster did no more for them than it did for those members, constituting the large majority, whom the mayor did not select and could not have selected. It seems to us, then, to be illogical to argue that the plaintiffs are in the attitude of having secured their appointments as members of the board by holding out that, if appointed, they would vote for McGilvray for inspector, since it is not pretended that they so held out to the mayor, who appointed them, and the union, to whom the holding out is (erroneously, as we think) said to have been made, neither appointed them nor controlled the appointments.

Defendants' counsel earnestly contends that plaintiffs should have exhausted their remedy within the organization of which they are members. Conceding, arguendo, that the gen-

eral ²⁸⁵ rule to that effect is applicable to a case in which the organization is acting in violation not only of the law of its being, but of the law of the state, we are nevertheless of the opinion that the plaintiffs have brought themselves fairly within that rule. We find no provision for the trial of such matters as this either in the constitution or by-laws of Local Union No. 60, nor in those of the United Association, and the efforts of the plaintiffs to induce those organizations to make the necessary provision and in some way give them a trial resulted in nothing but futile correspondence and vexatious delay, with no prospect of relief from a situation which, to men dependent for themselves and their families upon their daily earnings, had become little short of desperate.

As to the damages, counsel for defendant, calculating from the evidence, reaches the conclusion that Schneider lost in wages ninety-six dollars, and Schekeler one hundred and ninety-two dollars, and, as the judgment appealed from awards the one defendant a total of four hundred and sixty-six dollars, with interest from its rendition, and the other four hundred and eighty-two dollars, with interest, it is said that the judgments should be amended in that respect.

The amounts thus awarded represent, however, not only the damages sustained by reason of loss of wages, but also those resulting from mental suffering and injury to reputation, and likewise included two hundred dollars awarded to each plaintiff as punitive damages. We agree with the trial judge that his estimates are conservative, and find no sufficient reason for reducing the totals as thus allowed.

It is therefore ordered, adjudged and decreed that the judgment rendered in the consolidated cases of Stevens Schneider v. Local Union No. 60, United Association Journeymen Plumbers, etc., et al., and Edward Schekeler v. Same Defendants, and herein appealed from, be, and the same are, hereby affirmed, at the cost of the defendants.

Contracts Tending to Injure the Public Service are against public policy and unenforceable: *Woodman v. Innes*, 47 Kan. 26, 27 Am. St. Rep. 274; *Hope v. Linden Park etc. Assn.*, 58 N. J. L. 627, 55 Am. St. Rep. 614. Thus, agreements for compensation to procure appointment to a public office, or to resign such office in another's favor for a consideration, are void: *Basket v. Moss*, 115 N. C. 448, 44 Am. St. Rep. 463; *Edwards v. Randle*, 63 Ark. 318, 58 Am. St. Rep. 108. A public office cannot be the subject of a contract: *Water Commissioners v. Cramer*, 61 N. J. L. 270, 68 Am. St. Rep. 705; *White v. Cook*, 51 W. Va. 201, 90 Am. St. Rep. 775.

Am. St. Rep., Vol. 114—36

JOHNSON v. AGURS.

[116 La. 634, 40 South. 923.]

HOMESTEAD, Exemption of Surplus Proceeds of Judicial Sale of.—If a homestead is sold under a judgment foreclosing a vendor's lien, the proceeds of the sale after satisfying such judgment and lien are exempt from execution. (pp. 564, 565.)

HOMESTEAD.—Mortgages of Homestead Property Where the Mortgages do not Amount to a Waiver of the Homestead Right are not entitled to the surplus arising under a sale of the homestead to satisfy a vendor's lien. (p. 565.)

HOMESTEAD.—The Claim of the Surplus Resulting from the Sale of a Homestead to Satisfy a Vendor's Lien is in Time if interposed before the purchaser or sheriff has paid out the proceeds of the sale. (p. 565.)

Hall & Jack, for the appellant.

Leon Rutherford Smith, Charles Latham Gaines and Frank J. Looney, for the appellees.

635 LAND, J. Plaintiff's petition was dismissed on an exception of no cause of action, and he has appealed.

The facts alleged in the petition may be summarized as follows:

Plaintiff, with his wife and child, occupied as a residence a certain lot of ground, with the buildings and improvements thereon, situated in the city of Shreveport.

Plaintiff had purchased said property subject to a vendor's privilege in favor of the holder of three notes executed by a former owner in part payment of the purchase price.

In the year 1905 the holder of the said notes sued out executory process against the maker, under which the property was seized and advertised for sale. Before the sale, the plaintiff, alleging that he occupied said lot as a homestead, obtained an order from the district judge directing the sheriff to pay over to plaintiff the sum of two thousand dollars out of the proceeds of the sale of the property, or such part thereof as might remain after satisfying the writ in the hands of the sheriff.

The lot was adjudicated to Mrs. M. D. **636** Agurs for the price of seventeen hundred dollars, payable in cash. The purchaser paid to the sheriff the sum of three hundred and thirty-two dollars and fifty-three cents in full satisfaction of the writ of seizure and sale, and retained the balance of thirteen

hundred and sixty-seven dollars and forty-seven cents to meet subsequent mortgages recorded against the plaintiff. The first of these was a special mortgage for a large amount executed by plaintiff to secure a note held by the Merchants' and Farmers' Bank and Trust Company. This mortgage contained no waiver of the homestead privilege.

The other mortgages resulted from the registry of three judgments which had been rendered against the plaintiff.

At the time these mortgages were created, and at the time of the sale, plaintiff, with his family, occupied the lot in question as a homestead under such conditions as entitled him to the benefit of the exemption conferred by article 244 of the constitution of 1898.

Immediately after the sale the plaintiff instituted the present action against the said purchaser and the said bank and trust company to have said property adjudged to have been his homestead and to recover of the purchaser the sum of thirteen hundred and sixty-seven dollars and forty-seven cents.

The district judge was of opinion that until the price has been paid the purchaser is not entitled to any exemption from the payment of his debts, and also that, where a homestead is sold to satisfy a vendor's lien, the surplus of the price of sale is not exempt.

In support of the second proposition, the district judge cited an extract from the opinion in *Baker v. Frellsen*, 32 La. Ann. 822, in which the court held that the exemption did not apply to the seizure and sale of property for the satisfaction of the purchase price. The broad statement in the opinion, that until the price be paid the purchaser cannot "claim to have the property exempted from the payment of his debts," must be construed with reference to the context ⁶³⁷ and the issues before the court. Article 245 of the constitution of 1898 recognizes that the homestead exemption may exist as to all debts save such as are contracted for the purchase price of the property, its improvement, etc. The homestead exemption is perfect against all claims save those specially excepted by law: *Thompson on Homestead Exemptions*, sec. 334.

In support of the second proposition, the district judge cited *Mann v. Kelsey*, 71 Tex. 609, 10 Am. St. Rep. 800, 12 S. W. 43, as holding that, where a "homestead was sold to satisfy a vendor's lien, the surplus was not exempt"; the reason as-

signed being that the sale was a voluntary conversion of the homestead into money, and that money was not exempt.

We are not advised whether the sale referred to was a judicial sale or a voluntary alienation.

Under our practice it cannot be doubted that a sale under executory process is as much forced as a sale under a writ of fieri facias. Article 244 of the constitution of 1898 exempts the homestead "from seizure and sale by any process whatever," and we cannot perceive how the nature of the judicial process can affect the question before us.

The principal contention of defendant bank is that article 244 of the constitution of 1898 does not exempt "money" or the proceeds of a judicial sale, except in case the homestead exceeds two thousand dollars in value and is sold under legal process for more than that sum.

Under this article a homestead not exceeding two thousand dollars in value cannot be seized and sold at all.

The right to seize and sell a homestead results from the provisions of article 245, declaring that the exemption shall not apply to debts for the purchase price, for improvements, for taxes, etc.

⁶³⁸ This article does not provide for the distribution of the surplus of the proceeds of a judicial sale made for the purpose of satisfying one of these excepted debts. But article 244, in dealing with the sale of a homestead exceeding two thousand dollars in value, reserves that amount for the beneficiary in case the homestead sells for more than that sum.

Hence the proviso of the article is pregnant with affirmation that a homestead exemption may attach to the proceeds of a judicial sale.

To restrict this reservation to homesteads exceeding two thousand dollars in value would be violative of every principle of the equality of rights between persons of the same class.

The general jurisprudence on this subject has been thus stated:

"In most states, if an exempt homestead is converted into money or other personal property, otherwise than by the voluntary act of the debtor, the money or other property may be claimed as exempt.

"In most states, perhaps, where a homestead is sold at a judicial sale for a debt as against which it is not exempt, and a surplus remains, the debtor may claim the amount of his

exemption in such surplus to enable him to purchase another homestead": 15 Am. & Eng. Ency. of Law, 2d ed., 596, 597.

This doctrine seems to us to be just and reasonable and in accord with the legislative intent to secure a home for the debtor and his family.

The cases in our reports cited by defendants' counsel have no application to the facts involved in the present controversy. Plaintiff did not voluntarily alienate the property, and could not have opposed its judicial sale for the purpose of paying the purchase price or a part thereof. His legal rights in the premises were restricted to the surplus of the proceeds of the sale. His claim is that of owner of the proceeds of the sale not necessary to pay the claim of the seizing creditor.

⁶³⁹ The creditors holding mortgages are repelled by the exemption from claiming such surplus.

Plaintiff's action was timely, as it was instituted before the purchaser had paid out the proceeds of sale. Plaintiff's position is analogous to that of a defendant in execution claiming a surplus in the hands of the sheriff against which none of his creditors have a preferential claim.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed, and it is now ordered and decreed that the exception of no cause of action filed by defendants herein be overruled, and this case be remanded for further proceedings according to law; defendants to pay costs of appeal.

The Exemption of the Proceeds of a Sale of a Homestead is discussed in Mann v. Kelsey, 71 Tex. 609, 10 Am. St. Rep. 800; Freiberg v. Walzem, 85 Tex. 264, 34 Am. St. Rep. 808; Wright v. Westheimer, 2 Idaho, 962, 35 Am. St. Rep. 269; Schuttlettsell v. Collins, 98 Iowa, 576, 60 Am. St. Rep. 216; McConnell v. Wolcott, 70 Kan. 375, 109 Am. St. Rep. 454. If a homestead is included in a mortgage with other lands, and all are sold for a sum in excess of that due upon the mortgage, the surplus remaining after the payment of the mortgage will be deemed exempt: Clancy v. Alme, 98 Wis. 229, 67 Am. St. Rep. 802. As to the exemption of the proceeds of exempt personalty, see the note to Cullin v. Harris, 66 Am. St. Rep. 381.

CITY OF NEW ORLEANS v. SMYTHE.

[116 La. 685, 41 South. 33.]

APPEAL AND ERROR.—Evidence not Annexed to Any Bill of Exceptions will not be considered on appeal, though reduced to writing and appearing in the transcript. (pp. 566, 567.)

INTOXICATING LIQUORS—Licenses Dependent on Consent of Property Holders.—A municipal ordinance authorizing the granting of licenses for saloons and dance-halls, but forbidding such granting unless the petition therefor is accompanied by the written consent of a majority of the property holders within three hundred feet of the proposed location is constitutional, and is not illegal as conferring arbitrary powers on the property holders. (pp. 567, 568.)

CONSTITUTIONAL LAW.—Statutes Enacting Conditions and Qualifications for entering into a business and not imposing such conditions and qualifications on persons previously engaged therein are not on that account unconstitutional. (pp. 568, 569.)

INTOXICATING LIQUORS.—No Person has a Vested Right to Retail intoxicating liquors, and the power of the lawmaker to prohibit or regulate such an occupation is practically unlimited. (p. 569.)

INTOXICATING LIQUORS—Mandamus.—The Arbitrary Refusal by a City Council of a license to sell intoxicating liquors by retail to one who has complied with all the provisions of the ordinance controlling the subject may be redressed by mandamus. (p. 570.)

Michael Dracos Dimitry, for the appellant.

Henry Garland Dupre, assistant city attorney, for the appellee.

⁶⁸⁶ LAND, J. Defendant was charged on affidavit in the first recorder's court of the city of New Orleans with violating ordinance No. 12,636, C. S., relative to setting up and establishing a barroom without a permit from the city council.

The defendant demurred to the affidavit and charge on the ground that said ordinance is "unconstitutional, illegal, null and void, and in violation of articles 2 and 181 of the constitution of the state of Louisiana, and that said ordinance is arbitrary, discriminatory, and unjust, and deprives appearer of liberty and property without the process of law." This demurrer was overruled, and the case was tried and the defendant was found guilty and sentenced to pay a fine of ten dollars, or, in default thereof, to serve fifteen days in the parish prison. Defendant appealed to the supreme court and to the criminal district court.

The evidence adduced on the trial was reduced to writing and appears in the transcript, but is not annexed to any

bill of exception. Hence this court cannot review the action of the court a quo on such evidence: See *State v. Hagan*, 45 La. Ann. 839, 12 South. 929; *State v. Carr*, 111 La. 716, 35 South. 839.

The only questions of law that this court ⁶⁸⁷ can properly consider on this appeal are such as are raised by the demurrer.

The ordinance was passed in September, 1896, and was expressly authorized by section 21 of the city charter (Act No. 45, p. 55, of 1896), which reads as follows: "The council shall not grant any privileges for the opening of any bar-room, saloon, concert saloon or dance-hall, except upon the written consent of a majority of the bona fide householders or property holders within three hundred feet, measured along the street front, of the proposed location of such barroom, saloon, concert saloon, or dance-hall; and it shall revoke any privilege on the petition of a like number of such persons, any prior license or privilege to the contrary notwithstanding."

The ordinance, in part, reads as follows: "That hereafter it shall not be lawful for anyone to set up or establish any barroom, saloon, concert saloon, dance-hall, beer-house or place where liquor is sold at retail by the glass, to be then consumed, without permission of the city council previously applied for in writing, which shall be accompanied by the written consent of a majority of the bona fide property holders within three hundred feet, measured along the street fronts, of the proposed location of such barroom, saloon, concert-hall, dance-hall, beer-house or place where liquors are sold at retail by the glass," etc.

The second section of the ordinance provides that such consent of the property holders shall be shown by the certificate of the city engineer; and the third authorizes a fee of five dollars for each certificate.

The fourth section prescribes a penalty for any violation of the provisions of the ordinance, and the last section provides that all privileges hereafter issued under the ordinance shall be revocable at the pleasure of the council.

In *City of New Orleans v. Macheuca*, 112 La. 559, 36 South. 590, this court held that section 21 of act No. 45, page 55, of 1896, was a constitutional exercise of a legislative power, and that city ordinance No. 12,636, passed pursuant to that

section, was not illegal as conferring arbitrary powers on the property holders and on the city council. The doctrine of that case is in accord with the recognized general jurisprudence on the ^{ess} same subject matter, which has been enunciated as follows, viz.: "It is ordinarily provided by the statutes that before an application for a license to sell intoxicating liquors shall be granted, the applicant must procure the consent or recommendation of a designated number of persons living in the vicinity of the place for which the license is sought; these persons usually being voters of the district, township, or ward in which the proposed saloon is to be located, or residents or taxpayers in such district, township, ward, or city block. The validity of these statutes has been frequently assailed on constitutional grounds, but they have been uniformly upheld as being a valid exercise of the police power. They are not in violation of any clause of the fourteenth amendment. It has also been urged that provisions of this nature are unconstitutional as delegating legislative power to the classes of persons whose consent or recommendation must be obtained. This contention has likewise been held untenable": 17 Am. & Eng. Ency. of Law, 2d ed., 209, 210.

In *State v. City of New Orleans*, 113 La. 371, 36 South. 999, 67 L. R. A. 70, the relator alleged that he had complied with the provisions of the ordinance in question, and that the city council had arbitrarily refused to grant him a permit to open and conduct a barroom. Relator thereupon applied for a writ of mandamus, which was made peremptory, and the city appealed. The judgment was affirmed, two of the justices concurring on the ground that, under the statute, the discretion as to granting or withholding permits was confided to the property holders.

It is apparent that the decree in that case assumed the legality and constitutionality of the ordinance which it ordered to be enforced, and that the real point involved was as to the character of the discretion vested in the city council.

It is, however, argued in the case at bar that the ordinance discriminates in favor of persons conducting barrooms, saloons, etc., already established at the date of its adoption.

This argument denies to the legislature the power to discriminate between persons already lawfully pursuing an occupation subject ^{uss} to the police power and persons who may

thereafter seek to engage in the same occupation. Such a contention, if admitted, would prevent the legislature from requiring additional qualifications for persons desiring to engage in many callings and professions which cannot be carried on without a previous permit or license. A number of statutes in this state, requiring persons to procure a permit before engaging in certain pursuits, exempt those already actually so engaged. A cursory examination of our statutes shows that this exemption has been extended to physicians, pharmacists, and pilots. We are not aware that statutes of this kind have ever been declared void as denying the equal protection of the law. They recognize the distinction between persons actually engaged in certain callings from which they obtain a livelihood and in which they may have invested capital, and persons not so engaged. The two classes are not similarly situated; the one having rights already vested or at least recognized by law, and the other a mere hope or expectation of embarking in the same calling at a future day.

The main object of the legislation now under consideration was to put some restriction on the opening of saloons, bar-rooms, etc., in the residential sections of the city. It must be remembered that no person has a vested constitutional right to retail intoxicating liquors, and that the power of the law-maker to prohibit or regulate such an occupation is practically unlimited. It has been held that the legislature may confine the sale of intoxicating liquors to certain places, and may limit the number of licenses in any given locality: 17 Am. & Eng. Ency. of Law, 2d ed., 209.

In the case of *Mandeville v. Band*, 111 La. 860, 35 South. 915, this court held that an ordinance was void which prohibited the establishment of any more saloons within certain ~~ooo~~ designated limits, leaving those already established therein in undisturbed operation. In the case at bar any person can set up a saloon in any part of the city on complying with the provisions of the statute. The difference between prohibition and regulation is manifest. In *State v. Garibaldi*, 44 La. Ann. 809, 11 South. 36, this court held that the legislature had not delegated to the city of New Orleans the power to delegate to property holders the right to control the establishment of private markets.

The city ordinance in question has been in operation for nearly ten years, and has hitherto been held by this court to

be constitutional, legal, and valid. To reverse our former decision, and to now hold that section 21 of the city charter of 1896 and the city ordinance passed pursuant to its warrant are null and void, would be, in our opinion, little short of a public calamity, as it would leave all sections of the city wide open to the intrusion of barrooms, concert saloons, dance-halls, and beer-houses.

If relator has complied with the provisions of the ordinance, and the city council has arbitrarily refused him a permit, he has his remedy by mandamus, as pointed out in the Galle case, cited *supra*.

Judgment affirmed.

The Chief Justice and Provosty, J., concur in the decree.

Monroe, J., dissented.

The Power of Municipal Corporations to regulate the sale of intoxicating liquors is the subject of a monographic note to *State v. Calloway*, ante, p. 285.

The Constitutionality of Local Option Laws is the subject of a monographic note to *Chicago etc. R. R. Co. v. Greer*, ante, p. 313.

PATTISON v. GULF BAG COMPANY, LIMITED.

[116 La. 963, 41 South. 224.]

LIBEL.—A Father cannot Recover for Libel on His Minor Child. (p. 571.)

AGENCY.—The Statements of the Manager of a Corporation are Admissible Against It to show that it authorized the publication of a libel. (p. 572.)

CORPORATION, Liability of When Business is Conducted in Its Name.—If business is conducted in the name of a corporation, as far as employes and the public are advised, it is answerable for a libel, though the business belongs to another and different corporation whose name appears on the letterheads. (p. 572.)

A CORPORATION is Answerable for a Libel, the publication of which is sanctioned by its manager in its interest. (p. 573.)

LIBEL, Words, When Defamatory.—A statement that an employé was discharged, not for a trivial offense, and not for the cause generally assigned, but for good cause which she knows, and which the speaker knows and could tell, if necessary, but would prefer not to, and that it was sufficient to say that it was such a cause that she could no longer be retained in the factory, is, when published in a newspaper, libelous. (p. 573.)

LIBEL.—Injury and Malice may be Inferred from the Nature and Falsity of the Words and the surrounding circumstances. (p. 574.)

Carroll & Carroll, for the appellants.

Robert John Maloney, for the appellees.

⁹⁶⁴ LAND, J. This is a suit for damages for an alleged libel published in the New Orleans "Picayune" on November 6, 1902, reflecting on the character of plaintiff's minor daughter, aged nineteen years.

Plaintiff sued for himself individually and as tutor for his minor daughter, who married pending the suit, and her husband, Peter Strenger, was made a party. The suit was discontinued as to the owners of the "Picayune." The bag company pleaded the general issue. The case was tried before a jury, and there was a verdict and judgment in favor of Mrs. Strenger for five hundred dollars, and against the individual demand of the plaintiff. Defendant appealed.

Plaintiff and appellee answered the appeal, praying for an increase of the judgment in his own behalf, and for the benefit of his minor child, Hannah L. Pattison, wife of P. L. Strenger. There has been no appearance made in this court by Mrs. Strenger and husband.

The plaintiff individually had no standing in court: *Black v. Carrollton R. R. Co.*, ⁹⁶⁵ 10 La. Ann. 33, 63 Am. Dec. 586; 8 Am. & Eng. Ency. of Law, 2d ed., p. 664.

The petition represents that the daughter had been an employé for several years of the Gulf Bag Company, Limited, of which Robert J. Wood was manager, and was discharged from service without just cause on August 28, 1902; that on November 6, 1902, the libel complained of was published in the columns of the "Picayune"; that the girl referred to in the publication was the daughter of the plaintiff; that the article as published was the result of a malicious and deliberate conspiracy between the defendants to injure and defame the character of the daughter, and had the effect of blasting her reputation, good name, and future as an innocent and virtuous girl. A copy of the newspaper containing the article referred to was made a part of the petition. The offensive matter is set forth in what purports to be a statement made by Manager Wood of the bag company to one Mr. Alexander and other gentlemen representing the Central trades and labor council, in an interview relative to the striking employés of the bag company. Among the propositions of settlement presented to the manager was the following:

"The above contemplates that all of the old employés, including Miss Patterson, are to return to work within one week from date of acceptance."

The article proceeds to detail the interview between Mr. Alexander and Manager Wood, and quotes the latter as speaking as follows: "You have been misinformed," said Wood, "as have a great many others. I did not believe that you understood just what did happen here, and what precipitated this situation. It was not a trivial offense—it was not the cause which has been generally assigned by the union. It was a good cause, which she knows and which I know, and which I could tell you if necessary, but which I would prefer not to. Suffice it to say, however, that the cause was such that she could not be retained in this factory."

The petition charges that plaintiff's daughter was the girl referred to, and that said ~~906~~ article as published was the result of a conspiracy between the defendants.

It was not necessary for the pleader to have gone to the extent of alleging a conspiracy. The "Picayune's" liability resulted from the publication of the defamatory matter, and the mere privity of the bag company was sufficient to make it also responsible. The manager was interviewed and made a statement for the purpose of publication. He spoke for the corporation and authorized the insertion of his remarks in the article that appeared in the columns of the "Picayune."

Evidence as to the statements of the manager was admissible, not for the purpose of proving slander, but to show that the company, through him as its representative, authorized the publication of the alleged libel.

The defense that the defendant company was not in business during the year 1902, but that the factory belonged to and was operated by its successor, the "Bemis Bros. Bag Company," was not set up in the answer. Besides the business was conducted in the name of the Gulf Bag Company, as far as the employés and the public were advised, and the addition on letterheads of the legend "Branch Bemis Bros. Bag Company" is without significance. Parol evidence was not admissible to show that the Gulf Bag Company had been put into liquidation, or that the other company was a foreign corporation authorized to do business in this state, or that the two had been merged.

The only evidence of the existence of the second company is the testimony of the manager, who admits that the name of the old company was used in the conduct of the business for the purpose of securing the benefits of its goodwill and patronage. Both had the same manager and, as to the public, the same name. The name of the Gulf Bag Company was used throughout the published article. If there was a merger of the old company, ³⁶⁷ it was secret and intentionally concealed from the public. The Gulf Bag Company held itself out as still doing business, and its stockholders must take the consequences.

The language used was defamatory, and well calculated to injure the good name and reputation of plaintiff's daughter. No specific misconduct was charged, but the statement implies that the girl had done something of such a nature that she could not be retained in the factory. It is due to the manager and the reporter to state that they testified that they did not consider the language used as defamatory in the sense alleged in the petition.

The manager testified that his only objection against the girl was that she affiliated with the union and was a disorganizer of labor in the factory. The girl was discharged for the ostensible reason that she was a few minutes late in coming to her work. In the published article, the manager said in effect that this was not the true reason, and proceeded to state that there was a reason, known to himself and the girl, which he preferred not to tell, but was such that she could not be retained in the factory.

The unavoidable inference is that the reason not disclosed was personal to the girl, and had nothing to do with her work or the strike. The insinuation contained a veiled charge of some wrongdoing, the nature of which was left to the imagination.

The manager denied that he had been correctly reported. On this point the evidence is conflicting, and we are not prepared to dissent from the conclusion of the jury.

The manager represented the corporation in this state, and sanctioned the publication of the libel in the interest of the company for which he spoke. A corporation may be held responsible for libel: *Vinas v. Merchants' Mut. Ins. Co.*, 27 La. Ann. 367; *Townshend on Slander and Libel*, sec. 265.

Injury and malice may be inferred from the nature and falsity of the words and the ⁹⁶⁸ surrounding circumstances: *Spotorno v. Fourichon*, 40 La. Ann. 423, 4 South. 71.

In cases of this kind there is no standard for the measurement of damages, and the amount is left largely to the discretion of the trial judge or jury. Moreover, there is no prayer by the proper party for an increase in the amount awarded.

Judgment affirmed.

A Corporation May Become Liable for the publication of a libel: *Peterson v. Western Union Tel. Co.*, 75 Minn. 368, 74 Am. St. Rep. 502; *Hoboken Printing etc. Co. v. Kahn*, 59 N. J. L. 218, 59 Am. St. Rep. 585. On the other hand, a corporation may maintain an action for slander and libel upon it in the way of its business or trade *Gross Coal Co. v. Rose*, 126 Wis. 24, 110 Am. St. Rep. 894.

Communications Concerning the Discharge of an Employé as privileged communications are discussed in the note to *Holmes v. Clisby*, 104 Am. St. Rep. 149.

McELVEEN v. GOINGS.

[116 La. 978, 41 South. 229.]

THE EXEMPTION from Execution of Two Work Horses Includes Mules. (p. 574.)

Herman Eldridge Gayer, for the appellant.

Albert Gallatin Breeland, for the appellee.

⁹⁷⁷ PROVOSTY, J. Article 244 of the constitution exempts from seizure "the homestead consisting of lands, buildings and appurtenances, whether rural or urban; also two work horses, one wagon or cart, one yoke of oxen, ⁹⁷⁸ two cows and calves, twenty-five head of hogs or one thousand pounds of bacon or its equivalent in pork, whether these exempted objects be attached to a homestead or not, and on a farm the necessary quantity of corn and fodder for the current year, and the necessary farming implements, to the value of two thousand dollars."

The seizing creditor in this case seized plaintiff's mule, and contends that, mules not being horses, the constitution does not exempt them from seizure. He is mistaken, the term "work horses" includes mules: *Ray v. Hayes, Sheriff*, 28

La. Ann. 641. The constitution manifestly so intends. And in order so to hold it is not necessary to have recourse to what is known as a liberal construction, but simply to read the statute intelligently. Courts "will not apply the rule of strict construction with such technicality as to defeat the purpose of ascertaining the true meaning and intent of the statute": 26 Am. & Eng. Ency. of Law, p. 659. Thus in *Goldsmith v. State*, 1 Head, 154, the supreme court of Tennessee held that a criminal statute against horseracing was violated by the running of a mule-race.

The judgment appealed from is set aside and the injunction herein is perpetuated at the cost of defendants in both courts.

For Recent Authorities on the Exemption of horses and vehicles from execution, see Kirksey v. Rowe, 114 Ga. 893, 88 Am. St. Rep. 65; Cleveland v. Andrews, 5 Idaho, 65, 95 Am. St. Rep. 165; Tishomingo Sav. Inst. v. Young, 87 Miss. 473, 112 Am. St. Rep. 454. The general rule is that exemption laws are liberally construed in favor of debtors: See the monographic note to Tabb v. Mallette, 102 Am. St. Rep. 102; Goodwin v. Claytor, 137 N. C. 224, 107 Am. St. Rep. 479.

DAVENPORT v. DAVENPORT.

[116 La. 1009, 41 South. 240.]

NOTARY PUBLIC De Facto.—A notary public who has been duly commissioned and has taken an oath, and at divers times has filed bonds, and who has acted for twenty-five years, remains a notary de facto, though he has failed to file a copy of his oath with the Secretary of State and the clerk of the court as required by law, and has not renewed his bond in time to keep his commission alive. (p. 577.)

NOTARIES DE FACTO, Duty to Inquire into Title of.—One needing the services of a notary is not required to ascertain, under pain of nullity, whether he has filed his oath or bond with the Secretary of State. If the notary is a notary de facto, it is safe to have recourse to him. (p. 577.)

WILLS, Who may be Witnesses to.—An Executor may, in Louisiana, be a witness to the will naming him as such executor. (p. 578.)

WILLS, Witnesses, Evidence to Identify.—Where a witness to a will signs his name Fresco Cutero, parol evidence is admissible to show that he is the same person who gave his name as Francesco Cutero. (p. 578.)

CHILDREN, Legitimation of Need not Negative Disqualifications.—If a statute declares that a natural father has power to legiti-

mate his natural child by an act passed before a notary and two witnesses declaring his intention to legitimate such child, such declaration need not negative the existence of facts which would by the same statute preclude legitimation. (p. 579.)

CHILDREN, Legitimation of, Presumption in Support of.—Where a declaration to legitimate a child has been made before a notary and in the presence of witnesses, the presumption is that no impediment to the legitimation existed. (p. 579.)

CHILDREN, Legitimation of, Otherwise Than by Marriage of Parents.—Children may, in Louisiana, be legitimized otherwise than by the marriage of their parents, and it is not true that when legitimized in the manner prescribed by the code that they have no better status as heirs than children merely acknowledged. (p. 579.)

CHILDREN, Legitimation of, When Accomplished.—A statement in writing made before a notary and witnesses that the appearers declare that they do hereby make acknowledgment of said children, and do hereby legitimate them, accompanied by a will of the father declaring that he has legally acknowledged and legitimated such children, giving their names and bequeathing to them all his property, is sufficient to legitimate them, and is not a mere acknowledgment of their paternity. (pp. 580, 581.)

Foster, Milling, Godchaux & Sanders and Charles Frank Borah, for the appellants.

E. Howard McCaleb, Henry Mayer and Henry D. Smith, for the appellees.

1010 PROVOSTY, J. The plaintiffs are the collateral relations of John J. Davenport, deceased. The latter, some twenty days before his death, sent for the principal notary of the parish and executed before him an act acknowledging the defendants as his natural children and legitimating them, and executed ¹⁰¹¹ also two testaments. In the first he gave the children one-fourth of his estate; in the second he made them his universal legatees. This suit is brought to have these three acts declared to be null and of no effect. The grounds are:

1. That the notary was not in fact a notary, for the reason that he had not taken the oath or filed the bond required by law.

2. That the testaments are lacking the requisite number of witnesses, because one of the attesting witnesses did not sign, and another was disqualified by reason of interest, he being the executor named in the will.

3. That the act of acknowledgment or legitimation is informal, in that it fails to show that no legal impediment existed to the marriage of the parents at the time of conception; or that the deceased had no ascendants or legitimate de-

scendants living, or that the children named were not adulterous or incestuous; and that even the evidence does not show these essential facts.

In the brief, but not in the petition, the further grounds are taken: First, that marriage is the only means of legitimating children; and that, consequently, act No. 54, page 63, of 1894, prohibiting marriage between whites and persons of color, has the effect of precluding the legitimation of the issue of the illicit union of such persons; third, that the three acts, when read together, show that the intention was merely to acknowledge the children, and not to legitimate them.

1. The evidence shows that the notary had been duly commissioned, and had taken an oath, and at divers times had filed bonds, and had been acting as notary for twenty-five years, and was the principal notary of the parish; but that he had failed to file a copy of his oath in the offices of the Secretary of State and of the clerk of court as required by law, and also to renew his bond in time to keep ¹⁰¹² his commission alive. Therefore, at the time of the execution of the acts in question he was not a notary de jure. But we think it would be an intolerable hardship to require everyone who needs the services of a notary to ascertain first, under pain of nullity, whether he has or not filed his oath or bond with the Secretary of State, etc. If the notary is a notary de facto, it is safe to have recourse to him. The adoption of the doctrine of officers de facto was forced upon the courts by just such situations as that presented in this case. Here is a man dying who sends for the principal notary of the parish to receive his last will. It would be a strange law that would in such a case annul the will because the notary had not twenty-five years before filed his oath in the office of the Secretary of State, or had filed his bond a day or two too late. The validity of acts passed by de facto notaries was recognized by this court in the case of *Monroe v. Liebman*, 47 La. Ann. 155, 16 South. 734. The doctrine of the validity of acts of de facto officers in general is too well established to need to be supported by citation of authorities. In *Citizens' Bank v. Bry*, 3 La. Ann. 630, the validity of the acts of a deputy notary public was recognized.

We are not struck forcibly by the argument that the office which the notary fills comes into existence with and by the commission given him by the governor, and ends with it; so

that when the commission lapses the "office" also vanishes; and that, therefore, it is not properly an "office"; and, as a consequence, there can be no such thing as a notary de facto. True, there cannot be such a thing as a de facto incumbent of an office that does not exist; but there are such officers as notaries public, and if a person holds a commission as one, and acts as one, and has the reputation to be one, he is clearly one under the principle of the law ¹⁰¹³ of officers de facto: See 8 Am. & Eng. Ency. of Law, p. 771 et seq.

In the case of *Cragg v. Westmore*, 13 La. Ann. 344, the notary himself was plaintiff.

2. In the case of *Keller v. McCalop*, 12 Rob. 639, this court said: "The general principle in relation to the capacity of a testamentary witness is that all persons are capable, with the exception of those who are excluded by express law."

Now, articles 1591, 1592, of the Civil Code of 1900, designate as the persons incapable of being witnesses to testaments, heirs, legatees, women and persons deaf, dumb, or blind, or under sixteen years of age, or whom the criminal laws declare incapable of exercising civil functions. No mention is made of executors.

3. As to the witness who, it is said, did not sign, he gave his name as "Francesco Cutero" and signed as "Fresco Cutero." Parol evidence to show the identity of the two was objected to, but was properly admitted: *Succession of Crouzeilles*, 106 La. 442, 31 South. 64. Besides the court would have had no difficulty in reaching the same conclusion from the documents themselves and the attending circumstances.

4. Article 200 of the Civil Code of 1900 provides as follows: "A natural father or mother shall have the power to legitimate his or her natural child by an act passed before a notary and two witnesses, declaring that it is the intention of the parent making the declaration to legitimate such child or children. But only those natural children can be legitimated who are the offspring of parents who, at the time of conception, could have contracted marriage. Nor can a parent legitimate his or her natural offspring in the manner prescribed in this article, when there exists on the part of such parent legitimate ascendants or descendants."

The sole requirement here prescribed is that there shall be passed before a notary and two witnesses an act wherein the parent shall declare his intention to legitimate the child.

There is no requirement that the act shall negative the existence of the facts which would preclude the legitimation. ¹⁰¹⁴ These facts are in no wise dependent upon the will of the parties, and could not be affected one way or the other by the recitals of the act; the recital of their nonexistence would prove nothing; their proof or disproof is a matter depending upon evidence dehors the act: *Stephens v. Duckett*, 111 La. 979, 36 South. 89. The object of the law in prescribing certain forms for the legitimation is, "to discourage concubinage by compelling the parent to publicly avow his shame before a notary public and witnesses": *Succession of Llula*, 41 La. Ann. 87, 6 South. 555. For the full accomplishment of that object the recital of the nonexistence of the impediments is entirely unnecessary.

5. So far as concerns the absence of the evidence on the subject of the existence vel non of these impediments, the presumption is that they did not exist; and, in the absence of contrary proof, the court will so assume. Moreover, the act itself carries with it an assertion of their nonexistence, for presumably it would otherwise not have been passed.

6. The argument that children can be legitimated only by marriage, or, in other words, that children legitimated otherwise than by marriage have no better legal status as heirs than children merely acknowledged, cannot receive our sanction. The chapter of the code devoted to illegitimate children is divided into two sections. The first section treats of legitimation. The second treats of the acknowledgment of illegitimate children. If one meant no more than the other, why this separate treatment? All the articles of our code on the subject of acknowledgment stood just as they stand to-day, when the legislature passed the acts of 1831 (page 86, No. 37), and No. 68 of 1870 (page 96), providing for the legitimation of children. If this legislation was to have no effect, why take the trouble of it?

In the case of *Marionneaux v. Dupuy*, 48 ¹⁰¹⁵ La. Ann. 496, 19 South. 466, the court found on the facts of the case, that the deceased had not intended to legitimate his children, but only to acknowledge them; hence all that may have been said in that decision touching the effects of legitimating must be considered as obiter. Moreover, it is not true that there is no provision of our law which confers upon legitimated children the right to take the inheritance of their parents.

Section 2173 of the Revised Statutes confers it upon them in express terms, as follows: "They who are therein mentioned as being legitimated can inherit both the estates of their fathers and other relations."

There is nothing in these statutes that would go to show that the lawmaker did not intend to use the word "legitimate" in its ordinary sense, and that is to make legitimate, or, in other words, to give the status of a child born in wedlock. Article 199 of the Civil Code which provides that "Children legitimated by a subsequent marriage have the same rights as if they were born during marriage," seems to make a distinction between legitimation by marriage and by notarial act; but it was written at a time when marriage was the only mode of legitimation; and it has therefore to be read in the light of that fact. When the subsequent laws were passed providing the other mode of legitimation, there was no intention of creating a different class of legitimated children, a class possessed of no greater rights than children merely acknowledged.

7. As to whether the intention of the deceased was to legitimate or merely acknowledge his children, the acts are not as explicit as they might have been. The recitals of the acts are as follows:

The act of acknowledgment and legitimation:

"The said appearers declare that they do hereby and by these presents make acknowledgment ¹⁰¹⁶ of said children and do hereby legitimate them.

"They further declare that they desire and it is their wish that they inherit from them their property the same as if said illegitimate children had been born in lawful wedlock.

"That they do legitimate said children as is contemplated by article 203 of the Civil Code of 1900, of this state."

Will written on same day:

"My name is John Junior Davenport. I have no no ascendants nor descendants. I have six children, which I have this day acknowledged by public act before Henry Mayer, notary public, and whose names are as follows: Bettie Davenport, Emma Davenport, wife of Charles Stansberry, John F. Davenport, Blanch Davenport, Henry Davenport, and James Davenport. I will and bequeath to my said children, share and share alike, one-fourth of all the property that I may die possessed of, movable and immovable, real and per-

sonal. I appoint Thomas W. Tarleton and Charles Stansberry the executors of this my last will. I revoke and set aside all other wills made by me."

Second will:

"My name is John J. Davenport. I have no living ascendants nor descendants, save and except six children, who I have legally acknowledged and legitimated whose names are as follows: Bettis Davenport, Emma Davenport, wife of Charles Stansbury, John F. Davenport, Blanch M. Davenport, Henry N. Davenport, and James W. Davenport.

"I will and bequeath to each of my said duly acknowledged & legitimated children, share and share alike, all the property movable and immovable, real and personal, I may die possessed of.

"I appoint Thomas Wyatt Tarleton and Charles Stansbury executors of this my last will and testament, and I do hereby revoke and set aside all former wills made by me."

We think that the result from these three documents is that the deceased intended to legitimate his children. Davenport certainly meant what the words "as if born in lawful wedlock" mean; and possibly did not know what article 202 of the Civil Code of 1900 meant. The parol evidence shows beyond question that such was the intention; but there is no need of going into it or of considering the question of whether or not it was admissible.

Judgment affirmed.

The Acts of Officers De Facto are, as a rule, valid as to the public and third persons: *Greene v. Village of Rienzie*, 87 Miss. 463, 112 Am. St. Rep. 449, and cases cited in the cross-reference note thereto.

The Mistake of a Witness to a will in signing his name is held to vitiate the execution of the instrument, in the case of *In re Walker*, 110 Cal. 387, 52 Am. St. Rep. 104.

HENDERSON v. LOUISVILLE & N. R. CO.

[116 La. 1047, 41 South. 252.]

CARRIERS—Bill of Lading—Estoppel to Dispute.—A carrier is not estopped, notwithstanding the issuing of a bill of lading by its agent, from showing that no goods were received or shipped by it, though such bill of lading has been transferred to an innocent third person for value in due course of business. This rule of law has not been abrogated by article No. 150 of the year 1868, making bills of lading negotiable by indorsement, and making answerable, both civilly and criminally, any person issuing a bill of lading unless the property specified therein has been actually shipped. (p. 586.)

CARRIERS—Construction of Statute Making Bills of Lading Negotiable.—The statute making bills of lading negotiable means genuine bills of lading, and hence does not apply to those issued where no property has been shipped or received by the carrier. (p. 587.)

Denegre & Blair and Victor Levy, for the applicant.

McCloskey & Benedict, for the respondents.

1047 LAND, J. Plaintiff as the holder and owner of an "order notify" bill of lading issued by the agent of defendant company at the city of New Orleans, and acknowledging the receipt of one hundred barrels of sugar from Drew & Harvey, to be transported to the city of Chicago, sued the defendant for the value of the sugar on the ground of refusal to deliver ¹⁰⁴⁸ the same on demand and offer to surrender the bill of lading.

Defendant in its answer, after pleading the general issue, admitted that the bill of lading was signed by its agent and delivered to Drews & Harvey, but specially denied that the sugar or any part thereof was delivered to or received by the defendant company and that the agent had any authority to sign and issue the alleged instrument.

For further answer, and in the alternative, the defendant company charged that plaintiff had been guilty of laches in not forwarding the bill of lading and demanding delivery of the sugar at the point of destination, and in not communicating with Sprague, Warner & Co. of Chicago, who were to be notified, and in not making any inquiry of or giving any information to defendant.

The defendant averred that on account of such laches it was prevented from protecting itself against a loss by timely recourse against the firm of Drews & Harvey, which was in

good standing when the bill of lading was issued, but became insolvent before plaintiff communicated knowledge of the facts to defendant.

The district court rendered judgment in favor of plaintiff, and the defendant appealed to the court of appeal for the parish of Orleans, which affirmed the judgment in an elaborate and well-considered opinion.

The court of appeal found with the district court that the plaintiff was an innocent and bona fide transferee for value of the bill of lading, and proceeded to discuss and decide the case on the assumption that Drews & Harvey made no such shipment as was recited in the bill of lading, and consequently that the sugar was not delivered to the defendant company.

The district court ruled that the defendant was estopped by the bill of lading to deny the receipt of the one hundred barrels of sugar, and excluded specific evidence on the subject, but ¹⁰⁴⁹ nondelivery to the carrier is inferentially shown by the evidence, and it may be said that plaintiff's suit is based on that theory.

It is admitted in the opinion of the court of appeal that the English rule is that, even as against a bona fide consignee or indorsee for value, the carrier is not estopped by the recital of the bill of lading issued by its agent to show that the goods therein described were not in fact received for transportation. It is further admitted in the opinion that this is also the settled doctrine of the federal courts.

The court of appeal, however, cites decisions in some of the states to the effect that the carrier is estopped to deny the delivery of the goods to the prejudice of third persons, who have in good faith in the ordinary course of business acted upon the representations of the agent.

The court of appeal held that this controverted question was set at rest in the state of Louisiana by act No. 150, page 193, of 1868; and that the case of *Hunt v. Mississippi etc. R. R. Co.*, 29 La. Ann. 446, decided by a divided court is not an authoritative construction of the statute.

In their very able and interesting brief, counsel for defendant contend that the English rule has been followed in all the courts of the United States, federal and state, except those of New York, Kansas, and Nebraska, and that this rule was not abrogated or modified by act No. 150, page 193, of 1868, making bills of lading negotiable, as was decided by the

supreme court in this state in *Hunt v. Mississippi etc. R. R. Co.*, 29 La. Ann. 446.

The English doctrine, as set forth in *Grant v. Norway*, 2 Eng. L. & Eq. 337, and *Freeman v. Buckingham*, 18 How. (U. S.) 188, 15 L. ed. 341, was expressly approved by our predecessors in *Fellows v. Str. Powell*, 16 La. Ann. 316, 79 Am. Dec. 581. The same doctrine had been previously recognized in *Fearn v. Richardson*, 12 La. Ann. 752.

1050 The question to be solved is whether this rule is inconsistent with the provisions of act No. 150, page 193, of 1868. In *Hunt v. Mississippi etc. R. R. Co.*, 29 La. Ann. 446, two of the justices were of opinion that this rule of commercial law was not affected by the provisions of said act. One of the justices concurred in the decree, on the ground that the plaintiff was not a third party to the bill of lading. The two dissenting justices were of opinion that it was the intent of the statute "to protect both the carriers and the public, the former by punishing any persons in their employ for issuing false bills of lading or receipts, and the latter by putting such bills or receipts upon the same footing as commercial paper and protecting the holder in good faith with all the privileges and immunities given to bills of exchange and promissory notes."

It is apparent that there was an even balance of opinion on the question before the court, and that therefore the point was not decided.

The object of the act of 1868, as stated in the title, was "to prevent the issue of false receipts or bills of lading, and to punish fraudulent transfers of property by cotton presses, wharfingers, and others."

The first section provides that no cotton compress, wharfinger or other person shall issue any receipt or other voucher for goods, wares, etc., to any person purporting to be the owner or holder thereof, unless such goods, wares, etc., shall have been actually received, and shall be in store or on the premises, or under his control at the time of the issuing of the receipt.

The second section provides that no cotton compress, wharfinger or other person shall issue any receipt or other voucher upon any goods, wares, etc., to any person for money loaned or other indebtedness, unless such goods, wares, etc., shall be at the time in store or upon the premises and under his control.

The third section prescribes that duplicate ¹⁰⁵¹ receipts shall not be issued while the originals are outstanding without writing across the face of the same the word "duplicate."

The fourth section prohibits any cotton press, wharfinger or other person from selling, encumbering, shipping, transferring, or removing any goods, wares, etc., for which a receipt shall be given, without the written assent of the holder of the receipt.

Section 5 of the act reads as follows: "That no master, owner, or agent of any boat or vessel of any description, forwarder, or officer or agent of any railroad, transfer or transportation company, or other person, shall sign or give any bill of lading, receipt or other voucher or document for any merchandise or property by which it shall appear that such merchandise has been shipped on board of any boat, vessel, railroad car or other vehicle, unless the same shall have been actually shipped and put on board and shall be at the time actually on board, or delivered to such boat, vessel, car or other vehicle, to be carried or conveyed as expressed in said bill of lading, receipt, voucher or other document."

Section 7 provides that any cotton press, wharfinger, forwarder or other person who shall violate any of the provisions of the act shall be deemed guilty of a criminal offense and on conviction shall be fined in any sum not exceeding five thousand dollars or imprisoned in the state penitentiary not exceeding five years or both. This section further provides as follows: "And all and every person or persons aggrieved by the violation of any of the provisions of this act may have and maintain an action at law against the person or persons, corporation or corporations, violating any of the provisions of this act to recover all damages, immediate or consequential, which he or they may have sustained by reason of any such violation as aforesaid, before any court of competent jurisdiction, whether such person or persons shall have been convicted of fraud as aforesaid under this act or not."

Before referring to the sections relative to the negotiability of receipts and bills of lading, it is to be noted that the act makes it a criminal offense for any officer or agent of a railroad to sign or give any bill of lading for property not actually delivered for shipment.

It is to be further noted that the act gives ¹⁰⁵² to the party aggrieved a civil remedy by action for damages against the

person or persons, whether convicted or not, violating any of its provisions. .

It seems manifest that the criminal act of an agent or officer of a railroad in signing or issuing a false bill of lading cannot be considered within the scope of his employment or as binding on the principal.

The only civil remedy given by the statute is against the wrongdoer.

The act, so far from abrogating or modifying the general rule that the agent has no authority in such cases, affirms and accentuates the rule by making the act of the agent a criminal offense, thus placing such act beyond the pale of legal recognition as done under an implied authority resulting from the nature of the employment.

The contention that the act makes a false bill of lading negotiable, and therefore binding on the railroad when in the hands of a third innocent holder, is contrary to the express intent of the statute, which is to prevent the issue of false receipts and bills of lading.

The lawmaker certainly did not intend to denounce such issue as a felony and at the same time to encourage the violation of the statute by making false bills of lading negotiable. A careful reading of the provisions of the statute will demonstrate that the receipts and bills of lading intended to be made negotiable are such as are issued for property actually delivered or received.

Section 9 of the act reads as follows: "That all receipts, bills of lading, vouchers or other documents issued by any cotton press, wharfinger, forwarder or other person, boat, vessel, railroad, transportation or transfer company, as by this act provided, shall be negotiable by indorsement in blank, or by special indorsement, in the same manner and the same extent as bills of exchange, and promissory notes now are."

Surely, the act does not provide for the issue of false receipts and bills of lading. Section 6 of the same statute provides that receipts for goods, wares, etc., "stored or deposited ¹⁰⁵³ with any cotton press, wharfinger or other person or any bill of lading given by any forwarder, boat, vessel, railroad, transportation or transfer company may be transferred by indorsement," etc., but that "no property shall be delivered except on surrender and cancellation of said original receipt or bill of lading."

The statute places receipts and bills of lading on the same plane; and section 8 specially provides that all the provisions of the act apply to bills of lading.

It is impossible to conclude that the lawmaker intended to make false bills of lading negotiable, and at the same time to deny negotiability to false receipts.

We concur in the conclusion reached by Justice Marr (Manning, chief justice, concurring) in *Hunt v. Mississippi etc. R. R. Co.*, 29 La. Ann. 446, that: "When section 9 makes bills of lading negotiable, in the same manner and to the same extent as bills of exchange and promissory notes are, it means genuine bills of lading."

Any other construction would make the carrier bound for the consequence of a criminal act committed by a person not authorized to represent him.

It is therefore ordered, adjudged, and decreed that the judgment of the court of appeal and the judgment of the district court herein rendered be annulled, avoided and reversed; and it is now ordered and decreed that plaintiff's demand be rejected and his suit be dismissed; and it is further ordered that plaintiff pay all costs of this litigation.

Nicholls, J., absent.

The Rights and Liabilities of Assignees of Bills of Lading are discussed at length in the recent note to *National Bank v. Baltimore etc. R. R.*, 105 Am. St. Rep. 332-375. The conclusiveness of recitals in such bills, as against the carrier, is discussed at pages 347-357 of this note.

SPERIER v. OTT.

[116 La. 1087, 41 South. 323.]

PARENT AND CHILD—Damages for Mental Suffering Due to Malicious Prosecution of Child.—The father of minor children cannot recover for mental suffering due to their malicious prosecution. (p. 589.)

HUSBAND AND WIFE—Damages for Mental Suffering and Death of Wife.—The father of minor children cannot recover for mental suffering and consequent death of his wife due to the malicious prosecution and arrest of their minor children. (p. 589.)

MALICIOUS PROSECUTION of Minors—Exemplary Damages. A father, suing as the tutor of his minor children, may maintain an action for exemplary damages for their malicious prosecution and arrest. (p. 590.)

Nicholas Eugene Humphrey and E. Howard McCaleb, for the appellant.

Robert O'Connor, for the appellee.

1087 LAND, J. This is a suit for damages grounded on the alleged unlawful and malicious arrest and incarceration of two minor sons of the plaintiff, without a warrant, at the instance of the defendant.

The petition alleges that the only pretext for such arrest was that said children with a number of others had carried away a few pieces of old and decayed boards from an abandoned shanty, which was being demolished by the defendant. The petition further alleges that the plaintiff offered to restore said boards, besides paying any value that defendant might place on them, at the same time protesting that the children were innocent **1088** of the violation of any law or ordinance, and had acted under the belief that they were at liberty to take the boards, since the men, women and children of the neighborhood were doing the same thing. The petition further alleges that on the next day the defendant made an affidavit charging said two children and others with malicious mischief, and subsequently threatened to charge them with larceny if a moneyed settlement was not made, and that finally his children were tried and acquitted.

It is alleged that the boys, aged thirteen and eleven years respectively, were arrested by a police officer and placed in a patrol wagon in the presence of their mother, "who was so shocked and affected thereby that she became ill as the result and suffered both bodily and mental pain and anguish from the time of said arrest until the 7th of March, following, when petitioner was compelled to remove her to the Louisiana Retreat, where she continued to suffer, and where on the eighteenth day of March she died of a hemorrhage of the brain after seven weeks of the most excruciating bodily pain and mental anguish."

The petition further alleges that, at the time of arrest, the wife and mother was in perfect health, and that the shock then received by her and her subsequent suffering and death were the direct result of the unlawful and malicious acts of the defendant.

The petition alleges damages to the husband in the sum of ten thousand dollars and to his nine children in the sum of

ten thousand dollars, occasioned by the death of the wife and mother.

The petition further alleges damages to the children as heirs of the mother, in the sum of five thousand dollars for bodily pain and mental anguish by her suffered.

The petition further alleges damages to the husband in the sum of five hundred dollars for medical and funeral expenses. The petition finally alleges that petitioner was entitled to recover the sum of two thousand five hundred dollars as exemplary damages for ¹⁰⁸⁹ the wanton and malicious acts of the defendant.

Plaintiff's petition was dismissed on an exception of no cause of action, and he has appealed.

On the face of the petition the two minor sons of the plaintiff were the parties injured. The mother was a third person, and if she had lived could not have recovered for mental distress and shock. This very question was decided in *Black v. Carrollton R. R. Co.*, 10 La. Ann. 33, 63 Am. Dec. 586, in well-considered opinions, in which all the justices agreed that a father could not recover damages for mental shock and anguish caused by the mutilation of his minor son in a railroad accident. Slidell, C. J., dissenting on another point, concurred in the opinion of the court that the father could not recover damages for mental suffering, and, after stating the general rule that actions for injury to the person are personal said: "Moreover, let us bear in mind the difficulty which would result from recognizing the mental suffering of the third party as an element of damages. Where is any but arbitrary limit to be found in extending its benefit? Could an action for damages on that ground, if allowed to the father, be refused to the mother, the brother, the sister?"

The general jurisprudence on the same subject is thus stated:

"As a general rule, the right of recovery for mental suffering resulting from bodily injuries is restricted to the person who has suffered the bodily hurt. Mental distress caused by sympathy for another's suffering is not a recoverable element of damages. A parent cannot recover for mental distress and anxiety on account of physical injuries to a child, nor can a parent recover damages for anxiety for the safety of his or her child placed in peril by the negligence of another.

"Similarly it has been held that a husband's mental suffer-

ing caused by his wife's condition cannot be shown to increase the amount of damages": 8 Am. & Eng. Ency. of Law, 2d ed., p. 664.

Hence, we are of opinion that the petition discloses no cause of action, in so far as damages are claimed for the consequences of the mental shock suffered by the mother.

¹⁰⁹⁰ The petition, however, discloses a cause of action for exemplary damages in favor of the two minor children, who were arrested and prosecuted for malicious mischief. Under the allegations the arrest was unlawful and the prosecution was malicious.

It is therefore ordered, adjudged and decreed that the judgment appealed from be reversed as to the minors, Lawrence and Alexander Sperier, and it is now ordered that, as to the demand of said minors for exemplary damages, the exception of no cause of action be overruled, and this cause be remanded for further proceedings according to law, and it is further ordered that as thus amended the judgment appealed from be affirmed, costs of appeal to be paid by the defendant and appellee.

Nicholls, J., absent.

A Father may Maintain an Action for a tort committed on his minor child: See the note to *Carey v. Berkshire R. R. Co.*, 48 Am. Dec. 622; *Horgan v. Pacific Mills*, 158 Mass. 422, 35 Am. St. Rep. 504; *Holdridge v. Mendenhall*, 108 Wis. 1, 81 Am. St. Rep. 871; and in a proper case may recover exemplary damages: *Sawyer v. Fritcher*, 130 N. Y. 239, 27 Am. St. Rep. 521. It has been thought, however, that he has no cause of action for such injuries to the child as do not impair its ability to render him services: *Hurst v. Goodwin*, 114 Ga. 585, 88 Am. St. Rep. 43.

CASES

IN THE

SUPREME COURT

OF

MASSACHUSETTS.

BURKE v. DAVIS.

[191 Mass. 20, 76 N. E. 1039.]

MASTER AND SERVANT—Assumption of Risk.—Though the guard-rail above the feed board of a mangle is too high to warn and protect from injury an employé, he assumes the risk of injury if, knowing and appreciating the consequence of this imperfection, he consents to work at the mangle on being threatened with dismissal if he refuses. (pp. 592, 593.)

M. M. Lynch, for the plaintiff.

R. Spring and H. H. Atwood, for the defendant.

²⁰ SHELTON, J. This is an action of tort brought under the Revised Laws, chapter 106, section 71, to recover damages for injuries received by the plaintiff in the employ of the defendant and engaged in feeding sheets through a steam mangle for the purpose of drying and smoothing them. The action is based on the alleged negligence of the defendant in placing the guard blade in front of the rollers of the mangle too high, so that plaintiff's hand passed under it, and was caught between the rollers and seriously injured.

The plaintiff was seventeen years old at the time of the accident. She had been at work for the defendant about two years and a half, working in the laundry, usually in the ironing room, but not often on mangles, and then only at the request of Spargo, the defendant's superintendent. She had worked twelve or thirteen times on the mangle on which she was injured, and a few times on other mangles. This mangle is an ironing machine, consisting of a large, heated cylinder and several smaller rollers. The cylinder and the rollers re-

volve in opposite directions, so that the articles to be ironed are drawn between the rollers and the cylinder.

²¹ On the morning of the accident she began some other work, and Spargo ordered her to go to work upon this mangle. When she showed reluctance to do so, he said to her, "If you don't, you can put on your hat and coat and go home." She then went to work on it with one Jennie Laughton, put two roller towels and two sheets through the rolls, and started a third sheet, which was torn. Spargo then increased the speed of the mangle, so that it ran at its highest speed, being the usual speed used in ironing sheets. The plaintiff saw him do this, and understood it. There was a guard on the mangle about one inch above the feed board and in front of the rolls. This guard had been in the same position every time that the plaintiff had worked upon the machine. The distance between the feed board and the guard was plainly visible. This guard consisted of two pieces, a circular rod an inch or a little less in diameter, and a guard blade about an inch wide and an eighth of an inch thick. The lower surface of the guard blade was parallel to the feed board and about an inch above it.

The plaintiff testified that she tried to do the best she could with the torn sheet, but it went so fast that the first thing she knew her hand was in the mangle. She also testified that Spargo told her the machine was perfectly safe; that every time he told her to go up there, she told him she didn't want to go because she knew nothing about it, and he said it was perfectly safe, that other girls had been up there and never been hurt; that she was afraid to work on this mangle because she was afraid that she would be hurt, and her hand would be caught between the rolls; that she knew that the cylinder and the rolls were revolving; that she was afraid of the mangle because she thought from her previous experience that her fingers might get so far in that they might get caught, that if her hand went in she could not get it out; that in spite of what Spargo said, she thought that he was not right, that there was more danger than he thought.

Jennie Laughton testified that the purpose of the guard was "to warn by touch of the danger of the machine if you went beyond it." Another girl employed in the laundry testified for the plaintiff that Spargo told all the girls that the guard would prevent their fingers from going in any farther,

but that he also said that they should look out for their hands. Another of the ²² girls employed in the laundry said that the guard was never changed, that her fingers usually passed under the edge of the guard in pushing the work under, that the folder could push her fingers under so that they would touch the cylinder, and this fact could be seen by anyone standing on the floor who looked at it; that it would not absolutely prevent the fingers from going under. The whole arrangement of the cylinder and rolls was visible from the floor.

At the end of the plaintiff's case the judge ordered a verdict for the defendant, and the plaintiff excepted to this ruling.

The plaintiff concedes in argument that if this mangle had not been provided with a guard as above stated, she could have no remedy, for the reason that the danger of the operator's hands being dragged between the rollers was an obvious danger, and it was apparent that the only way for her to avoid danger was to keep her fingers and hands away from the rollers. She would have assumed the risk of such an accident: *Gaudet v. Stansfield*, 182 Mass. 451, 65 N. E. 850; *O'Connor v. Whittall*, 169 Mass. 563, 48 N. E. 844; *Lowcock v. Franklin Paper Co.*, 169 Mass. 313, 47 N. E. 1000; *Wilson v. Massachusetts Cotton Mills*, 169 Mass. 67, 47 N. E. 506. But she argues that the effect of putting the guard upon this machine, taken in connection with the assurances made by Spargo, was to justify her in believing that it was adequate for her protection: *Stager v. Troy Laundry Co.*, 41 Or. 141, 68 Pac. 405. But in that case there was evidence that the guard plate was improperly adjusted at a greater height above the table than it was intended to be put, while in the case at bar there is nothing to show that it was improperly placed. Moreover, the plaintiff, upon her own statement, was fully aware of the risk she ran in working upon this machine, and for that reason was reluctant to work upon it. It is true of her, as it was of the plaintiff in *Connolly v. Eldredge*, 160 Mass. 566, 36 N. E. 469, that the presence of the guard, although inadequate for complete protection, did not convert the mangle into a trap. She was not misled by any assurances of Spargo: *Lowcock v. Franklin Paper Co.*, 169 Mass. 313, 47 N. E. 1000; *Kenney v. Hingham Cordage Co.*, 168 Mass. 278, 47 N. E. 117. She was not ignorant of the proper method of doing her work, as in *Manning v. Excelsior Laundry Co.*, 189 Mass. 231, 75 N. E. 254. And the fact that she consented to under-

take the work only ²³ reluctantly and under a threat of dismissal if she should refuse to do it will not save her from being held to have assumed all the obvious risks of her undertaking: *Westcott v. New York etc. R. R.*, 153 Mass. 460, 27 N. E. 10; *Lamson v. American Axe etc. Co.*, 177 Mass. 144, 83 Am. St. Rep. 267, 58 N. E. 585.

On the whole case, we are of opinion that the plaintiff had assumed the risk of the accident which happened to her, and that the verdict against her was ordered rightly.

Exceptions overruled.

For Authorities Upon the Question involved in the principal case, see the monographic note to *Houston etc. Ry. Co. v. De Walt*, 97 Am. St. Rep. 892, 893.

BROOKS v. SAWYER.

[191 Mass. 151, 76 N. E. 953.]

A MINOR Procuring a Contract by False Representations as to Her Age, for the Sale of Her Real Property, and the Payment to Her of a Part of the Purchase Price, is not liable in an action of tort for such false representations, nor for the money received on account of such sale. (p. 595.)

Action of tort. The complaint alleged that the defendant, being the owner of certain real property, falsely and fraudulently represented to plaintiffs that she was not a minor, and induced them to enter into a contract with her for the purchase of such property and to pay her two hundred dollars on account of the purchase price; that she refused to comply with her contract of sale or to return the money so received thereon. A demurrer to the complaint was interposed and sustained. The plaintiffs appealed.

F. J. Carney, for the plaintiffs.

J. J. Foley, for the defendant.

¹⁵³ LATHROP, J. We are of opinion in this case that the demurrer to the declaration was rightly sustained, and judgment rightly ordered for the defendant. While the action is called one of tort, yet the action is clearly for the breach of a contract, and the fraud alleged is directly connected with

the contract. The case is governed by *Slayton v. Barry*, 175 Mass. 513, 78 Am. St. Rep. 510, 56 N. E. 574, 49 L. R. A. 560, where the question is fully considered, and the rule laid down by Chancellor Kent followed: "The fraudulent act, to charge him [the infant], must be wholly tortious; and a matter arising ex contractu, though infected with fraud, cannot be changed into a tort in order to charge the infant in trover, or case, by a change in the form of the action": 2 Kent's Commentaries, 241.

The case of *Drude v. Curtis*, 183 Mass. 317, 67 N. E. 317, 62 L. R. A. 755, disposes of the argument that the plaintiff may recover as damages the sum paid by him for the option. It also disposes of the case of *Walker v. Davis*, 1 Gray, 506, relied upon by the plaintiff.

Judgment affirmed.

For Authorities Upon the Question involved in the principal case, see the monographic note to Craig v. Van Bebber, 18 Am. St. Rep. 633-637, and in the recent cases of Ostrander v. Quin, 84 Miss. 230, 105 Am. St. Rep. 426; Damron v. Commonwealth, 110 Ky. 268, 96 Am. St. Rep. 453; Ridgeway v. Herbert, 150 Mo. 606, 73 Am. St. Rep. 464.

MURPHY v. METROPOLITAN NATIONAL BANK.

[191 Mass. 354, 77 N. E. 693.]

BANKING—Burden of Showing Payment of Check to Proper Person.—A Bank Paying the Check of a Depositor must assume the burden of proving that the payment was to the person named in the check, or that the drawer was guilty of such negligence in regard to the payment as precludes him from recovery. (p. 597.)

BANKING—Payment of Check on False Indorsement, When does not Charge the Drawer.—If M., purporting to represent B., who is in fact dead, applies for a loan, and the lender draws his check in favor of B. and delivers it to M., who procures another person to represent B. and to indorse the check and present it for payment, the payment to him is entirely unauthorized, and if made and charged to the account of such lender, he may recover of the bank therefor. (p. 598.)

BANKING.—The Death of the Drawee of a Check before it is drawn, not known to the drawer, does not enlarge the drawee's rights, nor justify its payment to another person on his forged indorsement of the drawee's name. (p. 598.)

BANKING—Duty of Identifying Payee of Check.—A banker on whom a check is drawn must ascertain at his peril the identity of the person named as payee. (p. 598.)

BANKING—Negligence, When not Attributable to Drawer of Check.—The fact that the drawer of a check names as payee a person then deceased, but whose death is unknown to such drawer, does not show the drawer to be guilty of such negligence as precludes his recovery of a bank paying such check on a forged indorsement to one personating the drawee. (p. 599.)

BANKING.—The Drawer of a Check Has No Duty to Ascertain the Identity of the Person to Whom It Has Been Paid.—The duty rests on the bank on which the check is drawn. (p. 599.)

BANKING.—The Duty of a Depositor, on the Return of His Pass-book is to do what a reasonable person would be expected to do, to see whether his account is correct; but if there is nothing to put him on inquiry as to the identity of persons to whom payments of checks have been made, he has no duty to investigate that subject, or to see that the indorsement of checks in the names of the payees are not forgeries. (pp. 599, 600.)

BANKING.—Delay in Notifying a Bank that a Check has been paid to a person other than the payee and on a forged indorsement does not impair the drawer's right to recover of the bank if there is no evidence that the bank was prejudiced by such delay. (p. 600.)

APPEAL AND ERROR—Evidence Which is not Harmful.—The admission of evidence that there is a custom when money is lent to an individual to examine the records in the probate court or in the registries of death, to see whether the person who is to receive the money is dead, does the defendant no harm in an action against a bank for paying a check on the indorsement of the name of the payee forged after his death. (p. 601.)

J. E. Cotter, C. Reno and J. P. Fagan, for the defendant.

D. V. McIsaacs and P. D. Morris, for the plaintiff.

¹⁶¹ **KNOWLTON, C. J.** The plaintiff had on deposit in the defendant bank, subject to be drawn by check, the sum of three thousand four hundred and nineteen dollars and seventy-five cents. On September 14, 1900, he drew a check for that amount, payable to the order of James J. Brown, and delivered it to one Moore, an attorney at law then in good repute, who purported to represent Brown in negotiating a loan to be secured by a mortgage on Brown's real estate. A note and mortgage for three thousand five hundred dollars, purporting to be executed by Brown, were delivered by Moore to the plaintiff, and by him passed to a client for whom he was transacting the business. Moore took the check to the defendant bank, and caused it to be certified, and then he went with it to the Federal Trust Company, a banking corporation, and had an interview with the president, with whom he had been acquainted for many years, and introduced to him a companion, as the James J. Brown named in the check. The check bore the indorsement "James J. Brown," and Moore also

indorsed it, and it was cashed by the trust company. In due time it was transmitted to the defendant through the clearing-house, and was paid. In fact James J. Brown had deceased on December 26, 1899, nearly nine months before these events occurred, and the signatures which purported to be his were forgeries. Moore absconded in September, 1902, and these forgeries were discovered not long afterward.

The evidence as to all material matters was uncontradicted. The defendant admitted that there were sufficient funds in the bank to meet this check, and that the check was presented and paid, and charged to the plaintiff's account. It also admitted that the death of James J. Brown occurred on December 26, 1899, and introduced in evidence a certified copy from the records of registration of births, marriages and deaths, which showed this fact. There was no evidence of the existence of any other James J. Brown, and there was much uncontradicted evidence that this person was the one intended by the plaintiff in making the check, and in all his negotiations with Moore in reference to ¹⁶² the loan. The action was brought to recover the amount of this check, upon a declaration containing four counts, stating the alleged liability in different ways.

Upon the admitted facts that the defendant had this money belonging to the plaintiff and paid it out upon this check, the burden is upon the defendant to show that the payment was to the person named in the check, or that the plaintiff was guilty of such negligence in regard to the payment as precludes him from recovery.

The plaintiff did not participate in the acts or conversation attending the payment of the check. The uncontradicted testimony shows that, from first to last, he dealt with Moore as the attorney of James J. Brown, and that Moore at no time represented the plaintiff in any way in the transaction. Moore received the check as the representative of Brown, and in procuring the payment at the trust company pretended to be acting in the interest of Brown, and not in the interest of the plaintiff. James J. Brown was represented to the plaintiff as the owner of the real estate proposed to be mortgaged, and the plaintiff caused the title to be examined, and found it standing in his name, and free from encumbrances. He also found that the property was of sufficient value to secure the payment of three thousand five hundred dollars, for

which, according to Moore's statement, Brown wished to mortgage it. He had no reason to doubt that Brown was living, and that the note and mortgage duly executed in his name were genuine securities.

It is too plain for question that the James J. Brown named in the check was the person whom the record showed to be the owner of the real estate described in the mortgage, and that the only payment authorized by the drawer of the check was a payment to him. In that respect the facts are different from those in the cases relied on by the defendant, in which the dealings were with an imposter who assumed a false name, and the check was intended for the person with whom the drawer was dealing, while the fraud was in the representation that he was another person, whose name he assumed: *Robertson v. Coleman*, 141 Mass. 231, 55 Am. Rep. 471, 4 N. E. 619; *Dunbar v. Boston etc. R. R.*, 110 Mass. 26, 14 Am. Rep. 576; *Metzer v. Franklin Bank*, 119 Ind. 359, 21 N. E. 973; *Crippen v. American Nat. Bank*, 51 Mo. App. 508; *Meridian Nat. Bank v. Shelbyville Nat. Bank*, 7 Ind. App. 322, 52 Am. St. Rep. 450, 33 N. E. 247, 34 N. E. 608; *Meyer v. Indiana Nat. Bank*, 27 Ind. App. 354, 61 N. E. 596.

It is true that the payee was not then living, and that it was impossible to make a payment to him in person; but the death of the payee of a check to whom the drawer has sent it, before it reaches its destination, does not enlarge the rights of the drawee in regard to payment. Nor does his death, unknown to the drawer, before the check is drawn, enlarge the drawee's rights. In such a case the check is either payable to no one, or it may be collected by the executor or administrator, according to the circumstances attending the making and delivery of it. In this case there is nothing to warrant a finding of negligence on the part of the plaintiff in not seeking Brown in person, or verifying Moore's representation that he was living. Nor does it appear that Brown's death affected in any way the defendant or the trust company, to induce the payment of the check upon the forged indorsement. The fraud could have been perpetrated in exactly the same way if Brown had been living. The only difference would have been that the danger of early discovery would have been greater.

The ordinary rule is well established that a banker, on whom a check is drawn, must ascertain at his peril the identity of the person named in it as payee. It is only when he is

misled by some negligence or other fault of the drawer, that he can set up his own mistake in this particular against the drawer: *National Bank of North America v. Bangs*, 106 Mass. 441, 8 Am. Rep. 349; *Danvers Bank v. Salem Bank*, 151 Mass. 280, 21 Am. St. Rep. 450, 24 N. E. 44; *Greenfield Sav. Bank v. Stowell*, 123 Mass. 196, 25 Am. Rep. 67; *Dedham Nat. Bank v. Everett Nat. Bank*, 177 Mass. 392, 83 Am. St. Rep. 286, 59 N. E. 62; *Welsh v. German American Bank*, 73 N. Y. 424, 29 Am. Rep. 175; *Shipman v. New York Bank*, 126 N. Y. 318, 22 Am. St. Rep. 821, 27 N. E. 371, 12 L. R. A. 791; *Hardy v. Chesapeake Bank*, 51 Md. 562, 34 Am. Rep. 325. We are of opinion that the plaintiff was guilty of no negligence, in connection with the making or payment of the check, that affects his right to recover: See *Shepard & Morse Lumber Co. v. Eldridge*, 171 Mass. 516, 68 Am. St. Rep. 446, 51 N. E. 9, 41 L. R. A. 617.

The next question is whether there was evidence of negligence in his failure to discover the forgery, or in his failure promptly to notify the defendant of his discovery of it, such as estops him from claiming his deposit. This check was returned to him, ¹⁶⁴ with his pass-book, at the beginning of the next month after it was made, and its payment appeared to be regular. He did not know Brown's signature, and he had no responsibility as to the ascertainment of the identity of the person to whom payment was made. It was the duty of the defendant to do that. He had every reason to suppose that the payment was to the James J. Brown for whom the check was intended. As the transaction was for a client to whom the note and mortgage belonged, he had no reason to consider the subject further. We understand that the interest was regularly paid until Moore absconded. Until then the mortgage was supposed to be good.

We have no doubt that, on the return of his pass-book with his checks, it was his duty to do what a reasonable person would be expected to do, in the examination of his account to see whether it was correct. If there was anything to put him on inquiry as to the identity of the persons to whom payments had been made, it would be his duty to investigate the subject: *Dana v. National Bank of Republic*, 132 Mass. 156; *Leather Manufacturers' Bank v. Morgan*, 117 U. S. 96, 6 Sup. Ct. Rep. 657, 29 L. ed. 811. But we have been referred to no case in which it is held that this duty requires a depositor, in a case

like the present, in which there is no reason to suspect payments to wrong persons, to make an investigation to see whether the indorsements of the payees are forgeries. It has been held in some cases that his duty does not require it: *United Security Ins. Co. v. Central Nat. Bank*, 185 Pa. 586, 40 Atl. 97; see *Janin v. London & San Francisco Bank*, 92 Cal. 14, 27 Am. St. Rep. 82, 27 Pac. 1100, 14 L. R. A. 320; *Hardy v. Chesapeake Bank*, 51 Md. 562, 34 Am. Rep. 325; *Weisser's Admr. v. Denison*, 6 Seld. 68, 61 Am. Dec. 731; *Frank v. Chemical Nat. Bank*, 84 N. Y. 209, 38 Am. Rep. 501.

We are of opinion that there was no such negligence of the plaintiff in failing to discover the forgery as to estop him from maintaining this action.

There remains the question whether his failure to inform the defendant of the forgery immediately after his discovery of it should bar him. According to the testimony of the defendant's president, the bank first received notice that the check was not properly indorsed, late in the autumn of 1902. The testimony as to the discovery of the forgery by the plaintiff was that he first heard of the death of James J. Brown about the 1st of ¹⁸⁵ October, 1902, and the plaintiff testified that he notified the defendant that the signature of Brown was not genuine on the very day that he discovered it. There was no evidence tending to show that the defendant suffered any loss from the failure of the plaintiff to notify it earlier than he did. Moore had absconded a considerable time before the discovery of the forgery, and his whereabouts have not since been known. If there was any delay in giving information, after the plaintiff obtained such knowledge as to warrant him in making a claim on the defendant, there is no good ground for conjecture even that the defendant's position was changed on account of it. Without showing some injury by reason of the delay, the defendant cannot use it as an estoppel against the plaintiff: *Janin v. London & San Francisco Bank*, 92 Cal. 14, 27 Am. St. Rep. 82, 27 Pac. 1100, 14 L. R. A. 320; *Mardy v. Chesapeake Bank*, 51 Md. 562, 34 Am. Rep. 325; see *Shepard & Morse Lumber Co. v. Eldridge*, 171 Mass. 516, 68 Am. St. Rep. 446, 51 N. E. 9, 41 L. R. A. 617; *National Bank of North America v. Bangs*, 106 Mass. 441, 8 Am. Rep. 349; *Danvers Bank v. Salem Bank*, 151 Mass. 280, 21 Am. St. Rep. 450, 24 N. E. 44. There was no evidence of such negligence of the

plaintiff after the discovery of the forgery as to prevent his recovery.

The views that we have expressed make it unnecessary to consider particularly the defendant's request for rulings. Upon the law and the testimony there was no occasion to give any of them. The defendant introduced no evidence to relieve it from liability for making an unauthorized payment of the plaintiff's money.

The admission of the testimony that there is a custom, when money is to be lent to an individual, not to examine the records in the probate court or in registries of death, to see whether the person who is to receive the money is dead, did the defendant no harm. If there had been no testimony on the subject, there would have been no evidence of negligence in failing to make such an examination. If there had been a special reason to seek evidence that Brown was living, it could have been done better in other ways than by searching registries.

Judgment on the verdict.

The Right and Remedies of the several parties where a forged check has been paid are discussed in the monographic note to *People's Bank v. Franklin Bank*, 17 Am. St. Rep. 889-899. And the liability of one who receives payment of a check on a forged indorsement is discussed in the note to *First Nat. Bank v. City Nat. Bank*, 94 Am. St. Rep. 641-650. The drawer of a check who delivers it to an impostor, supposing him to be the person whose name he has assumed, must, as against the drawee or a bona fide holder, bear the cross, where the impostor obtains payment or negotiates the paper: *Land Title and Trust Co. v. Northwestern Nat. Bank*, 211 Pa. 211, 107 Am. St. Rep. 565.

WYMAN, PETITIONER.

[191 Mass. 276, 77 N. E. 379.]

TREATIES.—When Anything in the Constitution or Laws of a State Conflicts with a Treaty, the latter must prevail. (p. 603.)

TREATIES, Effect of on the Right to Administer on the Estates of Decedents in the State Courts.—A treaty between the United States and a foreign nation purporting to give to the consul general or consul of such nation the right to intervene in the possession, administration and judicial liquidation of the estate of a citizen of such nation who has died, leaving property within the United States, is binding on the state courts, and requires them to appoint such consul or consul general administrator of such estate, rather than the public administrator. (p. 604.)

Conflicting petitions of Charles F. Wyman, as vice-consul of Russia, at Boston, and of John W. McEvoy, public administrator, to be appointed administrator of the estate of Julius Saposnick, who, while a citizen of Russia, died intestate in Massachusetts, leaving personal property therein. The petition of the vice-consul was in the probate court dismissed and that of the public administrator granted. The vice-consul having appealed, the case was heard before Chief Justice Knowlton, who, by agreement, reserved it for the determination of the full court.

F. R. Coudert and J. H. Appleton, for the petitioner.

F. T. Field, assistant attorney general, for the public administrator.

277 LATHROP, J. On the agreed facts in this case we have no doubt that the judge of the probate court erred in appointing a public administrator as administrator of the estate of a Russian subject dying here intestate and leaving personal property, and in dismissing the petition of the Russian vice-consul on the ground that it did not appear that he had a legal right to be appointed administrator of the estate to the exclusion of the public administrator.

By article 8 of the treaty of 1832, between Russia and the United States, it is provided: "The two contracting parties shall have the liberty of having in their respective ports consuls, vice-consuls, agents, and commissaries, of their own appointment, who shall enjoy the same privileges and powers as those of the most favored nations." The same treaty in article 10 provides: "The citizens and subjects of each of the high contracting parties shall have power to dispose of their personal goods within the jurisdiction of the other, by testament, donation, or otherwise, and their representatives, being citizens or subjects of the other party, shall succeed to their said personal goods, whether by testament or ab intestato, and may take possession thereof, either by themselves, or by others acting for them, and dispose of the same at will, paying to the profit of the respective governments such dues only as the inhabitants of the country wherein the said goods are shall be subject to pay in like cases."

Under the most favored nation clause reliance is had upon the provisions of article 9 of the treaty of 1853 between the

Argentine Republic and the United States, which reads as follows: "If any citizen of either of the two contracting parties shall die without will or testament, in any of the territories of the other, the ²⁷⁸ consul-general or consul of the nation to which the deceased belonged, or the representative of such consul-general or consul, in his absence, shall have the right to intervene in the possession, administration and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs." See, also, the treaty between Costa Rica and the United States of 1851, article 8.

There is but little authority directly in point on the question raised by this appeal. In *Lanfear v. Ritchie*, 9 La. Ann. 96, decided in 1854, the decision was against the vice-consul of Sweden and Norway, on the ground that the right claimed was "incompatible with the sovereignty of the state." But this was at a time when we might expect the doctrine of state rights to be strongly insisted upon. On the other hand, there are two decisions in the surrogate court for Westchester county, New York, which fully sustain the position of the vice-consul in the case before us. These cases are well considered and cover the entire ground: *Estate of Tartaglio*, 12 Misc. Rep. 245, 33 N. Y. Supp. 1121; *In re Fattosini*, 33 Misc. Rep. 18, 67 N. Y. Supp. 1119.

None of these cases is binding upon us, and the case must be decided on general principles.

Among the powers conferred upon the President by article 2, section 2, of the constitution of the United States is this: "He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur."

By article 6 it is declared: "This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

Treaties are to be liberally construed: *Shanks v. Dupont*, 3 Pet. 242, 7 L. ed. 666; *Hauenstein v. Lyman*, 100 U. S. 483, 25 L. ed. 628. When, then, anything in the constitution or laws of a state are in conflict with a treaty, the latter must

prevail, and this court has not hesitated to follow this rule, which is generally recognized as the law of the land: *Tellefsen v. Fee*, 168 Mass. 188, 60 Am. St. Rep. 379, 46 N. E. 562, 45 L. R. A. 481; ²⁷⁹ *Ware v. Hylton*, 3 Dall. 199, 1 L. ed. 568; *United States v. Forty-three Gallons of Whisky*, 93 U. S. 188, 23 L. ed. 846; *Hauenstein v. Lynham*, 100 U. S. 483, 25 L. ed. 628; *Head Money Cases*, 112 U. S. 580, 5 Sup. Ct. Rep. 247, 28 L. ed. 798, per Miller, J.; *Geofroy v. Riggs*, 133 U. S. 253, 10 Sup. Ct. Rep. 295, 33 L. ed. 642; *In re Parrott*, 1 Fed. 481, 6 Saw. 349.

While it may be true that there is some limit to the powers of the President and Senate in making treaties, as has been intimated in some of the cases in the supreme court of the United States, we cannot accede to the contention of the counsel of the public administrator, that the treaties in question in this case are beyond the jurisdiction of the treaty-making power; nor can we accede to the further contention as to the construction of the treaty which was adopted by the judge of the probate court.

We might perhaps stop here, but as the question of giving a bond is sure to arise, we are of opinion that the vice-consul, as he has applied for letters of administration, and thus has submitted himself to the court, should be required to give a bond, and in other respects to conduct himself with respect to the estate as would any other administrator.

The order, therefore, will be, decrees of the probate court reversed.

A Treaty is the supreme law of the land, binding all courts, state and federal. Thus, a provision in a treaty between this country and France, giving French heirs the right to be represented here by the consul of their country, relates to a subject within the treaty making power, and must prevail if in conflict with a state law: Succession of Rabasse, 47 La. Ann. 1452, 49 Am. St. Rep. 433. See, also, Tellefsen v. Fee, 168 Mass. 188, 60 Am. St. Rep. 379.

NOLIN v. PEARSON.

[191 Mass. 283, 77 N. E. 890.]

HUSBAND AND WIFE, Mutual Obligations of.—Each Spouse is Entitled to the Conjugal Society and Comfort of the Other, and this right is as valuable and important to her as to him. (p. 607.)

HUSBAND AND WIFE.—The Absolute Privilege of Each to the Conjugal Society of the Other must be considered as embracing the persons of both, with no distinction in favor of one as against the other. (p. 608.)

HUSBAND AND WIFE.—An Action by a Wife Against Another Woman for purposely debauching and carnally knowing the former's husband, whereby his affection for plaintiff was alienated and she deprived of his society and aid, may be sustained wherever the statute gives to married women the right to recover for injury in any form done to her person or her property. (pp. 609, 610.)

E. S. Abbott, for the plaintiff.

E. Foss, for the defendant.

284 **BRALEY, J.** The early common law recognized and upheld the doctrine that for most purposes husband and wife formed a simple person, represented by the husband, and as a consequence of this legal merger it has been said: "That is, the very being or legal existence of a woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband. . . . Upon this principle, of a union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage," and "The wife . . . hath no separate interest in anything during her coverture": 1 Blackstone's Commentaries, Sharswood's ed., 442, 445; 2 Blackstone's Commentaries, 143. Or, as pointedly and accurately stated in *Dixon v. Amerman*, 181 Mass. 430, 63 N. E. 1057, with a reference to the early English authorities, the wife was considered the husband's chattel.

Personal property in her possession upon marriage passed to him, and could be levied upon for his debts, or bequeathed by him to strangers, and he also took during coverture a sole estate in her lands, which she could not alien unless he joined, or devise even with his assent, unless when exercising a power granted to her at the creating of the estate, nor derive any benefit or income therefrom by any contract which she could make separately: *Hanlon v. Thayer*, Quin. 99; *Fowler v.*

Shearer, 7 Mass. 14; Legg v. Legg, 8 Mass. 99; Osgood v. Breed, 12 Mass. 525; Lowell v. Daniels, 2 Gray, 161, 61 Am. Dec. 448; Hawkins v. Providence etc. R. R., 119 Mass. 596, 20 Am. Rep. 353; Washburn v. Hale, 10 Pick. 429; Clapp v. Stoughton, 10 Pick. 463; Ames v. Chew, 5 Met. 320; Gerry v. Gerry, 11 Gray, 381; Bartlett v. Cowles, 15 Gray, 445.

²⁸⁵ Without her consent damages for injury to her person or reputation also might be released by him, or if collected in her lifetime they became his separate property, and as a husband he had the right moderately to chastise his wife, although it was declared by the colony in 1641 that she should be free from corporal correction by him: Southworth v. Packard, 7 Mass. 95; Kelley v. New York etc. R. R., 168 Mass. 308, 60 Am. St. Rep. 397, 46 N. E. 1063, 38 L. R. A. 631; Phillips v. Barnet, 1 Q. B. D. 436; Bacon's Abridgment, Baron & Feme (B.); Col. Laws, 1660 (Whitmore's ed.), 51. See Commonwealth v. McAfee, 108 Mass. 458, 11 Am. Rep. 383.

While the common law prevails in this commonwealth except so far as it may have been modified by statute, it is obvious from this reference to some of its provisions that the development of modern society would imperatively call from time to time for the modification or abrogation of many, if not all, of these archaic conditions: Dunn v. Sargent, 101 Mass. 336; Cooley's Constitutional Limitations, 7th ed., 484, 485. Beginning with the statutes of 1842, chapter 74, and by subsequent statutory enactments the separate legal existence of a married woman as to her right to hold and dispose of property both real and personal as well as the right to her person has been gradually recognized and established: Stats. 1845, c. 208; Stats. 1846, c. 209; Stats. 1855, c. 304; Stats. 1857, c. 249; Gen. Stats., c. 108; Stats. 1864, c. 276; Stats. 1868, c. 95; Stats. 1869, c. 409; Stats. 1871, c. 312; Stats. 1874, c. 184; Pub. Stats., c. 147; Rev. Laws, c. 153.

This remedial legislation has resulted in very largely impairing the unity of husband and wife as it existed at common law: Butler v. Ives, 139 Mass. 202, 29 N. E. 654; Bradford v. Worcester, 184 Mass. 557, 69 N. E. 310.

It also must be taken as settled that for the purposes of divorce, of separate maintenance and of public charitable relief she may have a separate domicile, and is absolutely entitled to her personal liberty and earnings, with a corre-

ponding liability for her debts and contracts, and for torts committed by her or by her husband under her direction: *Osgood v. Osgood*, 153 Mass. 38, 26 N. E. 413; *Burtis v. Burtis*, 161 Mass. 508, 37 N. E. 740; *Bradford v. Worcester*, 184 Mass. 557, 69 N. E. 310; *McCarty v. De Best*, 120 Mass. 89; *Shane v. Lyons*, 172 Mass. 199.

²⁸⁶ If the husband still is recognized as nominally the head of the family, and as such may determine their common residence, for the proper conduct of which he may be responsible under the criminal law, his control over the person or property of his wife has been reduced to a minimum, if it has not entirely disappeared: *Harmon v. Old Colony R. R.*, 165 Mass. 100, 52 Am. St. Rep. 499, 42 N. E. 505, 30 L. R. A. 658; *Kerslake v. Cummings*, 180 Mass. 65, 61 N. E. 760; *Bradford v. Worcester*, 184 Mass. 557, 69 N. E. 310.

But he retains the unmodified right to her conjugal society, even if her refusal to recognize this right affords him no ground for an absolute divorce, and he may recover damages for loss of consortium when caused by injuries to her person through the wrongs of others, as well as for criminal conversation with her: *Southwick v. Southwick*, 97 Mass. 327, 93 Am. Dec. 95; *Bigaouette v. Paulet*, 134 Mass. 123, 45 Am. Rep. 307; *Kelley v. New York etc. R. R.*, 168 Mass. 308, 60 Am. St. Rep. 397, 46 N. E. 1063, 38 L. ed. 631.

In *Kelley v. New York etc. R. R.*, 168 Mass. 308, 60 Am. St. Rep. 397, 46 N. E. 1063, 38 L. ed. 631, while recognizing this right in the husband, it was stated in the closing paragraph of the opinion that the wife had no corresponding right which she could enforce at common law, but whether she had by statute was left undecided. The question then left open is now presented for our decision.

When approached in the light of an abstract right arising from and incidental to the civil institution known as marriage, but which as between the parties is treated as a contract, and the consequent conjugal relation, there is great inherent difficulty in sustaining the proposition that while the husband can demand the right of exclusive marital aid and affection, the wife has no equivalent right, or that a sound public policy requires that she shall remain faithful to her marriage obligations, although he is at liberty to enter upon a course of conduct which may render further marital relations on her part impossible.

By the contract each spouse is entitled to the conjugal society and comfort of the other, and this association is one of the mutual obligations growing out of the union of husband and wife. The affection and comfort which each is supposed to derive from the society of the other springs from the joint relation, and is as valuable and important to her as to him. The case of *Lynch v. Knight*, 9 H. L. Cas. 577, is not an authority to the contrary, as ²⁸⁷ that was a suit for slander brought by the wife who joined the husband for conformity, and the words spoken of her not being actionable in themselves the special damage alleged was that in consequence of the slander she had been compelled by her husband to leave his house, with the consequent loss of his conjugal society. While the decision was placed upon the ground that the act of the husband was not such a natural and probable result of the words spoken as would make the defendant liable in damages, the question whether the right of consortium was confined to the husband alone, although discussed, was left undecided. In the judgments of Lord Chancellor Campbell and Lord Cranworth both were inclined to the view that this right was not limited to the husband, but extended to the wife, while Lord Wensleydale was of opinion that such a right on her part did not exist. Its existence, however, has always been recognized and enforced by the ecclesiastical courts in a suit by a wife for the restitution of conjugal rights, where in defense nothing less than conduct which would be sufficient to entitle the respondent to a judicial separation was a bar to the relief sought: *Orme v. Orme*, 2 Add. Ecc. 382; 1 Bishop on Marriage, Divorce and Separation, secs. 69, 1357; *Burroughs v. Burroughs*, 2 Swab. & T. 303.

The absolute privilege of each to the conjugal society of the other must be considered as embracing the persons of both, with no distinction in favor of one as against the other, and this equal companionship and aid in the founding and maintenance of the home and in the rearing of offspring is the foundation upon which this most important of all the domestic relations rests: *Bennett v. Bennett*, 116 N. Y. 584, 23 N. E. 17, 6 L. R. A. 553; *Warren v. Warren*, 89 Mich. 123, 50 N. W. 842, 14 L. R. A. 545; *Smith v. Smith*, 98 Tenn. 101, 60 Am. St. Rep. 838, 38 S. W. 439.

At common law, because the debauching or seduction of the wife was an "invasion of his exclusive right to marital in-

tercourse and the right to beget his own children," the husband was allowed to maintain an action for the loss of such aid, comfort and society as she would be expected to bestow upon him, although there might be no impairment of her services or assistance in the sense that she performed labor in the management or supervision of his household: *Hadley v. Heywood*, 121 Mass. 236; *Bigaouette v. Paulet*, 134 Mass. 123, 45 Am. Rep. 307; *Neville v. Gile*, 174 Mass. 305, 54 N. E. 841; *Evans v. O'Connor*, 174 Mass. 287, 75 Am. St. Rep. 316, 54 N. E. 557; *Houghton* ²⁸⁸ v. *Rice*, 174 Mass. 366, 75 Am. St. Rep. 351, 54 N. E. 843, 47 L. R. A. 710. But it early was recognized that if the wife was enticed away, and abandoned her husband, or was subjected to physical violence whereby she became disabled, he could sue for damages suffered by him from the wrongdoer, and either action could be maintained independently of proof of her adultery: 2 *Blackstone's Commentaries*, Sharswood's ed., 139; *Hyde v. Scysson*, Cro. Jac. 538; *Winsmore v. Greenbank*, Willes, 577; *Tasker v. Stanley*, 153 Mass. 148, 26 N. E. 417, 10 L. R. A. 468; *Crocker v. Crocker*, 98 Fed. 702.

In England by the "Matrimonial Causes Act," Stats. 20 & 21 Victoria, chapter 85, section 59, the common-law action for criminal conversation has been abolished, yet by sections 28 and 33 the husband may, on a petition against the adulterer alone, or upon joining him as correspondent in a petition against his wife for dissolution of the marriage, recover damages to be assessed by a jury as in an action at law: *Comyn v. Comyn*, 32 L. J., N. S., P. & M. 210; *Bernstein v. Bernstein*, 69 L. T., N. S., 513. Under this act there has been no abrogation of the husband's right of action against the adulterer, but only a change as to the form of remedy: *Eversley on Domestic Relations*, 2d ed., 170, 171. It also leaves unaffected his cause of action for enticing his wife to abandon him, or to recover for loss of consortium when caused by physical injury to her person.

By the Statutes of 1874, chapter 184, section 3, now Revised Laws, chapter 153, section 6, the disability of coverture, exclusive of suits between husband and wife, has been removed, and since the first enactment she has been liable to be sued, and might bring suit in the same manner as if sole. In consequence of this broad and comprehensive language she became, so far as civil procedure is concerned, discover

as to all persons except her husband, and whenever injured in her person or estate a married woman may bring suit in her own name against the wrongdoer for damages suffered, which upon recovery become her exclusive property: *Jordan v. Middlesex R. R.*, 138 Mass. 425; *Lombard v. Morse*, 155 Mass. 136, 29 N. E. 205, 14 L. R. A. 273; *Harmon v. Old Colony R. R.*, 165 Mass. 100, 52 Am. St. Rep. 499, 42 N. E. 505, 30 L. R. A. 658.

The loss of the essential element of matrimonial fellowship afforded by the husband's society and exclusively given to her by the contract of marriage, when accomplished by his seduction at the inducement of another woman, is an injury as tangible and from which she may suffer as acutely and with more disastrous ²⁸⁹ consequences to herself than from loss of reputation caused by libel or slander in which compensatory damages for mental suffering may be assessed; or from the injury, if under Revised Laws, chapter 153, section 10, she is engaged in business on her separate account, that may follow from malevolently depriving her of possible custom, when such a result is accomplished otherwise than by fair competition; or from the wrong caused by the violation of contracts of service between her and those she employs where a breach by the servant is induced without justifiable cause by the intentional acts of strangers, although in all of these instances the law gives to her an ample remedy: *Hastings v. Stetson*, 130 Mass. 76; *Walker v. Cronin*, 107 Mass. 555; *May v. Wood*, 172 Mass. 11, 51 N. E. 191; *Moran v. Dunphy*, 177 Mass. 485, 83 Am. St. Rep. 289, 59 N. E. 125, 52 L. R. A. 115; *Temperton v. Russell*, [1893] 1 Q. B. 715.

Our statute, as we have said, is expressed in the broadest terms. It permits a recovery by a married woman not only for injury in any form done to her person or property, but for damages which flow from a wrong suffered from a violation of personal rights. The allegations of the declaration disclose not only the commission of a felony, but all the elements of a wrongful act deliberately done for the purpose of working an injury to the plaintiff, and which actually has been accomplished: Rev. Laws, c. 212, sec. 10, c. 215, sec. 1; *Morasse v. Brochu*, 151 Mass. 567, 21 Am. St. Rep. 474, 25 N. E. 74, 8 L. R. A. 524.

If the duty of keeping his marital covenant rested on the husband, who has failed to perform it, none the less the plain-

tiff had a right to be protected from the intended unlawful acts, and willful interference of the defendant: *Winsmore v. Greenbank*, Willes, 577; *Plant v. Woods*, 176 Mass. 492, 79 Am. St. Rep. 330, 57 N. E. 1011, 51 L. R. A. 339; *Tasker v. Stanley*, 153 Mass. 148, 26 N. E. 417, 10 L. R. A. 468. See *Moran v. Dunphy*, 177 Mass. 485, 83 Am. St. Rep. 289, 59 N. E. 125, 52 L. R. A. 115; *Lumley v. Gye*, 2 El. & B. 216; *Bowen v. Hall*, 6 Q. B. D. 333; *Aikens v. Wisconsin*, 195 U. S. 194, 25 Sup. Ct. Rep. 3, 49 L. ed. 154.

The defendant admits by her demurrer that she purposely persuaded and enticed the plaintiff's husband to commit adultery, and to refuse performance of his marital obligations, and also induced him to abandon his home, and his wife, and by these means the possession of his companionship conferred upon the plaintiff by the contract of marriage has been lost and destroyed. This is distinctly a wrong because depriving her ²⁰⁰ of the consortium of her husband, for which she can, by force of our laws, maintain an action, without joining him as a party plaintiff, and the damages suffered when recovered are her separate property.

That no precedent of this court is found for the present action, which is of first impression, is not conclusive against the plaintiff, and is of little weight. If she has suffered an injury intentionally inflicted, followed by damage, she ought not to be remediless unless relief is refused by reason of an absolute legal prohibition, which we do not find: *Hastings v. Livermore*, 7 Gray, 194; *Rice v. Coolidge*, 121 Mass. 393, 23 Am. Rep. 279.

We are aware that in a few jurisdictions either from the construction of enabling statutes, which are held to confer upon a married woman only the right to sue for injuries to her person or for damages to her property, or for reasons of public policy, a cause of action for criminal conversation with her husband has been denied: See *Duffies v. Duffies*, 76 Wis. 374, 20 Am. St. Rep. 79, 45 N. W. 522, 8 L. R. A. 420; *Hodge v. Wetzler*, 69 N. J. L. 490, 55 Atl. 49; *Lellis v. Lambert*, 24 Ont. App. 653; *Doe v. Roe*, 82 Me. 503, 17 Am. St. Rep. 499, 20 Atl. 83, 8 L. R. A. 833; *Morgan v. Martin*, 92 Me. 190, 42 Atl. 354.

But the conclusion to which we have come is supported by the great weight of American authority: *Seaver v. Adams*, 66 N. H. 142, 49 Am. St. Rep. 597, 19 Atl. 776; *Foot v. Card*,

58 Conn. 1, 8 Am. St. Rep. 258, 18 Atl. 1027, 6 L. R. A. 829; Hart v. Knapp, 76 Conn. 135, 100 Am. St. Rep. 989, 55 Atl. 1021; Bennett v. Bennett, 116 N. Y. 584, 23 N. E. 17, 6 L. R. A. 553; Gerner v. Gerner, 185 Pa. St. 233, 64 Am. St. Rep. 646, 39 N. W. 884, 40 L. R. A. 549; Warren v. Warren, 89 Mich. 123, 50 N. W. 842, 14 L. R. A. 545; Wolf v. Frank, 92 Md. 138, 48 Atl. 132, 52 L. R. A. 102; Brown v. Brown, 124 N. C. 19, 70 Am. St. Rep. 574, 32 S. E. 320; Tucker v. Tucker, 74 Miss. 93, 19 South. 955, 32 L. R. A. 623; Smith v. Smith, 98 Tenn. 101, 60 Am. St. Rep. 838, 38 S. W. 439; Deitzman v. Mullin, 108 Ky. 610, 94 Am. St. Rep. 390, 57 S. W. 247, 50 L. R. A. 808; Westlake v. Westlake, 34 Ohio St. 621, 32 Am. Rep. 397; Haynes v. Nowlin, 129 Ind. 581, 28 Am. St. Rep. 213, 29 N. E. 389, 14 L. R. A. 787; Betser v. Betser, 186 Ill. 537, 78 Am. St. Rep. 303, 58 N. E. 249, 52 L. R. A. 630; Rice v. Rice, 104 Mich. 371, 62 N. W. 833; Clow v. Chapman, 125 Mo. 101; Nichols v. Nichols, 134 Mo. 187, 147 Mo. 387; Mehrhoff v. Mehrhoff, 26 Fed. 13; Waldron v. Waldron, 45 Fed. 315; Eagon v. Eagon, 60 Kan. 697, 57 Pac. 942; Price v. Price, 91 Iowa, 693, 51 Am. St. Rep. 360, 60 N. W. 202, 29 L. R. A. 150; King v. Hanson, 13 N. Dak. 85, 99 N. W. 1085; Williams v. Williams, 20 Colo. 51, 37 Pac. 614; Hodgkinson v. Hodgkinson, 43 Neb. 269, 47 Am. St. Rep. 759, 61 N. W. 577, 27 L. R. A. 120; Humphrey v. Pope, 122 Cal. 253, 54 Pac. 847; Beach v. Brown, 20 Wash. 266, 72 Am. St. Rep. 98, 55 Pac. 46, 43 L. R. A. 114. .

Judgment reversed; demurrer overruled.

A Wife may Maintain an Action against another woman, at least according to some authorities, for seducing the husband of the former, and alienating his affections: Hart v. Knapp, 76 Conn. 135, 100 Am. St. Rep. 989, and see the cases cited in the cross-reference note thereto; Callis v. Merriweather, 98 Md. 361, 103 Am. St. Rep. 404.

SAXE v. WALWORTH MANUFACTURING COMPANY.

[191 Mass. 338, 77 N. E. 883.]

MASTER AND SERVANT—Assumption of Risk of Absence of Guard Over an Emery Wheel.—If no guards ever have been used over emery wheels in a factory, and an employé is aware of this when he begins work, his employer does not owe him the duty of making a change, and is not answerable to him for injuries sustained by the explosion of the emery wheel on which he is working, though his injury would have been prevented had a guard been placed over such wheel. (p. 614.)

MASTER AND SERVANT—Nonliability for Defect in an Appliance.—Where an employé is injured by the explosion of an emery wheel at which he is working, and such explosion could not have occurred without some defect in the wheel, still he cannot recover of his employer if there is nothing to show what the defect was, and no evidence to indicate that the most careful inspection or the highest degree of diligence on the part of the employer could have discovered any indication of danger in using the wheel, and it was not manufactured by him. (p. 615.)

T. A. McGeough, for the plaintiff.

T. F. Noonan, for the defendant.

339 **SHELDON, J.** This was an action brought under Revised Laws, chapter 106, section 71, to recover for personal injuries received by the plaintiff while in the defendant's employ as a brass finisher. It was admitted that a proper notice had been served on the defendant. The plaintiff was at work in the defendant's factory on a piece of brass piping, when an emery wheel, which was located within ten feet of his position and just behind him, exploded, and a piece of the wheel struck him in the back of the head, causing the injuries complained of. This wheel was attached to a spindle, and was revolved at the rate of over three thousand revolutions a minute, by means of a belt attached to a shaft at the ceiling. These wheels are composed of emery and composition compressed and baked like an ordinary brick. They were kept in quantities in the defendant's stockroom; and whenever one was wanted it was taken from the stockroom and put on the spindle, sometimes by the foreman, sometimes by the man who wanted to use it. A workman who needed a special wheel would put it on for himself, and if he did not find it at the machine would send to the stockroom for it. This wheel was practically a new wheel; it did not appear how much it had been used.

A witness for the plaintiff, who had been a foreman for the defendant for eighteen years, testified that this must have been a defective wheel, but he could not tell the nature of the defect—it might be cracked, or it might be owing to the bad construction of the wheel; that there must be some defect; that these wheels were not manufactured by the defendant, and he did not know who manufactured this wheel.

There was, and had been, no guard on any of the defendant's emery wheels. A guard was used in some places, and would prevent the pieces of an exploding wheel from flying so as to cause such an injury as happened to the plaintiff.

At the close of the plaintiff's evidence, the judge of the superior court ordered a verdict for the defendant; and the plaintiff excepts to this ruling.

Two questions in the case can be readily disposed of. No contention is made that there was not evidence which would have warranted a finding that the plaintiff was himself in the exercise of due care. He was engaged in his own work, and was in no way responsible for the operation, condition or explosion ³⁴⁰ of the wheel: *Meagher v. Crawford Laundry Machinery Co.*, 187 Mass. 586, 73 N. E. 853; *Murphy v. Marston Coal Co.*, 183 Mass. 385, 67 N. E. 342. On the other hand, the jury would not have had a right to find that the defendant was negligent in not putting a guard over this wheel. No guard ever had been used in the defendant's factory. It was not contended, and there was no evidence, that the plaintiff was not aware of this fact when he began to work for the defendant; and the defendant owed no duty to him to make any change in this respect: *French v. Columbia Spinning Co.*, 169 Mass. 531, 48 N. E. 269; *Ross v. Pearson Cordage Co.*, 164 Mass. 257, 49 Am. St. Rep. 459, 41 N. E. 284.

The most difficult question is whether there was evidence of negligence on the part of the defendant in furnishing a defective emery wheel. This was practically a new wheel; there was evidence that it would not have exploded if there had not been some defect in it; there was nothing to show that the man who was running it was operating it in any respect improperly or at an excessive rate of speed. The jury well might have found that there was a defect in the wheel, and that the explosion was due to the existence of this defect. There was a duty incumbent on the defendant to see

that its machines and all parts of them were in a reasonably safe condition and suitable for the purpose for which they were to be used, so far as this could be done by the exercise of proper care on its part: *Murphy v. Marston Coal Co.*, 183 Mass. 385, 67 N. E. 342; *Droney v. Doherty*, 186 Mass. 205, 71 N. E. 547; *Toy v. United States Cartridge Co.*, 159 Mass. 313, 34 N. E. 461. But there was nothing to show what the defect in this wheel was. The only witness who testified on this subject said that he could not tell the nature of the defect at all. There was absolutely no evidence to show that the most careful inspection or the highest degree of diligence on the part of the defendant could have discovered any indication of danger in using this wheel: *Harnois v. Cutting*, 174 Mass. 398, 54 N. E. 842. There well may have been nothing more than a hidden flaw, such as was found to exist in *Roughan v. Boston & Lockport Block Co.*, 161 Mass. 24, 36 N. E. 461. The jury did not see the pieces of the broken wheel, as in *Jones v. Pacific Mills*, 176 Mass. 354, 57 N. E. 663. The wheel was not manufactured by the defendant. Nor was there any evidence as to the condition of the broken surfaces, as in *Toy v. United States* ³⁴¹ *Cartridge Co.*, 159 Mass. 313, 34 N. E. 461. The decisions relied upon by the plaintiff go no further than to say that the explosion of this wheel was some evidence of a defect in it. But this is not enough to make out negligence by the master in an action to recover for personal injuries to his servant: *Hill v. Iver Johnson Sporting Goods Co.*, 188 Mass. 75, 74 N. E. 303. The burden is upon the plaintiff to show affirmatively that the defendant was negligent; and we cannot find that there was any evidence to show this. It cannot be affirmed except upon bare conjecture: *Donaldson v. New York etc. R. R.*, 188 Mass. 484, 74 N. E. 915; *Clare v. New York etc. R. R.*, 167 Mass. 39, 44 N. E. 1054. If, as in the case here, other causes than the defendant's negligence might have produced this accident, the plaintiff was bound to exclude the operation of such causes by a fair preponderance of the evidence; and this he has not done: *McGee v. Boston Elevated Ry.*, 187 Mass. 569, 73 N. E. 657; *Faulkner v. Boston etc. R. R.*, 187 Mass. 254, 72 N. E. 976; *Wadsworth v. Boston Elevated Ry.*, 182 Mass. 572, 66 N. E. 421; *Drum v. New England Cotton Yarn Co.*, 180 Mass. 113, 61 N. E. 812; *McKay v. Hand*, 168 Mass. 270, 47

N. E. 104; *Allen v. Smith Iron Co.*, 160 Mass. 557, 36 N. E. 581; *Kendall v. City of Boston*, 118 Mass. 234, 19 Am. Rep. 446.

Accordingly, we are of opinion that the court rightly ordered a verdict for the defendant.

Exceptions overruled.

The Liability of an Employer for injuries to his employé by reason of defective or unguarded machinery is discussed in the monographic note to Brazil Block Coal Co. v. Gibson, 98 Am. St. Rep. 289-325. The general doctrine of assumption of risk is considered in the note to Houston etc. Ry. Co. v. De Walt, 97 Am. St. Rep. 884-900.

LEVIN v. GOODWIN.

[191 Mass. 341, 77 N. E. 718.]

NUISANCE—License, Whether Authorizes Maintenance of.—A license to keep a bowling-alley, granted by municipal authorities under power conferred on them by the legislature, protects the person licensed, though such maintenance by the making of noises operates as a substantial disturbance of the occupants of adjacent property and results in their pecuniary loss, if the bowling-alley is constructed and operated in the usual manner and with the usual safeguards. (p. 618.)

NUISANCE.—The Operation of a Bowling-alley cannot, by the court, be restrained to certain hours of the night to relieve occupants of adjacent property from noise, if such alley has been licensed by the municipal authorities acting under a power conferred on them by statute. (p. 618.)

Suit to enjoin an alleged nuisance consisting of the operation of a bowling-alley in the second story of a building adjoining that occupied by the complainant. The defendant pleaded a license granted him by the board of police of Boston. The trial court found:

"I find that the operation of said bowling-alleys during certain hours of the night is an actual substantial disturbance of the plaintiff's enjoyment of her said estate, and has resulted in a pecuniary loss to her; I think that the plaintiff would have substantial relief from further disturbance and loss if the operation of said alleys should be discontinued at night between the hours of 10 o'clock P. M. and 6 o'clock A. M., and I find she has suffered pecuniary damage down to the time of the filing of the bill of at least one hundred dollars."

The judge decreed for complainant in accordance with such finding, and the case was reported to the appellate court by agreement of the parties to be determined by it.

F. N. Nay and D. Stoneman, for the plaintiff.

J. H. Soliday and F. A. Goodwin, for the defendant.

³⁴² LATHROP, J. The principal question in this case is whether the license granted to the defendant, under the Revised Laws, chapter 102, section 168, was a full protection to him; and we have no doubt that it was. The legislature has seen fit to delegate to municipal authorities, except in Boston, and in Boston to the board of police, the power to grant a license to a person to keep a billiard, pool or sippio table, or a bowling-alley for hire, gain or reward, upon such terms or conditions as they deem proper, and to revoke it at their pleasure.

³⁴³ There can be no doubt that the law is constitutional: *Commonwealth v. Kinsley*, 133 Mass. 578. Nor can there be any doubt that a person carrying on a business may be licensed to make a noise, which but for the license would be a nuisance. In *Davis v. Sawyer*, 133 Mass. 289, 43 Am. Rep. 519, this court restrained by injunction the ringing of a factory bell at an early hour in the morning for the purpose of arousing its operatives, declaring it to be a private nuisance. The legislature then passed an act (Stats. 1883, c. 84), giving manufacturers and others employing workmen the right to ring bells and use whistles and gongs of such size and weight, in such manner, and at such hours, as the board of aldermen of cities and the selectmen of towns may in writing designate. The selectmen of the town where the factory was situated then gave to the manufacturer a license to ring the same bell at the hour at which he was prevented from ringing it by the injunction; and this court on a bill of review reversed its former judgment: *Sawyer v. Davis*, 136 Mass. 239, 49 Am. Rep. 21. It is somewhat significant that in this case the court in its opinion, among other things, refers to the statutes "establishing hospitals, stables, and bowling-alleys."

The question involved in the case before us was fully discussed in *Martha v. Lovewell*, 166 Mass. 391, 55 Am. St. Rep. 410, 44 N. E. 347, and the line was sharply drawn between

the liability of a person carrying on a business causing a nuisance, before and after the obtaining of a license.

In the case before us the defendant has done nothing which his license did not authorize him to do. The judge expressly found that the bowling-alleys were built in the same manner that such alleys are usually constructed, and contained certain pads or cushions designed to deaden the noise caused by the dropping or rolling of the balls.

The judge further found that before the filing of the bill the defendant put double windows on the side of the building next the plaintiff's house, and put burlap on the ceiling to deaden the noise; and that the alleys as run made no more noise than would be expected from the conduct of any similar business under similar conditions.

The judge of the superior court seems to have based his finding in favor of the plaintiff upon the ground that the plaintiff would have substantial relief from further disturbance and loss ³⁴⁴ if the operation of the alleys should be discontinued at night, between the hours of 10 o'clock P. M. and 6 o'clock A. M. This may be true, but the court had no authority to change the hours named in the license, or to afford the plaintiff relief so long as the conditions of the license were complied with.

Nor are we of opinion that the plaintiff is aided by the finding of the judge that the operation of alleys on the second floor of a wooden building, with unplastered walls, makes much greater noise than the operation of alleys on the ground floor or basement of a building where alleys usually are built. There is nothing in the finding which shows that the defendant did not do what he had a right to do under his license: nor is there anything in the law which confines the use of bowling-alleys to a plastered building, or to the ground floor or basement.

While the plaintiff has suffered loss, this does not entitle her to recover such loss from the defendant, who has acted strictly within his legal rights.

Bill dismissed.

The Question Whether Bowling-Alleys constitute public nuisances is discussed in the recent extended note to Acme Fertilizer Co. v. State, 107 Am. St. Rep. 230, on what are public nuisances.

GEORGE G. FOX CO. v. GLYNN.

[191 Mass. 344, 78 N. E. 89.]

BUSINESS, Goodwill in, When Exists.—If a baker manufactures bread with ingredients somewhat different from other bread, gives it a distinctive name, and adopts a loaf of peculiar visual appearance, and creates a demand for and an extensive trade in such bread, he creates and acquires a valuable goodwill in the manufacture and sale of such bread, which goodwill is property and a valuable asset in his business. (p. 623.)

BUSINESS and Trademark and Name, Restraining Infringements of.—One who has the goodwill of a business, dependent on a trade name which is also registered as a trademark, in his manufacture and sale of a product of unusual visual appearance, is entitled to an injunction against anyone who attempts to deprive him of such goodwill and business by manufacturing and selling goods of a name somewhat different from the trade name of the complainant, but having such a resemblance in visual appearance that the goods of the one may well be mistaken and purchased as the goods of the other. (pp. 623, 624.)

TRADE NAMES and Appearance of Goods, When Will be Protected.—A complainant is entitled to protection by injunction when the combination of name, size, shape and condition of surface, producing a peculiar visual appearance, were all adopted by him when not in use by anyone else, and are such a combination as no one needs to use. The general right of the defendant to use any size or shape or condition of surface he may choose does not give him the right to adopt a combination of these which will mislead the public to the complainant's detriment and the defendant's advantage. (pp. 624, 625.)

TRADE NAME—Wholesalers, When may be Enjoined.—Wholesalers cannot successfully defend on the ground that they do not mislead, nor intend to mislead, the retail dealers to whom they sell. It is enough to require an injunction against the wholesalers that they knowingly place an instrument of fraud in the hands of a retailer with which he may deceive the public. (p. 626.)

TRADE NAMES, Resemblance of, When a Question of Fact.—The finding of the master that the words "Crown Malt" bear such a close resemblance to the plaintiff's trade name and trademark "Creamalt," as to be likely to produce frauds by dealers and mislead the public, is a finding of fact which must stand unless plainly wrong. (p. 627.)

TRADE NAME and Mark, Against What Entitled to Protection—"Creamalt" and "Crown Malt."—A wholesale baker originating a kind of bread in which milk and malt are combined, and who, to identify it before the public, made it into oval loaves of distinctive size, shape and surface, and coined and adopted the word "Creamalt" as a trade name, and registered it as a trademark, and on each loaf printed such trademark in blue ink on a white label, and built up a valuable business, is entitled to an injunction to protect him from the manufacture and sale of other loaves of the same size, shape and visual appearance, on each of which is printed in blue ink on a white label the words "Crown Malt." (p. 627.)

Suit in equity to restrain the defendant Glynn, a retailer, and the defendants McKenzie and Connor, wholesalers, doing business as partners under the name of Sanderson Baking Company, from manufacturing or selling as and for "Creamalt" any bread of a shape similar to that manufactured by plaintiff, and from using the name "Crown Malt" on any such bread manufactured or offered for sale by the defendants. An interlocutory decree was entered in favor of plaintiff, from which McKenzie and Connor appealed, and the questions presented by the appeal were ordered determined by the full court.

O. Mitchell and J. T. Brennan, for the plaintiff.

J. W. Keith and E. D. Sibley, for the defendants.

³⁴⁶ KNOWLTON, C. J. The plaintiff corporation is a wholesale baker, and it brings this bill against a retail baker and a firm of wholesale bakers, alleging unfair competition in trade by the defendants against the plaintiff, and infringements of the plaintiff's registered trademark. The bill avers that the plaintiff originated a new kind of bread, in which milk and malt were combined, and that, in order to identify it before the public, it adopted distinctive features of shape, size, proportion and condition of surface, resulting in a distinctive visual appearance. For this novel bread the plaintiff coined and adopted the word "Creamalt" as a trade name, and registered it in the office of the secretary of the commonwealth as a trademark. The plaintiff's loaf bore the plaintiff's trademark, printed in blue ink upon a label of a certain size and color. The alleged unfair competition of the defendants consists in the manufacture and sale of a loaf of bread under the name "Crown Malt," which is practically identical in its visual appearance with the plaintiff's "Creamalt" loaf. The master found the above facts, and, among others, made further findings as follows: "This 'Creamalt' bread was steam glazed; that is to say, the bread was baked in an oven into which live steam was injected during the process of baking, with the result that the upper surface of the bread to a slight depth was chemically affected, the starch therein being converted into dextrine, with the result that the surface became glazed and crackled in appearance. On each and every 'Creamalt' loaf there was affixed a small white

label printed in blue ink and bearing the name 'Creamalt,' and the words 'Made with milk and malt, George G. Fox Company, Charlestown'; . . . that prior to said date, to wit, January 1, 1904, there was no bread of any kind known as 'Creamalt'; that there was no bread in this market advertised or known to the public to contain milk and malt; that there was no bread commercially successful containing milk and malt; . . . that there was no bread made having the distinctive visual appearance adopted by the complainant; that the peculiar shape of 'Creamalt' bread is uneconomical from the standpoint of the consumer for the reason ³⁴⁷ that it does not cut in uniform slices; . . . that the complainant extensively advertised its 'Creamalt' bread by circulars, . . . and that said bread quickly became popular; . . . that all 'Creamalt' bread made and sold by the complainant has the distinctive visual appearance shown in exhibit 'B'; and that all such loaves were steam glazed and had 'Creamalt' labels affixed; that the 'Creamalt' branch of the business is the most valuable part of its business, and is of large value; . . . that the public and the trade call for the complainant's bread either by the name 'Creamalt' or by asking for 'the oval loaf' and have learned to recognize the complainant's 'Creamalt' bread as 'Creamalt' bread by its general visual appearance; . . . that about the 1st of October, 1904, the defendants McKenzie and Connor placed on the market, being practically the same market as that of the complainant, an oval loaf of white bread identical in size, shape, proportions and general visual appearance with the bread of the complainant, except that no label was affixed to the loaves, and except as to the glaze, which was a cornstarch wash slightly different in effect from the steam glaze, consequent upon the fact that it had no chemical action upon the surface of the bread and gave no crackle; that in December, 1904, McKenzie and Connor began to use a steam glaze on their bread; that in January, 1905, they adopted the name 'Crown Malt' for their bread; that beginning in May, 1905, and continuously since, they have affixed to each and every loaf of their 'Crown Malt' bread a small white label printed in blue ink, bearing the words 'Crown Malt made only by Sanderson Baking Company' and a pictorial representation of a crown; . . . that at the time of placing their oval loaf on the market said McKenzie and Connor knew of the

complainant's distinctive loaf and made their 'Crown Malt' oval loaf in imitation of the complainant's 'Creamalt' loaf, and in response to a demand caused by the sale of the complainant's 'Creamalt' loaf, and that the changes the defendants McKenzie and Connor have made since first placing their oval loaves on the market have tended to increase the similarity of their loaf to the loaf of the complainant; and I find from such gradual approximation, and from all the evidence in the case, that said defendants had a fraudulent intent to appropriate to themselves the benefit of the public demand for the complainant's novel and ³⁴⁸visually distinctive loaf; . . . that the 'Crown Malt' oval loaf of the defendants McKenzie and Connor has been substituted and palmed off as and for the 'Creamalt' bread of the complainant by the defendant Glynn and other dealers to whom the defendants McKenzie and Connor sold their 'Crown Malt' bread; . . . that the trade name and trademark 'Crown Malt' is so similar to the trade name and trademark 'Creamalt' in connection with a loaf of bread, as to be likely to create confusion, mislead the public and render easy substitution by dealers, and that the complainant's trade name and trademark 'Creamalt' have been infringed by McKenzie and Connor's use of the trade name and trademark 'Crown Malt'; . . . that the 'Creamalt' loaf of the complainant is novel and distinctive; that the demand of the public for this bread was created by the complainant, and that the shape, proportions and color have come to be principally, if not exclusively, relied upon by ordinary purchasers as the means of identifying the complainant's 'Creamalt' bread, and that the oval loaf put out by the defendant amounts to a representation to the consuming public that the defendants' oval loaf is the complainant's 'Creamalt' loaf; . . . that the defendants McKenzie and Connor having knowledge of the fact that their bread was and had been sold by the defendant Glynn and others as and for the bread of the complainant, continued to make and sell their oval loaf and stand upon their right; that there is no necessity for the defendants McKenzie and Connor to make their bread of the peculiar and distinctive appearance of the complainant's 'Creamalt' bread apart from the desire to benefit by the demand created by the complainant for its 'Creamalt' bread, and said defendants can and do successfully make and sell their bread in another shape."

These findings show that the plaintiff has a valuable goodwill in the business of manufacturing and selling this peculiar kind of bread. This goodwill is property, and is a valuable asset in the plaintiff's business. For cases recognizing property in goodwill, see *Cruttwell v. Lye*, 17 Ves. 335; *Hitchcock v. Coker*, 6 Ad. & E. 438; *Knott v. Morgan*, 2 Keen, 213; *Potter v. Commissioners of Inland Revenue*, 10 Ex. 147; *Wedderburn v. Wedderburn*, 22 Beav. 84; *Griffith v. Kirley*, 189 Mass. 522, 76 N. E. 201; *Hutchinson v. Nay*, 183 Mass. 355, 67 N. E. 601, 187 Mass. 262, 105 Am. St. Rep. 390, 72 N. E. 974, 68 L. R. A. 186; *Moore* ²⁴⁰ *v. Rawson*, 185 Mass. 264, 70 N. E. 64; *Crossman v. Griggs*, 186 Mass. 275, 71 N. E. 560. For cases recognizing the right in connection with a trademark, trade name, or other designation of origin, see *American Waltham Watch Co. v. United States Watch Co.*, 173 Mass. 85, 73 Am. St. Rep. 263, 53 N. E. 141, 43 L. R. A. 826; *Flagg Mfg. Co. v. Holway*, 178 Mass. 83, 59 N. E. 667; *Samuels v. Spitzer*, 177 Mass. 226, 58 N. E. 693; *Marsh v. Billings*, 7 Cush. 322, 54 Am. Dec. 723; *Hildreth v. McDonald Co.*, 164 Mass. 16, 49 Am. St. Rep. 440, 41 N. E. 56; *Russia Cement Co. v. LePage*, 147 Mass. 206, 9 Am. St. Rep. 685, 17 N. E. 304; *Viano v. Baccigalupo*, 183 Mass. 160, 67 N. E. 641; *Regis v. Jaynes*, 185 Mass. 458, 70 N. E. 480; *Cohen v. Nagle*, 190 Mass. 4, 76 N. E. 276, 2 L. R. A., N. S., 964.

This goodwill is connected with and dependent upon the use of the name "Creamalt" and the combination of features in the manufacture of the bread which give it a distinctive visual appearance unlike that of any other bread in the market. These indicate the place of manufacture of the loaves as they are sold, and give them a peculiar value in the market. The right to have the benefit of the reputation of its products, which are designated as above, is important to the plaintiff, and it is a right of property which the courts will guard as carefully as it would visible, tangible property. This right necessarily includes a right to the use of the trade name, trademark or other proper designation of its bread, thus acquired by appropriation and public recognition. Anyone who attempts to deprive one of such a right, by palming off goods of his own manufacture for others which have acquired a valuable reputation, is a wrongdoer, whose fraudu-

lent attempt will subject him to the restraining and retributive orders of the court.

The practical difficulties which arise in such cases come from conflicting rights, where the plaintiff's right to use his chosen means of designation of his products is not exclusive. One way of designating articles of manufacture as coming from a particular maker is by a trademark. This, to be an effectual protection to one who has adopted and used it, must be something to which the user may have an exclusive right. It therefore cannot be anything to the use of which, for a similar purpose, others may also have a right. The courts will not recognize trademarks which are not chosen in such a way as not to conflict with the rights of others to use common names and things, like the names of persons and places, and of colors and forms with which all are familiar.

But goods often come to be known as of a particular manufacture, ³⁵⁰ and acquire a valuable reputation, by means of a designation that could not be made the subject of a trademark, because others may have occasion to make some use of the words or marks chosen. It is important to everyone who has acquired a valuable goodwill in his business in that way to have it protected, as his other property is protected. It is also important to the public to be able to recognize articles of manufacture as produced by a known and trustworthy maker, through the appearance by which they have come to be known. The courts therefore have two reasons for recognizing and protecting trade names, and other similar means of designation, whenever they accompany articles of manufacture. One is to save to the manufacturer the benefit of the goodwill which belongs to his products through the use of the trade name or other designation, and the other is to protect the public from frauds that might be practiced by the sale of imitations. The foundation of the jurisdiction of the courts in these cases is the right of the plaintiff, who asks for relief from the frauds of those who seek to appropriate that which rightfully belongs to him. Such a fraud need not be an active fraud in any other sense than in the willful refusal to recognize the right of the party, who has acquired a reputation for his goods, to have the benefit of the confidence which he has earned.

If the plaintiff in such a case has acquired for his manufactures a valuable reputation in the community, in connec-

tion with a trade name, or with other peculiarities by which they are known, and if the defendant has no right that will be interfered with to his detriment by a protection of the plaintiff's rights, the result is easily reached. The defendant is enjoined from any use of the name or other indications of origin employed by the plaintiff. If some of these names or indications belong to the public, for any proper use, and the defendant has an interest to employ them, it becomes necessary to give the case such a direction, if possible, as will enable each so to enjoy his right as not to interfere with the right of the other. If that is not possible, their rights must be adjusted on equitable principles, having proper regard to the interests of both. The cases in which the plaintiff can have no relief are those in which the right of the defendant to the use of the name is as important as the right of the plaintiff ³⁵¹ to have all the benefits, pertaining to his business, which he seeks to retain. In such a case the defendant does not fraudulently or wrongfully appropriate the plaintiff's property, although he may obtain an advantage from the good reputation of the plaintiff's products. Cases showing the general right of a manufacturer to protection in a case like the present are the following: *Knott v. Morgan*, 2 Keen, 213; *Garrett v. Garrett & Co.*, 78 Fed. 472, 24 C. C. A. 173; *Reddaway v. Banham*, [1896] App. Cas. 199; *Saxlehner v. Appollinaris Co.*, [1897] 1 Ch. 893; *Walter Baker Co. v. Baker*, 77 Fed. 181; *Anheuser-Busch Brewing Assn. v. Clarke*, 26 Fed. 410; *Von Mumm v. Frash*, 56 Fed. 830; *Cook & Bernheimer Co. v. Ross*, 73 Fed. 203; *Weinstock v. Marks*, 109 Cal. 529, 50 Am. St. Rep. 57, 42 Pac. 142, 30 L. R. A. 182; *Hildreth v. McDonald Co.*, 164 Mass. 16; *New England Awl etc. Co. v. Marlborough Awl etc. Co.*, 168 Mass. 154, 60 Am. St. Rep. 377, 46 N. E. 386; *American Waltham Watch Co. v. United States Watch Co.*, 173 Mass. 85, 73 Am. St. Rep. 263, 53 N. E. 141, 43 L. R. A. 826; *Samuels v. Spitzer*, 177 Mass. 226, 58 N. E. 693; *Flagg Mfg. Co. v. Holway*, 178 Mass. 83, 59 N. E. 667; *Viano v. Baccigalupo*, 183 Mass. 160, 67 N. E. 641; *Cohen v. Nagle*, 190 Mass. 4, 76 N. E. 276, 2 L. R. A., N. S., 964. The foundation of the plaintiff's right is the fact that the combination of name, size, shape and condition of surface, producing a peculiar visual appearance, were all adopted by the plaintiff when not in use by anyone else, and are such a combination as no one else needs to use. The

shape is found to be unusual, and uneconomical for cutting. The general right of the defendants to use any size or shape or condition of surface that they choose does not give them a right to adopt a combination of these, which will mislead the public, to the plaintiff's detriment and their own advantage: *New England Awl etc. Co. v. Marlborough Awl etc. Co.*, 168 Mass. 154, 60 Am. St. Rep. 377, 46 N. E. 386; *Reddaway v. Banham*, [1896] App. Cas. 199; *Saxlehner v. Apollinaris Co.*, [1897] 1 Ch. 893; *Enterprise Mfg. Co. v. Landers*, 131 Fed. 240; *Putnam Nail Co. v. Bennett*, 43 Fed. 800; *Buck's Stove etc. Co. v. Kiechle*, 76 Fed. 758; *Sterling Remedy Co. v. Spermine Medical Co.*, 112 Fed. 1000, 50 L. R. A. 657; *Globe-Wernicke Co. v. Brown*, 121 Fed. 90; *Elliott v. Hodson*, 19 Rep. Pat. Cas. 518; *Weinstock v. Marks*, 109 Cal. 529, 50 Am. St. Rep. 57, 42 Pac. 142, 30 L. R. A. 182; *Cohen v. Nagle*, 190 Mass. 4, 76 N. E. 276, 2 L. R. A., N. S., 964. If it were necessary for them to adopt such a combination it could only be permitted, after the plaintiff had acquired a valuable reputation in connection with it, on condition that it ³⁵² be accompanied by a designation or statement plainly showing that the defendants' bread was not of the plaintiff's manufacture: *American Waltham Watch Co. v. United States Watch Co.*, 173 Mass. 85, 73 Am. St. Rep. 263, 53 N. E. 141, 43 L. R. A. 826; *Weinstock v. Marks*, 109 Cal. 529; *Garrett v. Garrett & Co.*, 78 Fed. 472, 24 C. C. A. 173. The difference between the right to the use of a trade name or other similar designation acquired in this way and a technical trademark is, that, while the trade name or other designation, like a trademark, is attached to the manufactured article, and accompanies it in the market, it may be of such a kind as not to make the right exclusive. But the findings of the master show that the defendants' legitimate business can be conducted properly without giving their loaves this distinctive, misleading appearance.

It is not true that the wholesale dealers can successfully defend on the ground that they do not mislead or intend to mislead the retail dealers to whom they sell. It is enough to require an injunction, if they knowingly place an instrument of fraud in the hands of a retailer, with which he may deceive the public: *New England Awl etc. Co. v. Marlborough Awl etc. Co.*, 168 Mass. 154; *Fairbank Co. v. Bell Mfg. etc. Co.*, 77 Fed. 869, 23 C. C. A. 554; *Hostetter Co. v. Becker*, 73 Fed.

297; Fairbank Co. v. Luckel Co., 102 Fed. 327, 42 C. C. A. 346; Lever v. Goodwin, 36 Ch. D. 1.

The master's finding that the words "Crown Malt" bear such a close resemblance to the plaintiff's trade name and trademark "Creamalt" as to be likely to promote frauds by dealers, and mislead the public, is a finding of fact which must stand unless it is plainly wrong. The evidence on which the finding was made is not all before us. It does not appear that the finding is wrong. The defendants cannot suffer seriously from it, as the word "Creamalt" was coined by the plaintiff as a name for its bread, and there is nothing to show that there was any reason for the adoption by the defendants of the name "Crown Malt," except its similarity to the name adopted by the plaintiff.

In view of what we have stated, it is unnecessary to consider the defendants' exceptions particularly. Many of them are to findings of fact by the master, upon evidence which is not reported.

The plaintiff is entitled to an injunction, the terms of which will be fixed by a single justice, and to an assessment of damages.

Decree accordingly.

Words Which may Constitute a Valid Trademark are considered in the extended note to *Kyle v. Perfection Mattress Co.*, 85 Am. St. Rep. 83-125.

The Right to an Injunction to Protect a trademark or trade name from infringement is discussed in the recent cases of *Nesne v. Sundet*, 93 Minn. 299, 106 Am. St. Rep. 439; *Falk v. American etc. Trading Co.*, 180 N. Y. 445, 105 Am. St. Rep. 778; *Koebel v. Chicago Landlords' etc. Bureau*, 210 Ill. 176, 102 Am. St. Rep. 154.

MCLEOD v. NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

[191 Mass. 389, 77 N. E. 715.]

RAILWAYS, Risks Assumed by Employés of.—One seeking and obtaining employment as a brakeman on a railroad assumes the risk of injury from buildings and other permanent structures unusually near the track, the risk, of danger from which is obvious. (p. 629.)

J. J. Fealy, for the plaintiff.

C. F. Choate, Jr., for the defendant.

³⁹⁰ LORING, J. This is an action by an administrator to recover for conscious suffering and the death of his intestate.

The plaintiff's intestate was employed by the defendant as a freight brakeman on the Monday preceding the Monday on which he was killed. When employed he had had no experience on railroads. When he was killed he was standing on the step of an open flat car, facing it. The car was loaded with ashes and was being pushed down to an ash dump in the Norwood yard of the defendant. The plaintiff's intestate was killed by being knocked off by the corner of a building which was two feet and seven or eight inches from the nearest rail of the track in question, and "the edges of the corners of the building . . . were worn off by the cars hitting it at a distance of four or five feet from the ground." The building in question was a permanent building which had been in the same position with relation to the track for many years.

The plaintiff's intestate made a written application for the position of brakeman, which ended in these words: "If this application is granted, and I am employed as a freight brakeman, I shall enter upon such employment with a full understanding of the risks attending the same, all of which I will deliberately assume, and I will, as soon as possible, make a careful examination of the railroad tracks and yards where my duty calls me, and note their condition and position, and the position of all signal wires and poles, telegraph poles, switches, bridges and other objects that are near the track."

The evidence showed that the plaintiff's intestate had been by the building in question six times on the day in question, and it was on the seventh time that he was killed; and further, that on the preceding Monday (the first day of his employ-

ment) he had been working in the same yard and had been on the ash car when it was taken past the building in question to the dump.

³⁹¹ There was evidence from one of the plaintiff's witnesses that the intestate had been warned of the danger of this particular building, but the plaintiff put in a contradictory statement made by the witness. The case, therefore, is not a case where on the undisputed facts the intestate assumed the risk because he knew of it.

But, in our opinion, the risk was one which the plaintiff's intestate assumed by entering on the employment in question. There are a number of cases in this commonwealth where it has been held that a railroad employé takes the risk of permanent structures near the track, at least when they are not unusually near, leaving open the question whether the risk is assumed if the structure is unusually near. In some of the opinions the statement might be thought to go farther, but with the exception of *Scanlon v. Boston etc. R. R.*, 147 Mass. 484, 9 Am. St. Rep. 733, 18 N. E. 209, we do not think that it does: *Thain v. Old Colony R. R.*, 161 Mass. 353, 37 N. E. 309; *Vining v. New York etc. R. R.*, 167 Mass. 539, 46 N. E. 117; *Ryan v. New York etc. R. R.*, 169 Mass. 267, 47 N. E. 877; *Quinn v. New York etc. R. R.*, 175 Mass. 150, 55 N. E. 891; *Donahue v. Boston etc. R. R.*, 178 Mass. 251, 59 N. E. 663; *Fearns v. New York etc. R. R.*, 186 Mass. 529, 72 N. E. 68.

The question so left open is now before us for decision, and we are of opinion that the qualification is not material, and that the employé assumes the risk even if the structure in question is unusually near the track.

When the defendant invited the plaintiff's intestate to work for it, the invitation given was an invitation to work on its railroad as constructed. In inviting him to work for it the defendant did not come under an obligation to rebuild its tracks and buildings and make them more safe; but the plaintiff's intestate undertook to work on the defendant's railroad as then constructed, and so took the risk of all obvious dangers, including the danger of the proximity of a building to the defendant's tracks, although it was unusually near to them.

As is pointed out by the defendant's counsel, no similar limitation has been laid down in the employment of a workman in other occupations: *Lothrop v. Fitchburg etc. R. R.*,

150 Mass. 423, 23 N. E. 227; Boyle v. New York etc. R. R., 151 Mass. 392 102, 23 N. E. 82; Fitzgerald v. Connecticut River Paper Co., 155 Mass. 155, 31 Am. St. Rep. 537, 29 N. E. 464; Downey v. Sawyer, 157 Mass. 418, 32 N. E. 654; Richstain v. Washington Mills, 157 Mass. 538, 32 N. E. 908; Toomey v. Donovan, 158 Mass. 232, 33 N. E. 396; Murphy v. American Rubber Co., 159 Mass. 266, 34 N. E. 268; Rooney v. Sewall & Day Cordage Co., 161 Mass. 153, 36 N. E. 789; Cassady v. Boston etc. R. R., 164 Mass. 168, 41 N. E. 129; Barnard v. Schrafft, 168 Mass. 211, 46 N. E. 621; Murch v. Thomas Wilson's Sons, 168 Mass. 408, 41 N. E. 111; O'Connor v. Whittall, 169 Mass. 563, 48 N. E. 844; Donahue v. Washburn & Moen Mfg. Co., 169 Mass. 574, 48 N. E. 842; Tenanty v. Boston Mfg. Co., 170 Mass. 323, 49 N. E. 654.

For these reasons the case of Scanlon v. Boston etc. R. R., 147 Mass. 484, 9 Am. St. Rep. 733, 18 N. E. 209, cannot, in our opinion, be upheld.

If by the terms of the written agreement this common-law exemption for liability is limited so as to allow the plaintiff an opportunity to make an inspection (which we do not decide), the result is the same. The plaintiff had had an ample opportunity on the preceding Monday and on the day in question, on which he had passed the building in question six times; and the plaintiff admitted that his intestate had been warned about dangerous places in the yard but not about this place in particular.

Exceptions overruled.

An Employé is Held to Assume the risk, as a rule, of obvious dangers ordinarily incident to the service in which he engages: See the monographic note to Houston etc. Ry. Co. v. De Walt, 97 Am. St. Rep. 886. As to the application of this rule to railroad employes in respect to dangers arising from structures near the track, see Murray v. Boston etc. R. R. Co., 72 N. H. 32, 101 Am. St. Rep. 660; Leach v. Oregon Short Line R. R. Co., 29 Utah, 285, 110 Am. St. Rep. 708.

SHUTE v. BILLS.

[191 Mass. 433, 78 N. E. 96.]

LANDLORD AND TENANT.—A Landlord is not Answerable for Injuries Due to a Hidden Defect existing in premises when leased, if he neither knew nor ought to have known thereof. (p. 632.)

LANDLORD AND TENANT.—A Landlord Discovering a Defect After the Beginning of the Tenancy is under no obligation to communicate it to the tenant. (p. 632.)

LANDLORD AND TENANT.—A Known Usage that the Landlord do the Outside Repairs, such as the roof, gutters, and conductors, when houses are entirely let without any written lease to a single tenant at will, is good, and evidence to establish it is admissible in an action against a landlord. (p. 633.)

LANDLORD AND TENANT.—The Right of Recovery on the Part of a Member of the Tenant's Family, against the landlord for an injury due to a defect in the leased premises, is measured by the right of the tenant. (p. 633.)

LANDLORD AND TENANT.—A Landlord is not Liable for Damages Due to Imperfect Repairs made by him or his agent, unless such repairs were made negligently. (p. 634.)

LANDLORD AND TENANT.—Negligence in Making Repairs is Inferable when their purpose is to stop a leak in a roof or gutter, which, notwithstanding the repairs, continues to leak. (p. 634.)

LANDLORD AND TENANT.—A Landlord is Answerable for Damages Due to Negligence in Making Repairs, as where, being notified of a leak in a gutter, he undertakes to repair it, but does the work in so negligent a manner that the leak continues, and the water therefrom, falling on the steps, freezes, causing a daughter of the tenant, who is a member of his household, while in the exercise of due care, to slip and fall and be thereby injured. (p. 634.)

LANDLORD AND TENANT.—A Custom or Usage that the Landlord Retains Control of the Outside, Yard and Roof of a dwelling leased by him contradicts both the agreement of the parties and the rule of law. Evidence thereof should be excluded. (p. 634.)

Tort by a daughter of a tenant against the landlord for personal injuries due to slipping on the steps of the leased premises, which were in that part of Boston known as Roxbury. The trial court directed a verdict in favor of defendant. The plaintiff alleged exceptions.

F. H. Noyes, for the plaintiff.

F. N. Nay, for the defendants.

⁴³⁵ SHELTON, J. The plaintiff with her husband and mother occupied a one-family dwelling-house owned by the defendants and situated in Roxbury, the house being hired by her mother under an oral arrangement with the defendants' agent. Early in the evening of Sunday, December 8, 1901,

while she was leaving the house by the front door, she slipped upon the top step, fell and was injured. It had snowed shortly before, and the jury might have found that her fall was due to water having dripped during the day from a leak in a gutter overhead and frozen after sunset, leaving a thin skimming of ice upon the step. She contends that the defendants are liable for her injuries, on the ground that this leak in the gutter constituted a concealed defect existing at the time when the defendants let the house, which they then knew or should have known, but of which they gave no information • either to the plaintiff or to her mother, the tenant; and also on the ground that on its discovery, after occupancy had begun, the defendants' agent was notified and requested to repair it, but neglected so to do, although bound to make such repairs by express contract and also by contract implied from a general custom, by which they were bound to keep the roof and gutter in repair; and also upon the ground that the roof and gutter did not pass by the contract of letting, ⁴³⁶ but remained in the control of the defendants; and that having undertaken to repair, the defendants repaired the roof and gutter in a negligent manner.

1. Assuming without deciding that there was a leak in the gutter which might have been found to be a hidden defect, there was absolutely no evidence that its existence was known or ought to have been known, before the letting to the defendants. But to sustain the action upon this ground it must appear that the defendants either knew or ought to have known of the existing danger: *Martin v. Richards*, 155 Mass. 381, 29 N. E. 591; *Cutter v. Hamlen*, 147 Mass. 471, 18 N. E. 397, 1 L. R. A. 429; *Cowen v. Sunderland*, 145 Mass. 363, 1 Am. St. Rep. 469, 14 N. E. 117; *Bowe v. Hunking*, 135 Mass. 380, 46 Am. Rep. 471; *Minor v. Sharon*, 112 Mass. 477, 17 Am. Rep. 122. Even if the landlord should discover such a defect after the beginning of the tenancy, he is under no obligation to communicate it to the tenants: *Bertie v. Flagg*, 161 Mass. 504, 37 N. E. 572. The action cannot be maintained upon this ground.

2. There was evidence from Mrs. Tabor that after she had moved into the house, "when the roof leaked and run down through into the chambers, from the gutter on the front steps," she spoke to the defendants' agent about that, and he sent a man who put some new shingles and she thought pieces of tin on the roof and cleaned out some of the gutter. The

defendants' agent also testified that he had had repairs made on the roof and the gutter, that the shingles of the roof had been repaired and the gutter cleaned out and put in order. The plaintiff's husband also testified that he saw a cleat which had been nailed to the thick outer edge of the gutter, but there was nothing to show whether this was or was not there before the beginning of the tenancy. The plaintiff's mother also testified the defendants' agent promised when she hired the house to do "any repairing needed, anything within reason." The plaintiff also put in evidence, against the objection and exception of the defendants, that there was a known custom or usage in Boston by which, when houses are entirely let without any written lease to a single tenant at will, the owner does the outside repairs, such as the roof and gutters and conductors. We cannot say that this evidence was incompetent, or that such a usage, if the jury found its existence to be proved, would be a bad one: See *Pickering v. Weld*, 159 Mass. 522, 34 N. E. 1081; *Hutchins v. Webster*, 165 ⁴³⁷ Mass. 439, 43 N. E. 186; *Tower Co. v. Southern Pacific Co.*, 184 Mass. 472, 69 N. E. 348. Taking all the evidence together, we think that the jury might have found that the defendants had assumed the obligation to make repairs; at any rate such outside repairs as might be needed in the roof and gutters; that notice of the alleged leak in the gutter had been given to their agent, and they, acting through their agent, undertook to repair this leak, but that in spite of the repairs which were made the leak continued as before. It is true that the plaintiff herself testified that no repairs were made upon the gutter; but the jury might have believed the testimony of the defendants' agent upon this question. In that event, the defendants' liability in this action would depend upon whether or not the repairs upon the gutter were made negligently. "The general rule in this commonwealth must be considered as settled that a tenant cannot recover against his landlord for personal injuries occasioned by the defective condition of the premises let, unless the landlord agrees to repair, makes the repairs, and is negligent in making them": *Lathrop, J.*, in *Galvin v. Beals*, 187 Mass. 250, 72 N. E. 969, and cases there cited. If these facts are established, the plaintiff's rights to maintain this action would be measured by those of her mother, the tenant: *Jordan v. Sullivan*, 181 Mass. 348, 63 N. E. 909; *O'Malley v. Twenty-five Associates*, 178 Mass. 555, 60 N. E. 387; *Roche v. Sawyer*, 176 Mass. 71, 57 N. E. 216.

The only evidence that these repairs, if made by the defendants' agent, were made negligently was some testimony introduced by the plaintiff that after they had been completed the leak continued in the same manner and to the same extent as before. Doubtless the jury might have inferred from the testimony that no repairs were in fact made upon the gutter, but this was not the only possible inference. We are of opinion that if the jury found that such repairs were made, they then might find that the work done was ineffectual to stop the leak at all, and in view of the apparently simple character of what was needed to be done might have inferred from this that the work was negligently done; that the carpenter who had been sent to make repairs upon the roof and gutter did his work so negligently as not to stop the leak but to leave it as bad as before. They might have inferred from the fact that the leak was as bad as before that the work was improperly done. Accordingly, ⁴³⁸ for the reason that the jury might have found for the plaintiff upon this ground, if, as we think they might have done, they found that she herself was in the exercise of due care, the plaintiff's exceptions must be sustained.

3. There was no evidence that the defendants retained control of the roof and gutter; but the plaintiff asked one witness whether in houses which are let as this one was "there is any known and established usage or custom in Boston as to who shall retain control of the outside, yard, roof of the houses," and saved an exception to the exclusion of this question. The parties have treated the question as if a formal offer had been made to prove a custom by which in such cases the landlord retains control of the outside, including roof and gutters. But we think that the evidence was plainly inadmissible. It contradicts both the agreement of the parties and the rule of the law. Such a custom would be a bad one: *Boruszweski v. Middlesex Mutual Assur. Co.*, 186 Mass. 589, 72 N. E. 250; *Menage v. Rosenthal*, 175 Mass. 358, 56 N. E. 579; *Benson v. Gray*, 154 Mass. 391, 28 N. E. 275, 13 L. R. A. 262; *Hedden v. Roberts*, 134 Mass. 38, 45 Am. Rep. 276; *Commonwealth v. Cooper*, 130 Mass. 285. Moreover, if it were shown that the defendants did retain control of the roof and gutter, yet they could not be held liable upon that ground alone in this action, for it does not appear but that the gutter remained in as good condition as when it was let: *Moynihan v. Allyn*, 162 Mass.

270, 38 N. E. 497; Quinn v. Perham, 151 Mass. 162, 23 N. E. 175.

As there must be a new trial, we have passed upon all the questions raised by the exceptions which seem likely hereafter to be material: Tulley v. Fitchburg R. R., 134 Mass. 499.

Exceptions sustained.

A Landlord is Liable for such defects and dangers in the demised premises as were in existence when the lease was made, provided he knew or should have known of them, and provided also the tenant did not know of them: Wilcox v. Hines, 100 Am. St. Rep. 770, and note; Anderson v. Hayes, 101 Wis. 538, 70 Am. St. Rep. 930.

The Liability of a Landlord for defective repairs made by him or by his direction is considered in Hamilton v. Feary, 8 Ind. App. 615, 52 Am. St. Rep. 485; Peerless Mfg. Co. v. Bagley, 126 Mich. 225, 86 Am. St. Rep. 537.

SINGER v. MERCHANTS' DESPATCH TRANSPORTATION COMPANY.

[191 Mass. 449, 77 N. E. 882.]

CARRIERS, Condition, When a Part of the Contract of.—If a shipper accepts a receipt which states that its conditions are to be found on the back, he accepts and is bound by the conditions there to be found. (p. 637.)

CARRIERS—Delivery of Goods Without Surrender of Bill of Lading.—If a condition printed on a receipt for goods provides that if the word "order" is not inserted before or after the name of the consignee, the property may be delivered without requiring the production or surrender of the bill of lading, such condition is valid and excuses the surrender of the goods without the bill. (p. 637.)

CARRIERS—Delivery of Goods to Person of the Same Name as the Consignee.—If one L. S., residing and doing business in Boston ships goods to Illinois, consigning them to "L. S.," intending thereby himself, and the carrier, having no notice of this, delivers them to another "L. S.," who is and long has been doing business by that name at the point to which the goods are shipped, such delivery is authorized and discharges the carrier, though its agent in Boston had notice that the name of the consignor and consignee as stated in the receipt was the same, and the consignor had been in the habit for many years of shipping goods to the same point in the same manner, and had never had any trouble, and they had always been intended to be received, and in fact were received by one G. (p. 638.)

CARRIERS.—Negligence in the Delivery of Goods cannot be imputed to a carrier, where, under the circumstances known to it, the instructions are not doubtful and have been followed. (p. 638.)

CARRIERS.—One Intending to Make Goods Shipped by Him Security for a Draft for the unpaid purchase price must have them oiled to his own order and then indorse the bill of lading to the bank, discounting the draft. If he bills the goods "straight," and they are delivered by the carrier to the consignee, or a person of the same name, the carrier is not answerable. (p. 639.)

Action of contract to recover the value of three cases of boots shipped to defendant for transportation to Springfield, Illinois. The action was commenced in the municipal court of Boston, and on appeal to the superior court was tried without a jury, and an agreed statement of facts was entered into for the presentation of the case to the supreme judicial court, from which it appeared that in November, 1900, the plaintiff delivered to the defendant for transportation certain cases of boots and shoes marked, "L. Singer, Springfield, Ill." The plaintiff accepted from the defendant a receipt on the bottom of which was printed, "The conditions on which the above-mentioned property is received for transportation are printed on the back hereof," and among the matters printed on such back was a paragraph No. 9 as follows:

"If the word 'order' is written hereon immediately before or after the name of the party to whose order the property is consigned, without any condition or limitation other than the name of a party to be notified of the arrival of the property, the surrender of this bill of lading, properly indorsed, shall be required before the delivery of the property at destination. If any other than the aforesaid form of consignment is used herein, the said property may, at the option of the carrier, be delivered without requiring the production or surrender of this bill of lading." The receipt was indorsed in blank, attached to a draft on the State Bank of Chicago, and sent to Springfield, Illinois, through the Shoe and Leather National Bank of Boston, with directions to notify one Guralnik, a customer of the plaintiff living at 321 East Jefferson street, Springfield, Illinois. This customer had sent to the plaintiff an order for the goods in question. The plaintiff had been doing business in Boston for eleven years, and had been sending goods to Springfield, Illinois, six or seven times a year for five years prior to November, 1900, and he always marked and addressed them in the same manner, namely, "L. Singer, Springfield, Ill.," and the name "Guralnik" had never appeared on any of the cases of goods. After the draft and receipt reached the Shoe and Leather National Bank, it was found that some person other than Guralnik had received the goods. The plaintiff subsequently gave Guralnik a power of attorney to demand the goods, and plaintiff also called upon defendant's agent in Boston and made claim for their value. On December 26, 1900, the plain-

tiff surrendered the original receipt to the defendant and obtained a bill of lading containing the same conditions.

At and prior to December 1, 1900, a woman named Lena Singer was doing business at Springfield, Illinois, under the name of L. Singer, and had been receiving goods over defendant's line nearly every week, addressed to her by that name, and when the goods for which plaintiff sued reached Springfield, they were delivered to the Samuels Transfer and Storage Company, and a receipt taken. On the same day Guralnik and Lena Singer both claimed the goods which were marked in the same manner as the shipments which she had theretofore been frequently receiving. The defendant delivered the goods to her. The trial court refused to make the rulings requested by the defendant, and found for the plaintiff. The defendant alleged exceptions.

W. Hudson, for the defendant.

J. Bon, for the plaintiff.

⁴⁵⁴ LORING, J. The contract of the defendant in the case at bar was to deliver the cases in question to L. Singer, Springfield, Illinois, without requiring the production of a receipt or bill of lading.

By accepting the receipt, which states the conditions upon which the property is received, the plaintiff accepted those terms as part of the contract: *Grace v. Adams*, 100 Mass. 505, 97 Am. Dec. 117, 1 Am. Rep. 131; *Hoadley v. Northern Trans. Co.*, 115 Mass. 304, 15 Am. Rep. 106; *Fonseca v. Cunard Steamship Co.*, 153 Mass. 553, 25 Am. St. Rep. 660, 27 N. E. 665, 12 L. R. A. 340. The receipt in question states on its face that these conditions are to be found on the back. Such a receipt comes within that rule: See in this connection, *Pemberton Co. v. New York Cent. R. R.*, 104 Mass. 144; *Doyle v. Fitchburg R. R.*, 166 Mass. 492, 55 Am. St. Rep. 417, 44 N. E. 611, 33 L. R. A. 844. By force of this contract between the parties the case at bar is brought within the rule applied on proof of custom in *Forbes v. Boston etc. R. R.*, 133 Mass. 154.

The defendant performed this contract by delivering the goods to L. Singer, Springfield, Illinois.

Whether the consignor in the case at bar meant L. Singer of Boston, Massachusetts, or L. Singer of Springfield, Illinois, is not material. What a consignor in fact means, if not communicated to the carrier, is not material. The rights of the

parties ⁴⁵⁵ depend upon what is communicated to the carrier: *Samuel v. Cheney*, 135 Mass. 278, 46 Am. Rep. 467. The carrier in making delivery is bound to follow that direction, whatever it may mean, under all the circumstances of the case.

It is agreed that the Lena Singer to whom the goods were delivered was before and at the time in question doing business in Springfield, Illinois, under the name of L. Springer, and was so known to the defendant's representatives in Springfield; also that she had been receiving goods over the defendant's line "nearly every week, addressed to L. Singer," and that "these cases were marked and billed in the same manner as other goods received at Springfield for Lena Singer." It does not appear that there was any other L. Singer in Springfield.

Under these circumstances we see no ground for saying that the defendant did not follow the instructions given to him in delivering the goods to Lena Singer.

We cannot accede to the plaintiff's argument that because the defendant's agent in Boston had notice of the name of the consignor and consignee being the same he had notice that the goods were to be delivered to the consignor, and therefore that L. Singer, Springfield, Illinois, meant L. Singer of Boston. If any inference ought to have been drawn from this fact we think it was that L. Singer of Springfield was the consignor acting through an agent in making the consignment.

Neither is it material that "the plaintiff had been doing business in Boston for eleven years, and had been sending goods to Springfield, Illinois, for about five years previous to November 21, 1900, about six or seven times a year to the same Guralnik, and had always sent his goods addressed in the same way, namely, L. Singer, Springfield, Illinois, and through the defendant company, and he never had any trouble before this time." The defendant's agent in Springfield was not bound to remember and was not chargeable with the knowledge of these facts: See in this connection, *Raphael v. Bank of England*, 17 Com. B. 161; *Vermilye v. Adams Express Co.*, 21 Wall. 138, 22 L. ed. 609; *Seybel v. National Currency Bank*, 54 N. Y. 288, 13 Am. Rep. 583, where it is held that previous notice of loss to a subsequent purchaser of a negotiable security does not charge him with knowledge of the facts stated in the notice. Whether this is the law in Massachusetts ⁴⁵⁶ was left open in *Hinckley v. Union Pacific R. R.*, 129 Mass. 52, 37 Am. Rep. 297.

The issues of negligence on the part of the plaintiff and on the part of the defendant, on which the judge below tried the case, were not the issues on which the rights of the parties in the case at bar depend. Where the instructions as to delivery are doubtful under the circumstances known to the carrier, he is put on his inquiry, and the question of negligence arises. But the instructions here were not doubtful under the circumstances known to the defendant. The judge in the court below apparently acted on *Samuel v. Cheney*, 135 Mass. 278, 46 Am. Rep. 467. There was ground for arguing that the instructions there were doubtful under the circumstances known to the carrier. It is to be observed that the charge to the jury in that case was held to have been "sufficiently favorable to the plaintiff"; it was not held to have been correct.

The conclusion to which we have come is supported by *Dunbar v. Boston etc. R. R.*, 110 Mass. 26, 14 Am. Rep. 576; *Samuel v. Cheney*, 135 Mass. 278, 46 Am. Rep. 467; *M'Kean v. M'Ivor*, L. R. 6 Ex. 36; *Stimson v. Jackson*, 58 N. H. 138; *Conley v. Canadian Pacific Ry.*, 32 Ont. 258; *The Drew*, 15 Fed. 826; *Nebraska Meal Mills v. St. Louis Southwestern Ry.*, 64 Ark. 169, 62 Am. St. Rep. 183, 41 S. W. 810, 38 L. R. A. 358.

The plaintiff evidently intended to make the goods shipped security for his draft for the unpaid balance of the purchase money due him. To do that he should have had the goods billed to his own order and then indorsed the bill of lading to the bank discounting his draft. By mistake he billed the goods "straight," and is now seeking to make the defendant liable for his own blunder.

In the opinion of a majority of the court the entry must be exceptions sustained.

It is the Duty of a Carrier, as a general rule, to deliver the goods to the true owner or his assignee at its peril: See *National etc. Banking Co. v. Delaware etc. R. R. Co.*, 70 N. J. L. 774, 103 Am. St. Rep. 825, and cases cited in the cross-reference note thereto.

The Delivery of Goods by a Carrier to the consignee is generally at its peril, unless he surrenders the bill of lading either made or indorsed to himself: *Union Pac. Ry. Co. v. Johnston*, 45 Neb. 57, 50 Am. St. Rep. 540. However, a railway corporation delivering goods to the consignee in accordance with the terms of the bill of lading, but without requiring the presentation or surrender thereof, is not answerable to the consignor, although he has forwarded the bill with a draft attached to a bank for collection, thus showing an intention that the consignee should not have the goods without first paying therefor, the corporation having no knowledge of such intention: *Nebraska Meal Mills v. St. Louis Southwestern Ry. Co.*, 64 Ark. 169, 62 Am. St. Rep. 183.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

**ACKERMAN v. CINCINNATI, SAGINAW AND MACK-
INAW RAILROAD COMPANY.**

[143 Mich. 58, 106 N. W. 558.]

RAILROADS—Effect of Leases of, on Liability of the Lessor.—A lease of a railroad with all of its franchises and privileges under a statute authorizing it and providing that the company so “leasing shall hold and operate such road and said property and franchises subject to all the duties and obligations and with all the rights and privileges prescribed by the general railroad laws of the state,” relieves the lessor from liability for acts done by the lessee in the subsequent maintenance and repair of the road. (p. 644.)

PLEADING—Defenses—General Issue.—If it is sought to recover damages from a railroad company to lands from flooding by reason of an embankment on its right of way, the defense that such embankment was built by another company to which the defendant company had leased its property and franchises is available under the general issue. (p. 645.)

H. Geer, for the appellant.

Watson & Chapman, for the appellee.

55 HOOKER, J. This record presents the proceedings had upon the trial of two causes, which by stipulation were tried together at circuit, resulting in separate judgments for the plaintiffs. The defendant has appealed.

The declarations are in case to recover damages to lands from flooding. Previous to the acts which are said to ⁵⁹ have caused the damage, one or more drains essential to the proper drainage of the plaintiff's lands were crossed by defendant's railroad trains by means of an open trestle which permitted the uninterrupted and ready escape of excessive water through said drains and the natural depression through which the drains had been dug. The alleged cause of the trouble was

the filling up by an earth embankment of the space occupied by the trestle, or a part of it, thereby obstructing the flow of the water, which caused an injury to the land and crop of the plaintiffs. The plea was the general issue. In addition to its defense upon the merits, the defendant introduced a written lease of the railroad from itself to the Grand Trunk Railroad of Canada for ninety-nine years, with the privilege of renewal for a like period thereafter. It was executed December 28, 1900. This lease recited a former one, made in 1890, for twenty-nine years and two months, of the same property, which was canceled as a part of the later transaction. Testimony was given to the effect that the Grand Trunk Railroad was in full possession after 1900 to the exclusion of defendant, and that it and not the defendant caused any and all obstructions that were complained of, if there were such, and asked an instruction that verdicts for the defendant must be rendered. Thereupon the following occurred:

"Mr. Watson: For the purpose of getting it on the record, I now move to strike from the record the lease that has been introduced, and I insist that the lease has not been properly proved; that the paper has not been shown to be an instrument that could be executed. And I further move to strike it out for the reason that it is incompetent, irrelevant and immaterial, and for the further reason that a railroad company in this state cannot contract against obligations that are imposed upon it by the statutes of the state. Now, in discussing this matter, I desire first to call your attention to the statute that makes it obligatory on the railroad company to construct its track—that is, 2 Compiled Laws, section 6301—and which provides that the owner of any railroad shall construct its roadway in such a manner over these drains that it will not back the water up. Another section of statute provides that same ⁶⁰ thing, with the additional clause that it may also be liable, and then the section 6339 gives the railroad company the right to lease, and 6340, that provided that they may lease their right of way, their franchise, and all those things, and provides that the lessee shall take the property subject to the obligations that are imposed upon the original company, so there isn't any question about that. . . . I insist that the lease should be stricken from the record in this case.

"This motion was granted, and the lease (Exhibit 3) was ordered stricken from the record."

The motion was denied, and the cause went to the jury, a request to direct a verdict being also denied.

The question of what the liabilities of a lessor of a railroad are has been raised in nearly all of the states, and it cannot be denied that there are many cases sustaining plaintiffs' contention. Some of them hold that the liability extends no further than keeping the roadbed, fences, etc., in condition required by law. Others go to the extent of holding that the lessor is liable for injuries to passengers and travelers on the highways. There are some that extend the liability to cases of injury to employes of the lessee, while others deny this on the ground of absence of privity of contract. Some have rested the rule upon the theory of agency; while others say that the charter is a contract with the state, and that, though the road be leased under statutory authority, the lessor can only be released from its contract liability, and enjoy immunity therefrom by express provision of the statute. The latter rule has the support of Massachusetts, North Carolina, and Vermont: *Ingersoll v. Stockbridge etc. R. R. Co.*, 8 Allen (Mass.), 438; *Logan v. North Carolina R. R. Co.*, 116 N. C. 940, 21 S. E. 959; *Nelson v. Vermont etc. R. R. Co.*, 26 Vt. 717, 62 Am. Dec. 614. Those cases which rest upon the theory of agency would seem to rest upon an unsubstantial foundation, except where the facts fall short of an unrestricted lease. Some of them are cases where there is opportunity for finding the relation to have been that of principal and agent. The case of *Bay City etc. R. Co. v. Austin*, 21 Mich. 390, relied on by plaintiff,⁶¹ may be such a one, for aught that appears to the contrary therein. Such cases are correctly decided.

No one doubts that without statutory authority a railroad company would be precluded from substituting another in its place to perform its obligations to the state and public. This question was consistently disposed of in England, by the holding that a railroad company could not make a valid lease of its rights and franchises; this is upon the ground that the effect of a lease of property is to relieve the lessor from obligation to others in regard to its use, and that hence there could be no presumption of an intent to grant the power to lease—a logical conclusion. But the doctrine that a statutory authority to lease a railroad leaves the lessor liable to the full extent that it would be if it operated the road itself, unless it be expressly stated to the contrary in the statute, can rest on

nothing less than a supposed legislative intent to use the word "lease" in a limited and different sense than that usually given the term, which is in no regard doubtful—an interpretation which is in violation of 1 Compiled Laws, section 50, subdivision 1, which provides that: "All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases and such as may have acquired a peculiar and appropriate meaning in the law shall be construed and understood according to such peculiar and appropriate meaning."

It seems to us the better rule that, where a legislature has given authority to a railroad company to lease its railroad, it should be deemed to have intended to authorize an effective instrument, having the characteristics and qualities of a lease, as established by a long line of consistent holdings by the courts. The following authorities support this view of the subject: *McCafferty v. Spuyten Duyvil etc. R. R. Co.*, 61 N. Y. 178, 19 Am. Rep. 267. Thus, in *Mayor etc. of New York v. Twenty-third St. Ry. Co.*, 113 N. Y. 311, 21 N. E. 10, in an action to compel payment of taxes, it was held that: "While no such obligation was imposed by the acts authorizing ⁶² said company to lease its road (Laws 1873, c. 199; Laws 1875, c. 389), or by any statute, defendant, upon taking the place of its lessor as to its charter rights and power, took its place also as to its charter obligations and duties, and was not entitled to exercise the former without discharging the latter." See *Ahern v. Steele*, 115 N. Y. 203, 12 Am. St. Rep. 778, 22 N. E. 193, 5 L. R. A. 449, as to effect of demise generally. The case of *Miller v. New York etc. Co.*, 125 N. Y. 118, 26 N. E. 135, is a case much like the present case, if not on "all-fours": *Cain v. Syracuse etc. R. R. Co.*, 27 App. Div. (N. Y.) 376, 50 N. Y. Supp. 1; *Caruthers v. Kansas City etc. R. R. Co.*, 59 Kan. 629, 54 Pac. 673, 44 L. R. A. 737; *Little Rock etc. R. Co. v. Daniels*, 68 Ark. 171, 56 S. W. 874; *Heron v. St. Paul etc. Ry. Co.*, 68 Minn. 542, 71 N. W. 706; *St. Louis etc. R. Co. v. Curl*, 28 Kan. 622; *Missouri Pac. R. Co. v. Watts*, 63 Tex. 549. The opinion of Brewer, J., in last-cited case was followed in *Hayes v. Northern Pac. R. R. Co.*, 74 Fed. 279, 20 C. C. A. 52. Also, see opinion of Lurton, J., in *Arrowsmith v. Nashville etc. R. R.*, 57 Fed. 165, where he says: "Where obligations are imposed by charter or statute law upon a railroad company for the protection and advantage of the general public not having contract relation

with it, it may very well be said that a general authority to lease out its road, which contains no provision exempting it from such public obligations, will not absolve it from liability. So, if a railway be in such condition that it is a nuisance when leased out by reason of the absence of something necessary to its safe operation, or the presence of something dangerous to its safe operation, and this nuisance be continued by the lessee, both the lessor and the lessee would be liable; the one as having created, and the other as having continued, a nuisance. But to say that, after the lessor has, by authority of law, transferred the control and management of its road to another, he shall, unless specially exempted, remain liable for all the torts and contracts of the lessee, is to ignore the contract of lease and the legislative sanction under which it was made. The state, on grounds of public policy, may well refuse its consent to the transfer; but, if it consent, then there is no public policy to authorize the court to say that the responsibility for the future management and operation of the road has not been exclusively imposed ⁶³ upon the lessee, as the lawful substitute for the company owning the road."

Especially is this true where the statute provides expressly that all of the rights and obligations shall pass with the lease to the lessee, who, according to the terms of the statute, must be a railroad company, and who, by accepting it, assents to hold and operate the road and property and franchises, subject to all the duties and obligations, and with all the rights and privileges prescribed by the general railroad law of the state: 2 Comp. Laws, sec. 6339.

The testimony in the present case shows beyond question that the defendant leased its entire road and equipment and franchises for ninety-nine years to a nonresident corporation, some years before the act complained of. The authority of the nonresident company to accept a lease of a railroad under the laws of Canada is not raised, and need not be considered. Its authority under our law will be found in 2 Compiled Laws, section 6339, which provides: "That it shall be lawful for any railroad company organized or that may be organized under the laws of this state to sell, lease and convey its road, together with the rights and franchises connected therewith, or any part or portion thereof, to any other railroad company, whether organized within or without this state; and to acquire by lease or purchase from the owner of any other railroad,

such road, together with the rights and franchises connected therewith, or any part or portion thereof, whether located within or without this state; and for the railroad company so purchasing or leasing to acquire and use such road, rights and franchises by purchase of the stock or otherwise, as may be agreed between the parties interested, said railroads not to have the same terminal points and not being competing lines; provided, the stockholders owning a majority of the stock of said companies shall consent thereto; and, provided, further, that the company so purchasing or leasing shall hold and operate such road and said property and franchises subject to all the duties and obligations, and with all the rights and privileges prescribed by the general railroad laws of this state."

⁶⁴ By the express terms of this act, not only the roadbed and rolling stock may be sold or leased, but also the "rights and franchises" connected therewith, i. e., the lessee takes and operates the road, subject to all the duties and obligations and with all the rights and privileges prescribed by the general railroad laws of this state: See *Thayer v. Flint etc. R. R. Co.*, 93 Mich. 150, 53 N. W. 216; *Gage v. Pontiac etc. R. R. Co.*, 105 Mich. 335, 63 N. W. 318.

Another feature of this act which should not be overlooked is that restricting such sales, leases and conveyances to "another railroad company," which owes, or, as already shown by accepting the lease, assumes all obligations to the state and public which the general railroad law prescribes. The defense was available under the plea of the general issue.

The judgments are reversed, and new trials ordered.

Carpenter, C. J., and Grant, Montgomery and Moore, JJ., concurred.

The Liability of a Lessor Railway corporation for the torts or negligence of the lessee is discussed in the monographic notes to *Lee v. Southern R. R. Co.*, 58 Am. St. Rep. 147-156; *Ohio etc. R. R. Co. v. Dunbar*, 71 Am. Dec. 295-298. A street railroad corporation is liable for injuries caused by the negligent operation of the road by another corporation to which it has leased it: *Muntz v. Algiers etc. Ry. Co.*, 111 La. 423, 100 Am. St. Rep. 495. And under a charter authority to "farm out the right of transportation," a railroad company cannot, by lease, relieve itself from liability for any acts or negligence or torts committed by its lessee: *Harden v. North Carolina E. E. Co.*, 129 N. C. 354, 85 Am. St. Rep. 747.

GOODELL v. AUDITOR GENERAL.

[143 Mich. 240, 106 N. W. 890.]

JUDGMENTS Prematurely Entered.—A judgment for the sale of land for taxes founded on service by publication is not void because rendered prior to the elapsing of five days, as provided by statute, when the court remains in session sufficiently long thereafter to afford opportunity for objection to such premature rendition of the judgment. (pp. 646, 647.)

M. J. Sherwood, for the petitioner.

Chadbourne & Rees, for the respondent.

240 HOOKER, J. Appellant Rees purchased the southwest one-quarter, section 29, township 52 north, range 36 west, for delinquent taxes of 1894, at the statutory sale held in December, 1896. The day set for hearing the tax petition was November 2d. The court was in session November 2d, November 5th, and November 7th, when the decree of sale was made. The court then sat the following days, viz., November 9th, 10th, 11th, 12th, 13th, 16th, 17th, and 21st, when it adjourned sine die. A tax deed was made May 17, 1898. The petition and order of hearing were, ²⁴¹ respectively, entitled: "In the Matter of the Petition of Stanley W. Turner, Auditor General," etc. Two questions are raised:

1. Was the decree void because entered before the expiration of five days in term?

2. Were the proceedings void for want of jurisdiction because of noncompliance with section 62 of the tax law? Act No. 206, Pub. Acts 1893.

This application is a petition to set aside the decree. It was granted by the circuit court, and the auditor general has appealed.

1. The contention that a court does not obtain jurisdiction to render a decree when the proceedings rest on publication until five days have elapsed after the day set for hearing is not sound. No one could reasonably contend that such a defect could not be cured by vacating the decree and entering another later. The entry of the decree might be an irregularity, or, if not even irregular, it might become void upon the face of proceedings, in case the court should adjourn sine die within the five-day period. Many such cases have been cited in the briefs: *Peninsular Sav. Bank v. Ward*, 118 Mich. 87, 76 N. W.

161, 79 N. W. 911; *McGinley v. Calumet etc. Min. Co.*, 121 Mich. 88, 79 N. W. 928; *Gates v. Johnson*, 121 Mich. 663, 80 N. W. 709; *Wait v. McMillan*, 121 Mich. 95, 79 N. W. 917; *Miller v. Brown*, 122 Mich. 147, 80 N. W. 999; *Brown v. Houghton etc. Min. Co.*, 123 Mich. 117, 81 N. W. 969; *Brown v. Napper*, 125 Mich. 117, 83 N. W. 999; *Aztec Copper Co. v. Auditor General*, 128 Mich. 615, 87 N. W. 895. It has been held that the publication of the order and proof thereof gives the court jurisdiction: *In re Wiley*, 89 Mich. 58, 50 N. W. 742. Failure to enter an order *pro confesso* before decree was disregarded as an irregularity in *Jenkinson v. Auditor General*, 104 Mich. 34, 62 N. W. 163, and *Hooker v. Bond*, 118 Mich. 255, 76 N. W. 404. See, also, *Burns v. Ford*, 124 Mich. 274, 82 N. W. 885.

We have intimated in several cases that the entry of the decree within the five-day period is not of itself fatal, provided the court remains in session sufficiently long to afford the statutory opportunity, while in many others ²⁴² we have placed emphasis on the fact of an earlier adjournment. Among the latest of these are *Allen v. Cowley*, 128 Mich. 530, 87 N. W. 620, and *Wolverine Land Co. v. Davis*, 141 Mich. 187, 104 N. W. 648. The question is now before us, and we must hold the decree valid. It is said that, although an irregularity, this being a direct attack, relief should be given, but counsel fail to show why we should set aside the proceedings. There is nothing to indicate that there was any appearance and objection filed within the five-day period. On the contrary, the absence of such is indicated by the record.

2. The present statute says that the clerk shall prepare an order to be signed by the circuit judge.

“Said order shall be substantially in the following form:

“ . . .

“In the matter of the petition of ———, auditor general of the state of Michigan, for and in behalf of said state, for the sale of certain lands for taxes assessed thereon”: 1 Comp. Laws, sec. 3885.

This is the form used. It is contended that the form used should have been: “In the matter of the petition of the state of Michigan, for the sale of certain lands for taxes assessed thereon.”

That was the form specified in section 62, Act No. 206, Public Acts 1893, which required the order to be “substan-

tially" in that form. We think the language used a substantial compliance therewith.

We are constrained to reverse the decree. The petition is dismissed, with costs of both courts.

Grant, Blair, Montgomery and Ostrander, JJ., concurred.

A Judgment Prematurely Entered, as where the summons has been served but the time allowed by law to plead has not expired, is irregular merely, and not void: *Mitchell v. Aten*, 37 Kan. 33, 1 Am. St. Rep. 231. Such a judgment is not subject to collateral attack: *Altman v. School District*, 35 Or. 85, 76 Am. St. Rep. 468. It can be attacked only upon motion or by appeal: *Estate of Newman*, 75 Cal. 213, 7 Am. St. Rep. 146.

MORAN v. MORAN.

[143 Mich. 322, 106 N. W. 206.]

WILLS—Construction—Repugnant Clauses.—A will bequeathing and devising to his wife all of the testator's property "to be hers absolutely," gives her an absolute estate in fee, and a succeeding repugnant provision in the will "that if at her death any of said property is still hers, then the residue still hers shall go to my, not her, nearest heirs," must fall, and fail of effect. (pp. 649, 650.)

J. C. Harvey, for the complainants.

Clark, Jones & Bryant and O. B. Taylor, for the defendant.

323 McALVAY, J. The bill of complaint in this case was filed to obtain a construction of the will of Charles G. Moran. The complainants are the brothers of said Moran. The defendants are the executor of his wife, the beneficiaries and legatees under her will, and a brother and sister of complainants. Charles G. Moran died at Grosse Pointe, Wayne county, Michigan, September 29, 1900, leaving a last will and testament. The provisions of this will, omitting the formal parts, are as follows: "I give and bequeath to my beloved wife, Mary E. A. Moran, all my property real and personal, of every name, nature and description to be hers absolutely, providing, however, that if at her death any of the said property be still hers, then said residue still hers shall go to my, not her, nearest heir or heirs. She is made sole executrix of this will without bonds."

This will was duly probated. The widow qualified as executrix, rendered her final account August 7, 1901, which was allowed by the probate court. The residue of the estate was assigned to her as "sole legatee and devisee of said deceased, in accordance with the provisions of said will," and she was discharged as executrix. The widow, Mary E. A. Moran, died testate, July 28, 1903; her will providing, after the payment of certain bequests, that the residue of her estate should be equally divided between her brothers and sisters. Her executor took possession of all the real and personal estate of which she died possessed, which included the real and personal property devised by the will of her husband. The bill of complaint in this suit was filed November 21, 1903, for the purpose above stated. Upon the hearing of the cause on the bill and answers, the circuit court decreed that, under the will of Charles G. Moran, his wife, Mary E. A. Moran, took ³²⁴ "An estate in fee simple with an unlimited power to convey, and that the proviso therein that if, at her death, any of the said property be still hers, then said residue still hers should go to the nearest heir or heirs of said Charles G. Moran, is repugnant to the clause in the will creating the estate in fee simple aforesaid, and for that reason is void."

From this decree the complainants have appealed, contending that said will gave the wife a life estate, with remainder to the heirs of Charles G. Moran.

Similar testamentary provisions have frequently been before this court for construction, and have been passed upon. This will differs from those in the other cases in that it does not contain the words "during her natural life," or "for her use during her natural life," or words giving power to sell "for her use and benefit," or similar expressions familiar to the profession, which have been referred to in the decisions in this state as aids in arriving at the intention of the testator, or in determining whether later words in the instrument indicative of reserving a remainder over are repugnant to an earlier devise. The terms of the instrument under consideration are: "I give and bequeath to my beloved wife, Mary E. A. Moran, all my property real and personal, of every name, nature and description, to be hers absolutely."

This is a plain, clear, and direct gift and devise, without qualification or limitation. It offers no difficulty in arriving at the real intent and meaning of the testator. By it he gave

his wife all of this property, and created in her a title in fee simple to the real estate, with unlimited power of conversion and disposition. The words in the will which follow this clause are: "Providing, however, that if at her death any of the said property be still hers, then said residue still hers shall go to my, not her, nearest heir or heirs."

If by this it was intended to dispose of a remainder over to his heirs, it is certainly repugnant to the former part of the will already construed, and is void, being inconsistent ³²⁵ with the absolute estate already devised: *Jones v. Jones*, 25 Mich. 401, cited and approved in *Dills v. La Tour*, 136 Mich. 243, 98 N. W. 1004. The expressions in this later clause indicate to us that he understood that he had given her an absolute estate, and was not creating a gift or devise of what might remain after her decease. He says: "If at her death any of said property be still hers, then said residue still hers shall go to my nearest heirs"—thereby expressing his wish as to its distribution. The absence from this instrument of certain expressions referred to earlier in this opinion makes the clear intent of the testator easier to be ascertained, and renders less difficult the application of the fundamental rule of construction of testamentary documents that the real intent and meaning of the testator must be given effect, if that intent can be derived from the instrument, and is lawful, and for this purpose all of the clauses of the will are to be considered, and, if possible, harmonized.

The decree of the circuit court is affirmed, with costs.

Grant, Blair, Hooker and Moore, JJ., concurred.

When the Words of a Will at the outset clearly indicate a disposition to give the entire estate absolutely to the first donee, the estate will not ordinarily be cut down to a less estate by subsequent or ambiguous words inferential in their intent: *Gannon v. Albright*, 183 Mo. 238, 105 Am. St. Rep. 471. See, however, *Hill v. Giannelli*, 221 Ill. 286, 112 Am. St. Rep. 182; *Platt v. Brannan*, 34 Colo. 125, ante, p. 147.

KRAPP v. METROPOLITAN LIFE INSURANCE COMPANY.

[143 Mich. 369, 106 N. W. 1107.]

INSURANCE, LIFE—Proof of Death.—If a life insurance policy provides that the proof of death shall be evidence of the facts therein stated in behalf of, but not against, the company, it is admissible in evidence as an admission, though not conclusive. (pp. 652, 653.)

INSURANCE, LIFE—Evidence—Physicians—Privilege.—A physician is incompetent to testify to facts concerning the health of the deceased insured's relatives acquired by him through his employment by them as their physician. Such facts are privileged. (p. 653.)

INSURANCE, LIFE—Evidence.—Death Certificates are admissible as to the cause of death of the insured persons to whom they relate, though the physicians making them are prohibited by statute from testifying to the facts stated in them because acquired in their professional capacity. (p. 654.)

EVIDENCE—Nonexperts—Opinion as to Cause of Death.—An intelligent nonexpert witness of mature years who has seen many cases is competent to testify that a certain person died of consumption. (p. 654.)

Haug & Yerkes and C. C. Yerkes, for the appellant.

F. D. Andrus, for the appellee.

³⁶⁹ **MOORE, J.** The defendant, the Metropolitan Life Insurance Company, is a New York insurance company ³⁷⁰ having offices and doing business in the state of Michigan. On March 11, 1902, it issued a policy of insurance on the life of Minnie Krapp, who was the wife of the plaintiff. The policy was in the sum of five hundred dollars. Minnie Krapp died on July 6, 1903. The defendant refused to pay on the ground that answers made by the insured to certain questions in the application on which the policy was issued were not true. Among the statements made by the insured in her application for this insurance were the following: That she was then in sound health, that she had never had bronchitis nor consumption, that none of her parents, grandparents, brothers, or sisters, ever had consumption, nor any pulmonary disease.

As evidence tending to establish the untruth and incorrectness of these statements, the defendant offered in evidence the proofs of death furnished by the beneficiary, who is the plaintiff. The defendant, to show the answer was untrue as to her

parents, grandparents, brothers, and sisters, not having consumption or any pulmonary disease, offered in evidence certificates of death, filed with the health board, and identified by the physicians who filled them out, and who testified that the statements were true, showing that the mother and two sisters died of consumption prior to the issuing of the policy. The defendant also offered the testimony of the physicians, who made out the certificates of death, as to the correctness of the certificates of death; and that the mother and sisters of the insured died of consumption, and had consumption prior to the date of the application. The defendant also offered to show that the mother and two sisters had consumption and died therefrom, prior to the date of the application, by the husband of the mother of the insured; and also by the immediate neighbors of the family of the insured.

The certificates of death were held inadmissible by the court, because they disclosed matters which were claimed by the plaintiff to be privileged. The physicians' testimony ³⁷¹ was held inadmissible, because of privilege. The stepfather's and neighbor's testimony, because they were not physicians and had no special training or experience which would permit them to determine what diseases people may have had. The proofs of death were rejected by the court, because he claimed they are merely secondary evidence of the facts stated therein. At the conclusion of the trial, the court directed a verdict for the plaintiff. The case is brought here by writ of error.

Were the proofs of death admissible for any other purpose than to show that the insured was dead? It is claimed they are admissible under the following provision in the policy: "Proofs of death shall be made to the home office in the manner and to the extent required by blanks furnished by the company, and shall contain answers to each question propounded to the claimant, physicians, and other persons indicated in the blanks, and shall further contain the record and verdict of the coroner's inquest, if any be held. The proofs of death shall be the evidence of the facts therein stated in behalf of, but not against, the company."

And, also, under the following decisions: *John Hancock Mut. Life Ins. Co. v. Dick*, 117 Mich. 518, 76 N. W. 9, 44 L. R. A. 846; *Wasey v. Travelers' Ins. Co.*, 126 Mich. 119, 85 N. W. 459. We think under these cases the testimony should

have been admitted as being in the nature of an admission, though it was not conclusive. It is said that, even if admissible, it is immaterial, because the jury might not infer that because the assured died of consumption, that she had that disease when she was insured, citing *Redmond v. Industrial Benefit Assn.*, 150 N. Y. 167, 44 N. E. 769. It is probable that this contention is true if no other proof was offered to establish the fact, but proof cannot all be offered at once. The testimony was competent, and though but a link in the chain of testimony, it was competent to make it; for a chain is made up of a succession of links.

Did the court err in holding the testimony of the physician was inadmissible because of privilege? The testimony ³⁷² of the doctor was that he acquired the information which was the subject of inquiry only in his professional capacity, while the persons were treated by him as a physician. We think the offered testimony was within the statute, and properly excluded: See 3 Comp. Laws, sec. 10,181, and the many cases cited in the note to said section. See, also, *Grattan v. Metropolitan L. Ins. Co.*, 80 N. Y. 281, 36 Am. Rep. 617; *Davis v. Supreme Court Lodge Knights of Honor*, 165 N. Y. 159, 58 N. E. 891.

Did the court err in holding that the certificates of death were inadmissible? Section 4617 of 2 Compiled Laws reads as follows: "All certificates of death, local registers, or county records authorized under this act, or certified copies thereof, shall be prima facie evidence in all courts, and for all purposes, of the facts recorded therein."

It is said: "These certificates were not admissible for two reasons:

"First. They were secondary evidence when primary was obtainable.

"Second. Their contents being a privileged matter, under section 10,181 of 3 Compiled Laws, the offer of their admission was an attempt to circumvent the statute and accomplish indirectly that which the statute directly forbids."

It is also said that to hold their admission admissible under section 4617 is to nullify section 10,181 of 3 Compiled Laws, and that, as the first-named section was enacted last, without a repealing clause, it will not have that effect, counsel citing *Buffalo Loan etc. Co. v. Aid Assn.*, 126 N. Y. 450, 22 Am. St. Rep. 839, 27 N. E. 942; *Davis v. Supreme Lodge Knights of*

Honor, 165 N. Y. 159, 58 N. E. 891; *McKinley v. Metropolitan Ins. Co.*, 26 N. Y. Supp. 63.

An examination of these cases will show they are not controlling. In the first two cases the certificates were not made under a general law of the state, but because of what in one of the opinions is characterized as an obscure ³⁷³ provision of the city charter, and it was held the charter provision was local and should not be so construed as to repeal a general law. In *McKinley v. Metropolitan Ins. Co.*, 26 N. Y. Supp. 63, it was held that even if the certificate then offered in evidence was presumptive evidence of the recitals therein, it could be so only as to the things required by the law to be stated, and that, as the physician was not required to certify that the deceased had been diseased four years prior to his death, the certificate could not be received to establish that fact. Other New York courts have taken a different view from that suggested by counsel. Chapter 661 of the laws of 1893, "the public health law," provided for the collection and keeping of vital statistics. Section 22 provided that certified copies of the entries of death and causes of death "shall be presumptive evidence in all courts and places of the facts therein stated." In the insurance case of *Keefe v. Benefit Assn.*, 37 App. Div. (N. Y.) 276, 55 N. Y. Supp. 827, it was held that a copy of the record was competent evidence, citing several cases: See, also, *Hennessy v. Metropolitan L. Ins. Co.*, 74 Conn. 699, 52 Atl. 490; *McKinstry v. Collins*, 74 Vt. 147, 52 Atl. 438. We do not think it follows that if effect is given to the provisions of section 4617 of 2 Compiled Laws, it repeals or annuls the provisions of section 10,181 of 3 Compiled Laws. The certificates should have been admitted in evidence.

Did the court err in refusing to receive testimony of others than physicians as to the disease which caused the death of the assured? Counsel cite only the case of *Grattan v. Metropolitan L. Ins. Co.*, 80 N. Y. 281, 36 Am. Rep. 617, in support of the ruling. In a brief paragraph language is used which sustains the ruling of the trial court. We do not, however, think that decision is controlling. Would it be claimed that an experienced mother would not be competent to say whether a child had measles? Or that an intelligent person of mature years who had seen many cases could not tell whether one had so prevalent a disease as consumption? In *Elliott v. Van Buren*, 33 Mich. 49, 20 Am. Rep. 668, Justice Campbell,

speaking for the court, said: ³⁷⁴ "We think there is no rule which can prevent ordinary witnesses from describing what they see, or from testifying concerning the kind of injury or sickness of others whom they have had occasion to consort with, unless it is something out of the common course of general information and experience, or unless the question presented involves medical knowledge beyond that of ordinary unprofessional persons. It would be ridiculous to shut out testimony of what any juryman would understand well enough for all the exigencies of the case before him, simply because no physician had seen or examined the person. It would lead to a denial of justice in all cases of bodily injuries and sicknesses which did not occur within range of medical help, and which were not regarded as so difficult of treatment as to demand it. There is no danger that the introduction of common testimony on matters of common knowledge will do any more mischief, when open to cross-examination before a court and jury, than would arise from the want of any legal means of selecting witnesses from the numerous class of professional men, who differ as much in their relative merits as many of them do from laymen." See, also, *Rogers v. Ferris*, 107 Mich., 126, 64 N. W. 1048; *State v. Knapp*, 45 N. H. 148.

We think the testimony competent. Its weight was for the jury. For the reasons stated, the judgment is reversed, and a new trial granted.

McAlvay, Grant, Blair and Hooker, JJ., concurred.

Proofs of Loss Under a Policy of Life Insurance showing that the death was caused by suicide are admissible, but not conclusive, against the insured: *Leman v. Manhattan Life Ins. Co.*, 46 La. Ann. 1189, 49 Am. St. Rep. 348.

The Question of Whether a Physician may Testify as to facts learned by him in the course of his professional duties is discussed in the note to *Thompson v. Ish*, 17 Am. St. Rep. 565. A physician is not precluded from answering the question as to whether or not he has ever treated the assured for a specified disease, such as typhoid fever: *Brown v. Metropolitan Life Ins. Co.*, 65 Mich. 306, 8 Am. St. Rep. 894.

CREYTS v. CREYTS.

[143 Mich. 375, 106 N. W. 1111.]

DIVORCE—Alimony After Death of Husband.—A provision in a decree of divorce against a husband for the payment of a certain sum monthly, until the further order of the court, for the support of his infant child, is not discharged by the death of the husband. (p. 658.)

DIVORCE—Alimony After Death of Husband—Commutation of Payments.—Under statutory authority the court has power to make a decree against a husband in an action for divorce for the support of his child a charge upon his property, and alter it from time to time in the interest of justice, and the court may, upon his death, fix the time for which the payments must continue, calculate their present value, and make the sum a lien upon his unappropriated property with priority over all other claims of the widow, heirs and next of kin, except rights of dower. (pp. 658, 659.)

The statute referred to in the opinion of the court is as follows:

"SEC. 8640. In all cases where alimony or allowance for the support and education of minor children shall be decreed to the wife, the amount thereof shall constitute a lien upon such of the real and personal estate of the husband as the court by its decree shall direct, and in default of payment of the amount so decreed the court may decree the sale of the property against which such lien is decreed in the same manner and upon like notice as in suits for the foreclosure of mortgage liens; or the court may award execution for the collection of the same, or the court may sequester the real and personal estate of the husband and may appoint a receiver thereof, and cause such personal estate and the rents and profits of such real estate to be applied to the payment thereof, or the court in lieu of a money allowance may decree such a division between the husband and wife of the real and personal estate of the husband or of the husband and wife by joint ownership or right as he shall deem to be equitable and just.

"SEC. 8641. After a decree for alimony or other allowance, for the wife and children, or either of them, and also after a decree for the appointment of trustees, to receive and hold any property for the use of the wife or children as before provided, the court may, from time to time, on the petition of either of the parties, revise and alter such decree, respecting

the amount of such alimony or allowance and the payment thereof, and also respecting the appropriation and payment of the principal and income of the property so held in trust, and may make any decree respecting any of the said matters which such court might have made in the original suit."

W. M. Smith, for the petitioner.

Thomas, Cummings & Nichols and L. B. Gardner, for the respondent.

³⁷⁵ HOOKER, J. On May 12, 1903, a decree was made by this court, on appeal from the circuit court for the county of Ingham, in chancery (133 Mich. 4), in favor of the above-named complainant, dissolving the marriage between the parties, and awarding to her three thousand five hundred dollars alimony, in lieu of dower, and also requiring the defendant to pay to her, for the maintenance and education of Thelma Creyts, an infant whose custody, etc., was given to her, the sum of ten dollars per month, until the further order of the court; the birth of said infant being therein adjudicated to have occurred upon September 15, 1895. The defendant in the divorce case paid the alimony decreed, and ³⁷⁶ said sum of ten dollars per month regularly and promptly, until his death, which occurred on January 2, 1905.

At the time the alimony provided by the decree was paid, the defendant had living five sons and daughters, children of a former wife, all adults, and they have survived him. He also had considerable property remaining after payment of the alimony, and soon after the decree was made he gave to each of said sons and daughters two thousand dollars. Soon afterward he married Roby A. Avery, and she was appointed his administratrix. The inventory shows an estate of about five thousand dollars.

The petitioner, Carrie L. Creyts, complainant in the divorce case, claims that the decree for the payment of ten dollars per month, for maintenance of Thelma Creyts, is a charge upon the property of the estate, and that said sum should be paid for such period as the court shall hereafter determine. In opposition to this claim the persons interested in the estate claim that the decree is not operative since the death of Creyts. The petition prays that the court modify the decree by adjudging:

1. That the death of John Creyts did not "interrupt or suspend" the right of petitioner to said sum of ten dollars per month, but that the sum is payable until the said Thelma Creyts shall reach the age of twenty-one years, and that Roby A. Creyts, administratrix, shall make such payments.

2. That the present worth of said payments shall be determined by the court and decreed to be a lien upon the estate of John Creyts, and that payment of said sum be made to petitioner, by Roby A. Creyts, before there shall be a distribution of the estate, and that petitioner have costs of this proceeding.

The original decree was not discharged by the death of the complainant. No one would contend that the provision for the wife would have been discharged by his death or before payment, or before it became due. And in *Shafer v. Shafer*, 30 Mich. 163, an appeal by the wife, after a husband's death, was held allowable if she was dissatisfied with the decree for alimony, and, in the matter of *Seibly v. Ingham* Circuit Judge, 105 Mich. 584, 63 N. W. 528, we held that it ³⁷ was a proper practice to permit the revivor of a divorce suit to permit proceedings upon the decree to adjudicate the reserved question of alimony, upon bringing in the representative. These cases necessarily imply the authority to retain jurisdiction of the property of the husband in a divorce case after the death of the husband, to see that it be applied to the support of the wife and infant children: See, also, *Smith v. Waalkes*, 109 Mich. 16, 66 N. W. 679. In *Miller v. Miller*, 64 Me. 484, a case in which a similar order to that in this case was made, it was held that such order was not discharged by the death of the husband. It is possible that, in the absence of the statute, the court could do no more than to enforce the decree heretofore made, by proceedings to which the representative should be made a party, if it could do anything in the premises; it being suggested that, in that case, the wife would be on the same footing with any other claimant, and be obliged to obtain and be satisfied with allowance and payment through probate court.

Under our statute, which authorizes the court to make the decree a charge upon the property, and to change and alter the decree from time to time, in the interests of justice (3 Comp. Laws, secs. 8640, 8641), we are of the opinion that, where the rights of bona fide holders have not intervened,

the court may alter, amend, enlarge or diminish the decree, as the necessities of the one and the ability of the other party may require, and that it may protect the child by making the decree a charge upon property to prevent its dissipation, and that the power is not determined ³⁷⁸ by the death of the husband. How the interests of other creditors might be affected, if at all, need not be considered, as it does not arise upon the record. We are therefore disposed to hold that this decree should be amended to give the provision for the maintenance of the child the effect of a lien upon the property of the estate, and priority over all claims of the widow and heirs.

Both parties indicate a desire that the decree be further modified by fixing the period for which such provision shall continue, and determining the amount of the present value of the same, and providing for the immediate payment of such sum, in place of the periodical payments provided for by the original decree. We have no doubt of our authority to do this, under the provisions of the statute referred to, and rather than to keep the estate open and defer distribution with the expense and possible loss necessarily attendant upon such a policy, we approve the alternative suggestion, and we hereby fix such amount, including arrearages and interest thereon, at the sum of eight hundred and twenty-five dollars, and make the same a lien upon the property of the estate not heretofore appropriated by order of the probate court, with priority over all other claims of the widow, heirs, and next of kin, except rights of dower.

A decree may be taken accordingly, with costs to be paid out of the estate, including a solicitor's fee of twenty-five dollars, to complainant's solicitor, the amount of this decree to be paid into court, or to the duly authorized guardian, to be appointed by the probate court.

McAlvay, Grant, Blair and Moore, JJ., concurred.

An Obligation to Pay a Wife Alimony during her life has been held to terminate on the death of the husband, although, in pursuance of the directions of the court, he gave a mortgage to secure the performance of the decree awarding alimony: *Wilson v. Hinman*, 182 N. Y. 408, 108 Am. St. Rep. 820, and see the cases cited in the cross-reference note thereto.

CARNAHAN v. CARNAHAN.

[143 Mich. 390, 107 N. W. 73.]

JUDGMENTS in Divorce—Conclusiveness.—Equity has jurisdiction to grant divorces and enforce a trust, and if the parties join in the trial of both questions in one suit they are bound by the decree when neither appeals therefrom. (p. 663.)

DIVORCE—Jurisdiction—Division of Property.—Under a statute authorizing a division of certain classes of property in divorce cases, the court has jurisdiction to determine what property belongs to the husband and to divide it between him and his wife. (p. 663.)

DIVORCE—Execution Against Wife.—Execution cannot issue against a wife in favor of her husband to enforce an order in a decree of divorce requiring her to pay over to him certain money which the court finds she holds in trust for him, although in such case execution might issue against the husband to enforce an order for alimony against him. (pp. 663, 664.)

CONTEMPT—Civil Remedy.—Where execution may issue to collect a decree for the payment of money, the proceeding by contempt to enforce a civil remedy cannot be resorted to. (p. 664.)

JUDGMENTS in Divorce—Enforcement Against Wife by Proceedings in Contempt.—An order in a divorce proceeding that the wife pay over to her husband a portion of a trust fund which she has on deposit beyond the jurisdiction of the court, is not a decree for the payment of money in the ordinary sense, to be enforced by an execution, and is therefore enforceable against her by proceedings in contempt. (p. 664.)

JUDGMENTS in Divorce—Enforcement Against Wife by Proceedings in Contempt.—Although a void execution has been issued and a void levy made against a wife, this does not affect the maintenance of subsequent proceedings in contempt against her to enforce an order in divorce proceedings that she pay over to her husband a certain portion of a trust fund. (p. 665.)

JUDGMENTS in Divorce—Enforcement Against Wife by Contempt Proceedings.—A trustee in bankruptcy and the bankrupt may join in proceedings in contempt to compel the bankrupt's divorced wife to pay over a certain portion of a trust fund which was determined in the divorce proceedings to be held by her as a trustee for her husband, and which she was ordered therein to pay over to him. (p. 665.)

DIVORCE—Decree Against Wife—Bankruptcy of Husband—Effect of.—If a wife is directed by a decree in divorce to deliver to her husband a certain portion of a trust fund, the assignment of the decree to the husband's assignee in bankruptcy does not change the nature of the wife's obligation to a debt enforceable by execution. (p. 665.)

JUDGMENTS—Enforcement Against Women by Proceedings in Contempt.—A statute forbidding imprisonment of women on any process in any civil action does not prohibit the enforcement of equity decrees or orders against a female by contempt proceedings. (p. 666.)

JUDGMENTS—Enforcement Against Women by Proceedings in Contempt—Evidence.—If, in contempt proceedings against a divorced wife to enforce an order in the divorce proceedings requiring

her to pay a certain part of a trust fund to her husband, his trustee in bankruptcy is made a party to the proceedings in contempt and his relation to the case is alleged and admitted, such relationship may be proved on the trial of the application for an order in contempt. (p. 667.)

CONTEMPT—Term of Imprisonment.—An order for the imprisonment of a woman for contempt of court until the further order of the court, for disobedience of the order of the court, is not indefinite when the statute provides that a person shall be imprisoned only until the order of the court shall have been performed. (p. 667.)

Cady & Crandall, for the complainant.

E. E. Stockwell and T. Wellman, for the appellant.

³⁹² **HOOKE**R, J. The complainant, a woman, was found guilty of a contempt for not paying certain moneys in accordance with a final decree in a divorce case, and has appealed from an order that she pay the sum of six hundred and sixty-six dollars and sixty cents to Ormsby, trustee, and that, in default of such payment, she be, and remain, imprisoned in the common jail, until ³⁹³ she shall have performed the requirements of the order, or until the further order of the court.

A history of the proceedings is as follows: On August 27, 1904, Nelson E. Carnahan filed a bill for divorce against his wife, Minnie Carnahan, the appellant. It prayed that certain property to which Minnie Carnahan had the legal title be declared a trust in favor of Nelson Carnahan. No service of the subpoena was had on Minnie Carnahan, and apparently the case went no further. On September 1, 1904, Minnie Carnahan filed a bill for divorce and alimony against Nelson E. Carnahan. He answered and filed a cross-bill, by which he attempted to make his former bill a part of his cross-bill by reference. The case was heard on pleadings and proofs in December, 1904, and Minnie Carnahan testified that she had on deposit in Sarnia twelve hundred dollars, being the amount of an insurance upon property earned by Nelson. The court thereupon made an order in open court restraining her from transferring, assigning or otherwise disposing of the same, until the determination of the cause, or the further order of the court. On December 22, 1904, a decree was made granting a divorce to Minnie Carnahan, adjudging that she had in her possession or under her control six hundred and forty-four dollars, which in justice and equity is the property of Nelson Carnahan, being the sum found by the court as an

equitable property settlement between them, and it was therein ordered that Minnie Carnahan turn over and pay to the said Nelson Carnahan, or his solicitors, the said sum, and, it appearing that she had said sum on deposit in the Lambton Loan and Investment Company of Sarnia, Canada, that within twenty days from the signing of the decree she give to said Nelson or his solicitor a check upon said company, authorizing and directing it to pay and turn over said sum to Nelson Carnahan or his solicitor. This decree was enrolled January 10, 1905. On July 24, 1905, Nelson E. Carnahan's solicitor filed a praecipe for execution, and it was issued, and the same has not been returned unsatisfied. The appellant claims that the records in the office of ³⁰⁴ register of deeds in St. Clair county show an undischarged levy of said execution upon real estate. On August 5, 1905, a joint written application of Nelson E. Carnahan and Charles E. Ormsby, his trustee in bankruptcy, was filed, asking an order to show cause, against Minnie Carnahan, why she should not be punished for contempt for disobedience of the aforesaid decree. This application was accompanied by documents showing the facts stated therein, relating to the bankruptcy proceedings, etc., and a demand of payment. Complainant answered, a hearing was had, and the aforesaid order followed, from which Minnie Carnahan has appealed.

The following claims of counsel show the questions to be considered:

1. That in the divorce case the court has no jurisdiction to decree that the wife should turn over the property to the husband, and to the extent that it required it the decree was void, and does not support the contempt proceedings.

2. An outstanding execution precludes proceedings for contempt.

3. That there is a misjoinder, for the reason that the trustee in bankruptcy is not jointly interested with Mr. Carnahan in the decree.

4. That the trustee claims by assignment, and his claim is simply one of debt.

5. This is a proceeding to enforce a civil remedy, and for that reason is a civil action, and the law does not permit a woman to be imprisoned in such a case.

6. The evidence offered to prove that Ormsby was appointed, and had qualified, as trustee, was not admissible.

7. The demand made was legally insufficient.

8. The court has not found that Ormsby has suffered injury by reason of the alleged misconduct.

9. That there was no evidence indicating that the rights of Carnahan were impaired, impeded, or prejudiced, and that he had suffered loss and injury by the alleged misconduct.

10. There is no evidence to support the finding.

11. The order is void because the period of commitment is indefinite.

³⁹⁵ 1. The first point raised is that the decree is void for the reason that property rights should not be tried in a divorce case. It is sufficient answer to say that equity has jurisdiction to grant divorces and to enforce trusts, and whether properly cognizable in one suit, as a rule, or not, the parties are bound by the decree, not having appealed. The record shows that the complainant joined in the trial of both questions. The decree cannot be considered void. Furthermore, as will be seen later, 3 Compiled Laws, section 8640, authorizes a division of certain classes of property, and it must follow that the court has power to determine what property the husband has.

2. Could execution issue, and if so, does that preclude proceedings for contempt? The decree affords the only light as to the conclusions of the judge upon questions of fact. From that we may infer that he has attempted to make a property settlement between them. We cannot suppose that the separate property of the wife was considered, and therefore may conclude that he was dealing with property belonging to them in common (being evidently personal), or the separate property of the husband as claimed in his answer. That the court had a right to decree a division of this property between the husband and wife is shown by 3 Compiled Laws, section 8640. It follows that under this statute it is within the power of the court to issue execution against the husband, or sequester the real and personal property of the husband, or declare a lien upon it under the express provisions of that section, to enforce the payment of alimony. It is silent, however, upon the question of execution against the wife, and, being a statute expressly designed to afford relief to the wife, we think it was not designed to afford the husband relief against the wife, except incidentally in the decree as to division of property. It is probable that the possibility of a necessity of enforcing the decree against the wife, by execution or

otherwise, was not considered. This would leave this decree to be enforced against her in the same way that it could be in a case brought for the single purpose ³⁹⁶ of obtaining the husband rights in this fund. There is no doubt of the authority of the court to award execution upon application for the collection of any decree for the payment of money. See 1 Compiled Laws, section 468, which provides:

“(468) SEC. 63. The court may enforce performance of any decree, or obedience thereto, by execution against the body of the party against whom such decree shall have been made, or by execution against the goods and chattels, and in default thereof, the lands and tenements of such party; but no execution shall be issued on any final decree, until the same shall have been enrolled, as hereinbefore provided.”

This is an old statute, being section 3517 of the compilation of 1857. It has been the settled rule in this state that, where execution may issue to collect a decree for the payment of money, the proceeding by contempt to enforce a civil remedy cannot be resorted to: See *Haines v. Haines*, 35 Mich. 138; *North v. North*, 39 Mich. 67; *Swarthout v. Lucas*, 102 Mich. 492, 60 N. W. 973. We have no doubt that such is now the rule, except as it is modified by 3 Compiled Laws, section 10891, subdivision 3, and in construing that section we must harmonize the last provision of subdivision 3—i. e., “And for any other disobedience to any lawful order, decree or process of such court,” with the earlier provision permitting contempt proceedings on decrees “for the nonpayment of any sum of money . . . in cases where, by law, execution cannot be awarded”—and if we must say that this is a decree for the payment of money, in the sense of the term there used, this remedy is not appropriate.

As already indicated, this decree should be interpreted as deciding that upon a settlement of the question of alimony the court has determined how the property of the husband or that in which he has an interest with his wife shall be divided between them. It has been found, and adjudicated, that of this property she has in her control, beyond the jurisdiction of the court, on deposit, the amount, ³⁹⁷ a sum which equitably belongs to him, and that she turn over and pay this sum. This is not a decree for the payment of money in the ordinary sense. It is not subject to the exemption law. The decree requires delivery of the specific thing—i. e., the fund,

in contradistinction to the payment of a debt, and a writ of execution is not appropriate in such a case. The fact that a void execution has been taken, and a void and ineffective levy made, does not affect the question, it being apparent that no benefit has been derived from it by the defendant and injury suffered by complainant.

3. Ormsby has succeeded to the defendant's property, and in the capacity of trustee in bankruptcy is injured and impeded by the refusal to pay, and is entitled to receive the money when paid. The defendant is also injured and impeded for the reason that he is entitled to have it collected and paid in discharge of his debts, and to the return to him of any surplus that may remain. We see no impropriety in their joining in an application to the court to enforce payment by proper means.

4. We do not accept the complainant's theory that the assignment of this decree which follows, like that of other property, the adjudication in bankruptcy, changes its nature and makes a debt of what has not been so decreed. If there were any disposition to comply with the decree, the complainant could readily find a way of safely doing so, even if we admit the contention that she cannot safely pay to Ormsby.

5. Counsel invoke the statute (3 Comp. Laws, sec. 10342), which provides:

“(10342) SEC. 45. No female shall be imprisoned on any process in any civil action except in actions for the violation of any of the provisions of an act entitled ‘An act to prevent the manufacture and sale of spirituous or intoxicating liquors as a beverage,’ the same being chapter sixty-nine of the Compiled Laws of eighteen hundred and seventy-one, in which action she shall be liable to the same punishment as a male.”

308 This raises one of the most important questions in the case. Is this a civil process, and, if not, can a process in its nature criminal be used to enforce a civil right through imprisonment? The only constitutional provision forbidding the imprisonment of women is the following: “No person shall be imprisoned for debt arising out of or founded on a contract express or implied, except,” etc.: Const., art. 6, sec. 33.

In addition to the statute heretofore mentioned is the following:

“(9553) SEC. 1. No person shall be arrested or imprisoned on any civil process issuing out of any court of law, or on any execution issuing out of a court of equity, in any suit or proceeding instituted for the recovery of any money due upon any judgment or decree founded upon contract, or due upon any contract expressed or implied, or for the recovery of any damages for the nonperformance of any contract.

“(9554) SEC. 2. The preceding section shall not extend to proceedings as for contempts to enforce civil remedies; nor to actions for fines, penalties, or forfeitures, or on promises to marry, or for moneys collected by any public officer, or for any misconduct or neglect in office, or in any professional employment”: 3 Comp. Laws, secs. 9553, 9554.

If the statute first cited is to be applied literally, and no woman can be imprisoned, as a means of enforcing civil rights, the court of chancery is powerless to enforce trusts against female trustees, the delivery of securities or other property, or obedience to injunctions, if not the production of testimony, and litigants are at the mercy of women who may refuse obedience to the judgments of courts of justice. We think that substantial rights such as these were not within the intent of the legislature in giving immunity from imprisonment on civil process, which may reasonably be held to be limited to writs of *capias ad respondendum*, and *satisfaciendum*, and kindred process. Counsel for the complainant cite no authorities except the statutes, and we assume, therefore, that a search for others has been unavailing. If the question has been decided in this court, ³⁹⁹ we have no recollection of the case. That the process is criminal and not civil, see *Schwab v. Coots*, 44 Mich. 463, 7 N. W. 61; *Langdon v. Wayne Circuit Judges*, 76 Mich. 358, 43 N. W. 310; *Montgomery v. Muskegon Booming Co.*, 104 Mich. 411, 62 N. W. 561. In *Scott v. Chambers*, 62 Mich. 532, 29 N. W. 94, the court did not give a woman's immunity under the statute as a reason for not sustaining contempt proceedings against her, disposing of the case upon another ground. The same was true in *Latimer v. Barmore*, 81 Mich. 592, 46 N. W. 1. See, also, 4 Ency. of Pl. & Pr., p. 803, subd. c, and note. That the power extends generally to all who refuse obedience, see 9 Cyc. 23. See, also, 7 Am. & Eng. Ency. of Law, 2d ed., 40.

6. The objection to the introduction of proof of Ormsby's relation to the case was not well taken. It had been alleged in the application, accompanied by a certified copy of the order, and complainant's answer admits it. It was proper to show it.

7. We are of the opinion that a sufficient demand was shown.

8. We think it sufficient for the court to find that Carnahan's rights were impaired and impeded, etc., and the order permitting payment to Ormsby was proper.

9. There was sufficient proof that both Carnahan's and Ormsby's rights were impaired and impeded.

10, 11. The tenth claim need not be further discussed, being covered by what has been said. The eleventh is that the order made is indefinite, providing that complainant be imprisoned until the further order of the court. 3 Compiled Laws, section 10915, is said to limit the punishment to six months. Section 10913 provides:

"(10913) SEC. 23. When the misconduct complained of consists in the omission to perform some act or duty, which is yet in the power of the defendant to perform, he shall be imprisoned only until he shall have performed such act or duty, and paid such fine as shall be imposed, and the costs and expenses of the proceedings."

Such cases are not covered by section 10915: See *People v. Jones*, 33 Mich. 303; *Wilcox Silver Plate Co.* ⁴⁰⁰ *v. Shimmel*, 59 Mich. 524, 26 N. W. 692; *Chapel v. Hull*, 60 Mich. 167, 26 N. W. 874; *Latimer v. Barmore*, 81 Mich. 592, 46 N. W. 1; *Swett v. Thorkildsen*, 115 Mich. 314, 73 N. W. 370.

We find nothing in the record that warrants a reversal of the order, and the same is affirmed, and the case remanded that the same may be enforced.

Blair, Montgomery, Ostrander and Moore, JJ., concurred.

A Decree for alimony may be enforced against a husband by an attachment for contempt, unless he is unable to pay the alimony as ordered: See *Webb v. Webb*, 140 Ala. 262, 103 Am. St. Rep. 30, and cases cited in the cross-reference note thereto.

Proceedings for Contempt are regarded as criminal proceedings: See the note to *Clark v. People*, 12 Am. Dec. 186. Consult, also, *Frankel v. Frankel*, 173 Mass. 214, 73 Am. St. Rep. 266; *Ex parte Robertson*, 27 Tex. App. 628, 11 Am. St. Rep. 207.

GRAND RAPIDS NATIONAL BANK v. FORD.

[143 Mich. 402, 107 N. W. 76.]

DEEDS—Registration of as Mortgages.—If the statute provides that deeds and mortgages shall be recorded in separate books kept for that purpose, a deed absolute in form, though intended as security for a loan of money, and accompanied by an unrecorded defeasance, is void as to a bona fide purchaser, if recorded in the book of deeds instead of mortgages. (p. 671.)

VENDOR AND PURCHASER—Bona Fide Purchasers.—A person, who gives up his security for part of his claim, and takes in its place of deed to certain lands, is as to such lands a bona fide purchaser as against a prior grantee thereof whose conveyance is imperfectly and invalidly recorded. (p. 672.)

Butterfield & Keeney, for the appellant.

Burlingame, Belden & Orton, for the appellee.

403 MONTGOMERY, J. This was a suit for the foreclosure of a deed held by the complainant as security for the debt of defendant Thomas F. McGarry. The bill of complaint was taken as confessed by defendants Thomas F. McGarry and Nettie B. McGarry. Defendant Mary A. Ford, a subsequent purchaser of the property, contested the right of the complainant in the circuit court, and now appeals from the decree of that court.

In September, 1897, the defendant Thomas F. McGarry and his wife executed a warranty deed running to Frank M. Davis (the cashier of complainant bank) of lot 4 of Tuft's second addition to the city of Grand Rapids. This deed was given to secure the payment of a one thousand dollar note upon which McGarry's apparent liability was that of an indorser, and a further sum of fifteen hundred dollars that day advanced. A defeasance was executed at the same time. This deed was recorded in the book of deeds in the office of the register of deeds of Kent county. It was not recorded in the book of mortgages. Nor was the defeasance at any time recorded. On September 15, 1900, the defendants McGarry conveyed the property in question by warranty deed to defendant Mary A. Ford. She had no actual knowledge of the existence of the prior deed, but it was assumed that the property was free and clear from all encumbrances.

Two questions are presented for decision: 1. Whether **404** the record of the deed to complainant as a deed—the fact being admitted that it was as between the parties to it in-

tended to operate as a mortgage—was constructive notice to Mrs. Ford; 2. Whether, if the record be held not to be constructive notice, Mrs. Ford is in a position to assert rights as a bona fide purchaser.

The question first stated has been presented in briefs and arguments which indicate that nothing which would aid the court has escaped the attention of counsel. The provisions of the statute, in so far as they are material, are as follows:

Section 8979 of 3 Compiled Laws provides that the register of deeds shall keep an entry of deeds and an entry-book of mortgages.

“SEC. 8980. In the entry-books [book] of deeds, the register shall enter all deeds of conveyance absolute in their terms and not intended as mortgages or securities, and all copies left as cautions, and in the entry-book of mortgages he shall enter all mortgages and other deeds intended as securities, and all assignments of any such mortgages or securities; and in the entry-book of levies he shall enter all levies, attachments, notices or *lis pendens*, sheriff's certificates of sale, and United States marshals' certificates [certificate] of sale, noting in such books the day, hour and minute of the reception and other particulars, in the appropriate columns in the order in which such instruments are respectively received, and every such instrument shall be considered as recorded at the time so noted. And the said record of such levies, attachments, notices, *lis pendens*, sheriffs' certificates, marshal's certificates, and the original papers required by statute to be filed to perfect such levies, attachments, notices, *lis pendens*, and certificates on file in the office of the register of deeds, shall be notice to all persons of the liens, rights and interests acquired by or involved in such proceedings, and all subsequent owners or encumbrancers shall take subject to such liens, rights or interests.

“SEC. 8981. Different sets of books shall be provided by the registers of deeds of the several counties, for the recording of deeds and mortgages; in one of which sets all deeds required by the preceding section to be entered in the entry-book of deeds, shall be recorded at full length, ⁴⁰⁵ with the certificates of acknowledgment or proof of the execution thereof, and in the other, all such instruments as are required to be entered in the entry-book of mortgages, shall, in like manner, be recorded.”

"SEC. 8988. Every conveyance of real estate within this state, hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser in good faith, and for a valuable consideration, of the same real estate or any portion thereof, whose conveyance shall be first duly recorded."

It is very clear that, if the statute be construed literally, the instrument in question should have been recorded as a mortgage. It cannot be questioned that this deed was, by the parties to it, intended as a security. It would seem, therefore, that, unless the complainant's contention that the statute should be construed to mean that deeds, appearing to the register of deeds to be intended as security, are the only ones included in this phrase, the record was not made as the statute directs. It is strenuously insisted that the word "intended" should be interpreted as referring to something which is apparent in the language or form of the instrument, and not dependent upon the hidden mental process going on in the mind of either the grantor or the grantee, or both. The contention would have great force if the mere deposit of the paper for record constituted notice to subsequent purchasers, but it has been held that the statute (section 8988) above quoted puts the burden upon the person offering the paper for record of seeing to it that the instrument is properly recorded: *Barnard v. Campau*, 29 Mich. 162; *Gordon v. Constantine Hydraulic Co.*, 117 Mich. 620, 76 N. W. 142. It is difficult to imagine a case in which the grantee in a deed would not be aware of the fact that such deed was intended as security. It is then within the power of the party offering the instrument for record to comply with the statute, if the statute be given the construction for which defendant's counsel contend. Indeed, we are not able to see how we can place upon the words "intended as security" the construction contended for by complainant, without doing violence to ⁴⁰⁶ the obvious import of the language. It is to be noted that the register is to record in the book of deeds all deeds of conveyances absolute in their terms, *and not intended as mortgages or securities*. The construction contended for would result in eliminating from the statute the words italicized.

Can the direction that instruments intended as security be recorded in the book of mortgages be treated as directory?

Authorities are cited which, in construing statutes differing somewhat from ours, treat such a provision as directory; but we think the better reasoned cases hold such provisions mandatory. The purpose of the recording law is that the true state of the title be represented. If the grantee in a conveyance complies with the terms of the statute, he is protected. If he fails to comply with the plain requirements of the statute, the subsequent purchaser in good faith is protected, and is not to be charged with constructive notice. In 1 Jones on Mortgages, sixth edition, section 511, the rule is stated: "When it is provided that mortgages shall be recorded in books kept for that purpose separate from other instruments, a mortgage recorded as a deed is not effectual as against subsequent bona fide purchasers or mortgagees, even if the mortgage be in form an absolute deed, but intended as security for a loan of money"; citing authorities.

The author adds: "Except in states whose statutes require a different construction, the record of a conveyance in the form of an absolute deed, in a book kept for the recording of deeds, ought to be held to impart effectual notice of the rights or interests conveyed, although a statute requires mortgages to be recorded in separate books."

The author also cites *Kennard v. Mabry*, 78 Tex. 151, 14 S. W. 272, to the point that a statute, which is merely directory to the recorder in this respect, would not invalidate a record of the mortgage not made in the record books specially used for mortgages. This section fairly states the law. As ⁴⁰⁷ we have pointed out, we cannot construe this statute as being merely directory to the register, for the reason that in this state at least the duty of complying with the recording law rests upon the grantee. Nor do we think we can safely treat any of the distinct requirements of this statute as directory merely. The statute declares void, as against good faith purchasers, any conveyance "not recorded as provided in this chapter." We cannot say that a conveyance recorded elsewhere than in the place designated is recorded as provided in the chapter referred to. Our conclusion is sustained by the reasoning in the following cases: *Thompson v. Mack*, Harr. (Mich.) 150; *Gordon v. Constantine Hydraulic Co.*, 117 Mich. 620, 76 N. W. 142; *Dey v. Dunham*, 2 Johns. Ch. (N. Y.) 182; *Warner v. Winslow*, 1 Sand. Ch. (N. Y.) 432; *Gillig v. Maass*, 28 N. Y. 191; *Odell v. Montross*, 68 N.

Y. 499; *Friedley v. Hamilton*, 17 Serg. & R. 70, 17 Am. Dec. 638; *Ives v. Stone*, 51 Conn. 446; *White v. Moore*, 1 Paige (N. Y.), 553. Numerous cases are cited by complainant, most of which rest upon statutes differing materially from ours. As to those cases which cannot be distinguished, we must decline to follow them.

Does Mrs. Ford occupy the position of a bona fide purchaser? It appears that defendant McGarry had in his possession at one time eight thousand dollars belonging to Mrs. Ford. On November 1, 1898, McGarry represented to Mrs. Ford that he had loaned this money to one J. G. McGarry, and that to secure the repayment thereof J. G. McGarry had deeded to defendant McGarry a hotel property in Walker, Minnesota. The deed to Thomas F. McGarry was in fact made, but whether there had been a loan to J. G. McGarry is at least doubtful. However, T. F. McGarry gave Mrs. Ford his promissory note for the amount, accompanied by an instrument reciting that he had negotiated a loan to J. G. McGarry, and declaring that said property was held in trust for Mrs. Ford, and providing for its sale in case of default. The property, while subject to prior encumbrances, had an equity available to Mrs. Ford of something ⁴⁰⁸ over two thousand dollars. On the 15th of September, 1900, a new agreement was made between the parties, by the terms of which McGarry deeded to Mrs. Ford the lot in Tuft's subdivision for three thousand five hundred dollars, paid her five hundred dollars in cash, and agreed to pay the remainder in installments, which was to be in full of all claims and demands. And it was expressly agreed that this engagement was to take the place, and stand in lieu, of all other negotiations upon the subject matter. This was a discharge of the security afforded by the declaration of trust. McGarry so treated it and conveyed away the equity in the Minnesota property before Mrs. Ford learned of complainant's claim. The rule of *Schloss v. Feltus*, 103 Mich. 525, 61 N. W. 797, 36 L. R. A. 161, is invoked by complainant. It is contended that the only consideration for the conveyance to Mrs. Ford was the discharge of a pre-existing debt. There was in this case something more. There was release of the security of the trust agreement, and a transfer of the trust property to an innocent purchaser while Mrs. Ford stood disabled to enforce the trust, because of her agreement to abrogate it. She could not

have been placed in statu quo after learning that she had been defrauded. In these circumstances she is entitled to occupy the position of a bona fide purchaser.

The decree will be reversed, and the bill dismissed, with costs of both courts to defendant Ford.

Carpenter, C. J., and Grant, Hooker and Moore, JJ., concurred.

A Deed Absolute Intended as a Mortgage has been held properly recorded in the book of absolute conveyances, so that such registration will impart notice of the mortgage: See the note to Koch v. West, 96 Am. St. Rep. 401.

JENKS v. HART CEDAR AND LUMBER COMPANY.

[143 Mich. 449, 106 N. W. 1119.]

MORTGAGES—Impairment of Security—Limitation of Actions.—The removal of timber from mortgaged land, by which the security of a second mortgagee is impaired, constitutes a present injury to him sufficient to put in operation the statute of limitations against his right of action therefor, though his mortgage has not matured. (p. 675.)

W. D. Fuller, for the appellant.

W. Foote, for the appellee.

450 MONTGOMERY, J. For the purpose of presenting the legal questions in this case, the facts may be briefly stated. In 1897 John V. Cahill was the owner of one hundred and sixty acres of land in Oceana county subject to two mortgages. The first mortgage was owned by Mary Groff and Margaret Zoller of Fort Plain, New York. The second mortgage was owned by one Skeels and the present plaintiff. Cahill sold to defendant the hardwood timber on fifteen acres of land, and defendant, during the fall and winter of 1897-98, cut and removed the timber. The mortgages were of record, and defendant was given notice after the first payment of twenty-five dollars on the timber, and before the balance was paid, that the second mortgagee would not assent to the impairment of the security. Defendant replied that the owner of the fee claimed the right to sell the timber, and requested the second mortgagee to take prompt action if any was contemplated. No proceedings were then instituted. Plaintiff

and Mrs. Skeels in 1902 filed a bill to foreclose the second mortgage. A decree was obtained and sale had on September 28, 1903, of the land, subject to the mortgage of Groff and Zoller, at twelve hundred dollars. A deficiency of six hundred and forty-seven dollars was reported. Mrs. Skeels assigned to plaintiff her interest in the deficiency and also all right of action against defendant to recover for the timber taken. June 15, 1904, this suit was instituted to recover for the impairment of the security of the second mortgage. Judgment passed for the defendant on a special finding of above facts, and plaintiff brings error.

The circuit court was of the opinion that the prior right of action for impairing the security rested in the first mortgagee, and that, in the absence of a discharge of that right on assignment thereof to plaintiff or a waiver of the right, the second mortgagee could not maintain the action, and also that, if a right of action ever did exist in plaintiff, it was barred by the statute of limitations.

Plaintiff maintains that a second mortgagee has such an interest in the land mortgaged as entitles him to maintain an action, and cites in support of this contention the ⁴⁵¹ case of Gooding v. Shea, 103 Mass. 360, 4 Am. Rep. 563, which sustains the contention. It was there held that a second mortgagee had the right to maintain the action, and that the fact that the first mortgagee had a prior right would not, in the absence of a showing by the defendant of a satisfaction of the demand of such prior mortgage, defeat the action: See, also, 1 Jones on Mortgages, 6th ed., sec. 684. Whether the case of Gooding v. Shea, 103 Mass. 360, 4 Am. Rep. 563, states the correct rule, or whether the right of the second mortgagee should be subordinated to the right of the first mortgagee, and not enforceable without the assent of the first mortgagee or a waiver of his prior right, we find it unnecessary to decide. As sustaining the view that the assent of the first mortgagee is essential to the right of the second mortgagee to maintain the action, see Sanders v. Reed, 12 N. H. 558.

In the present case, however, it appears that, if the right of action existed independently of the assent of the first mortgagee or waiver of his prior right, the action accrued more than six years before the suit was instituted. If on the other hand, the assent of the first mortgagee or the waiver of his prior right was essential, the record shows no such as-

sent. In the one view the action is too late, and in the other no right of action has as yet accrued.

It is sought to avoid the force of the statute of limitations in this case by the claim that the act of the defendant was not legally injurious until the mortgage matured, and that the removal of the timber was not in and of itself wrongful in a sense to entitle the mortgagee to immediately bring an action. We are not able to see why one who has his security interest in property impaired by the wrongful act of another has not suffered a present injury.

The circuit judge reached the correct conclusion, and judgment is affirmed.

McAlvay, Grant, Blair and Moore, JJ., concurred.

A Mortgagee may Enjoin the Cutting of Timber on the mortgaged premises, if his security will be impaired by the removal of the timber, or he may recover damages therefor: See *Beaver Lumber Co. v. Eccles*, 43 Or. 400, 99 Am. St. Rep. 759; notes to *Greer v. Newland*, 109 Am. St. Rep. 448; *Weber v. Ramsey*, 43 Am. St. Rep. 432. And it would seem that a second mortgagee is within this rule: *Gooding v. Shea*, 103 Mass. 360, 4 Am. Rep. 563.

BENSON v. ROSS.

[143 Mich. 452, 106 N. W. 1120.]

JOINT TORT-FEASORS—Evidence.—A person who is injured by a bullet negligently and unlawfully shot from a rifle by one of three defendants, who were using it in turns in shooting at a mark, is not required to show which of the defendants fired the shot, as the concert of action made them all liable as joint tort-feasors. (p. 676.)

C. R. Robertson, for the appellant.

J. H. Pound, for the appellees.

⁴⁵² **MONTGOMERY, J.** This action was brought against the three defendants. Defendant Haight was not served, and the case proceeded against the defendants Ross. At the conclusion of the testimony the circuit judge directed a verdict for defendants, and plaintiff brings error.

The sole question presented is whether there was any testimony tending to show defendants' responsibility for the injury. It is undisputed that on the Fourth of July, 1902,

the defendant came to the premises of the defendant, William J. Ross, bringing with him a Flobert rifle, and that a bullet was fired from this rifle which, by misadventure, struck and inflicted serious injury upon the plaintiff. There was testimony on the plaintiff's behalf tending to show that at the time this injury to plaintiff occurred the three defendants were engaged in shooting ⁴⁵³ at a mark, using the rifle by turns. The plaintiff's testimony failed to show who held the gun when the shot which caused the injury was fired. Defendants' testimony tended to show that, some time before the accident, the two defendants Ross had ceased to participate in the firing, and that William J. Ross had requested Haight to shoot no more. The circuit judge seems to have deemed it essential to plaintiff's case to show that the shot was fired by one of the two contesting defendants, or by his affirmative direction. We think this view of the defendants' responsibility too restricted.

There was testimony tending to show that the three defendants were acting in concert in an act, not only violating a city ordinance, but palpably and grossly negligent. If the jury found such concert of action, all would be liable as joint tort-feasors: *Jenne v. Sutton*, 43 N. J. L. 257, 39 Am. Rep. 578; *Mahnke v. Freer*, 126 Mich. 572, 85 N. W. 1099; *Conradt v. Clauve*, 93 Ind. 476, 47 Am. Rep. 388. Whether the defendants' testimony was sufficient to overcome the evidence offered on plaintiff's behalf was a question for the jury.

Judgment reversed, and a new trial ordered.

McAlvay, Grant, Hooker, and Moore, JJ., concurred.

An Act Wrongfully Done by the Joint Agency or co-operation of several persons renders them liable jointly or severally: *Cuddy v. Horn*, 46 Mich. 596, 41 Am. Rep. 178; *Valparaiso v. Moffitt*, 12 Ind. App. 250, 54 Am. St. Rep. 522.

CROZE v. ST. MARY'S CANAL MINERAL LAND CO.

[143 Mich. 514, 107 N. W. 92.]

CHATTEL MORTGAGES—Conversion—Seizure and Sale.—If mortgaged logs are so mingled with those of another that they cannot be sorted at the place of seizure, the mortgagee is not guilty of conversion in removing them to another place in the direction of a market, for the purpose of sorting and selling them. (p. 679.)

CHATTEL MORTGAGES—Seizure and Sale.—A mortgagee is not bound to sell mortgaged chattels at the place of seizure. (p. 679.)

CHATTEL MORTGAGES—Sale on Credit—Conversion.—A sale of mortgaged personalty by the mortgagee in possession on credit does not constitute a conversion, but renders him accountable to the mortgagor on the same basis as if he had received cash. (pp. 679, 680.)

CHATTEL MORTGAGES—Negligence—Sale—Conversion.—If a mortgagee of personalty is rightfully in possession upon default of the mortgagor, his act in negligently removing the mortgaged property at an improper time and manner, and his negligent act in waiting an unreasonable time in which to sell after taking possession, do not amount to a conversion, but merely render him liable for resulting damages. (p. 681.)

SALES—Delivery—Title.—In case of a sale by a mortgagor of a part of an entire mass of goods, some of which is mortgaged, where the purchaser is allowed to take possession of the whole for the purpose of enabling him to separate the part purchased, the title to that part passes to him. (p. 683.)

Chadbourne & Rees, for the appellant.

L. W. Croze and Tarsney & Fitzpatrick, for the appellee.

515 **CARPENTER, C. J.** Plaintiff, as the assignee of a cause of action originally belonging to one Will C. Baudin, brought this action for the conversion of certain timber, and recovered verdict and judgment in the lower court. Defendant asks us to reverse that judgment.

The material facts are as follows: December 27, 1900, Baudin executed and delivered to defendant a chattel mortgage covering the timber in question to secure the payment of an indebtedness of four thousand four hundred and eighty dollars. In the mortgage the timber was described as "all the logs and timber now ⁵¹⁶ cut or that may be cut by the said party of the first part [upon certain described sections of land] excepting from the above one million feet, board measure, of long timber eighteen feet long and upward, heretofore sold out of said lot of logs to the Tamarack Mining Company." The mortgage provided that the indebtedness should be paid July 1, 1901, and authorized the mortgagee,

in case of default, to take possession, and sell at public auction, "or at his option at private sale with or without notice," sufficient of the mortgaged property to satisfy the said debt, interest, and reasonable expenses. Baudin did not pay this indebtedness at maturity, and in September, 1901, the defendant through a deputy sheriff took possession of the mortgaged property. When this possession was taken, the logs were cut, part of them had been towed to Portage Lake, and the remainder was on the rollways on the shore of Lake Superior at Misery Bay, a place some distance from Portage Lake. At that time the logs belonging to the Tamarack Mining Company had not been delivered and were commingled with the logs of which defendant took possession. It is conceded, however, that the title to the same belonged to the Tamarack Mining Company. The day after defendant seized this property it and said Tamarack Mining Company entered into an agreement to have the logs "properly boomed and towed to Portage Lake, and there properly sorted and delivered to the several respective parties entitled thereto," and for this purpose appointed I. A. Moore as their agent and custodian. They also agreed that each party should "bear and pay each its proportion of the cost and expense based upon the number of feet the logs and timber actually sorted and delivered each." At this time there were liens against these logs and timber aggregating a large amount. These were subsequently paid by defendant and the Tamarack Mining Company. Their precise amount is not shown in the record, nor was it shown on the trial in the court below. Mr. Moore, the joint agent of defendant and Tamarack Mining Company, ⁵¹⁷ proceeded to tow the logs on the rollways in Lake Superior to Portage Lake in conformity with the terms of said contract. These logs were moved between September 14 and October 11, 1901. I think it is but fair to say that the evidence justly warranted the inference that defendant was negligent in attempting such work at that time. It was the stormy season of the year, and the jury might have found that the work was done at increased expense and resulted in the loss of many logs. Not all of the logs on Misery Bay were removed. There was left on the rollways at that place four hundred and sixty-six thousand feet, and these have never been removed. Owing to the approach of winter the logs at Portage Lake were not sorted until the spring of 1902.

They were then sorted and there was delivered to the Tamarack Mining Company as its property logs to the amount of five hundred and twenty-eight thousand three hundred and fifty-eight feet. In June, 1902, defendant sold by private sale, on credit, the remainder of the logs for the sum of seven thousand seven hundred and ten dollars and fifty-three cents, and the testimony shows that this was less than the expense of moving the same and the amount expended in paying liens.

The question of paramount importance in this case is whether, under his declaration, plaintiff made a case entitling him to take the judgment of the jury. The declaration contains two counts. The second count is the ordinary count in trover charging the defendant with converting the property. The first count charges that defendant converted the property by removing the same before sale from the place where it was seized, and it also charges that the timber left at Misery Bay was damaged by reason of defendant's negligence in not caring for and protecting the same. The trial judge overruled plaintiff's contention that defendant, by removing the logs to Portage Lake, thereby converted the same to its own use. We think he was right. There is no inflexible rule requiring the mortgagee to sell the mortgaged chattels at the place of seizure: See *Olcott v. Bynum*, 17 Wall. (U. S.) 44, 21 L. ed. 570. The circumstances in this case forbade such a sale. Part of the property seized was already at Portage Lake. That place lay in ⁵¹⁸the direction of the market. Commingled with these logs were the logs of the Tamarack Mining Company. Those logs had to be withdrawn before the mortgaged property could be sold, and we think, therefore, it was the duty of defendant to gather the property together at Portage Lake in the manner it attempted. This is made clear by the testimony of plaintiff's assignor, Baudin, who says: "The logs could not have been sorted out on the bank nor in the slough. . . . In order to get the Tamarack logs, it would be necessary to bring all the logs together down at Portage Lake, or to some harbor, and then sort them after they were brought down."

It is also contended by plaintiff that defendant converted the property when it sold the same on credit. This contention was also properly overruled by the trial judge. While it is not to be denied that, in one sense, it is the duty of a mortgagee to sell for cash, it is also true that the only

penalty for the breach of this duty is to hold him responsible for the damages thereby caused. That is, to charge him on the same basis as if he had received cash: See *Williams v. Hatch*, 38 Ala. 338; *Jones on Chattel Mortgages*, 4th ed., sec. 800.

The trial court charged the jury that, if defendant attempted to remove the property from the shores of Lake Superior at an improper time, it thereby converted such property; that, if the defendant neglected for an unreasonable time to sell the mortgaged property after taking possession, that, too, was a conversion; and that it must be held to have converted the four hundred and sixty-six thousand feet left on the shores of Lake Superior at Misery Bay because it left the same there an unreasonable time. Was this charge correct? It must be conceded that it was the duty of defendant to make a sale of the property within a reasonable time after seizure and to effect its removal with due diligence, and while it does follow that it would, in some form of action, be answerable in damages for a failure to perform this duty, it by no means follows that such failure would amount to a conversion of the property. Does it? To maintain an action ⁵¹⁹ for conversion, one must either have actual possession, or the immediate right to possession: *Stevenson v. Fitzgerald*, 47 Mich. 166, 10 N. W. 185; *Axford v. Mathews*, 43 Mich. 327, 38 Am. Rep. 185, 5 N. W. 377; *Foster v. Lumbermen's Min. Co.*, 68 Mich. 188, 36 N. W. 171; *McGraw v. Sampliner*, 107 Mich. 141, 64 N. W. 1060. Plaintiff's assignor did not have the actual possession. Defendant had that. Defendant was a mortgagee in possession. It had the right to retain that possession so long as its mortgage lien existed. Plaintiff had no right to possession, unless the wrongful conduct of the defendant had terminated its title to the property. Had defendant committed such a wrong as to destroy its mortgage lien, and to give plaintiff an immediate right of possession of the mortgaged property?

An instructive case upon this question is *Donald v. Suckling*, L. R. 1 Q. B. 585. It was there decided that it was not a conversion for the pledgee of a chattel to repledge the same, before the maturity of the debt due, for a larger sum than that debt, upon the ground that the wrongful conduct complained of did not destroy the special property of the pledgee. In the course of an opinion in that case, *Blackburn*,

J., said: "But I think in all these cases (cases in which it was held trover might be maintained) the act done by the party having the limited interest was wholly inconsistent with the contract under which he had that limited interest, so that it must be taken from his doing it that he had renounced the contract."

In *Rose v. Page*, 82 Mich. 105, 46 N. W. 227, it was held that a mere irregularity in the sale of chattel mortgaged property in good faith would not subject the purchaser or mortgagee to an action in tort, in which the value of the property can be recovered, leaving the mortgage debt unpaid. This is only another way of saying that an action of trover could not under these circumstances be maintained. In *Brown v. Maynard*, 107 Mich. 401, 65 N. W. 293, this court said: "A void attempt to foreclose a chattel mortgage, in which the mortgagee bids in and retains the property, is not a conversion."

⁵²⁰ It follows from these principles that neither unreasonable delay in selling mortgaged property nor negligence in caring for the same constitutes conversion. Indeed, there is abundant authority for saying that the total loss of a chattel arising from the mere negligence of a bailee does not constitute a conversion: *Anonymous*, 2 Salk. 655; *Ross v. Johnson*, 5 Burr. 2826; *Packard v. Getman*, 4 Wend. (N. Y.) 613, 21 Am. Dec. 166; *Hawkins v. Hoffman*, 6 Hill (N. Y.), 586, 41 Am. Dec. 767. In *Marseilles Mfg. Co. v. Perry*, 62 Neb. 715, 87 N. W. 544, a decision of the supreme court of Nebraska, it was held that a mortgagee, who took possession of mortgaged chattels and retained them for more than two years without making a sale, was responsible for their value as at the time he seized them. This case is, in our judgment, no authority for the proposition that unreasonable delay in removing the property from Misery Bay amounted to a conversion. Trover for conversion is one of the common-law forms of action abolished in Nebraska, and in deciding the case the court was not called upon to consider what constituted a conversion. It may also be said that, even if defendant converted the logs remaining at Misery Bay, the reasons hereafter pointed out as decisive against plaintiff's right to maintain an action of damages for the deterioration of that property would have prevented a recovery.

The distinction between an action for damages and an action for conversion is not merely technical. One who

has converted property is liable for the entire value of the property at the time of the conversion, while one whose wrong has damaged that property is held responsible only for those damages. For instance, in this case, the defendant would, in an action (whether in assumpsit or on the case) for damages, be bound to make good all losses arising from negligently towing the logs; but, according to the law of conversion as applied by the trial judge, he was responsible for the value of all the logs towed, "and the question of whether there were losses cut no figure whatever." It is our judgment, therefore, that the negligence ⁵²¹ of the defendant in towing the logs, its delay for several months to sell them, as well as its delay in moving the same from the banks of Lake Superior, did not destroy its special property therein, and therefore did not give the plaintiff such a possessory right as to entitle him to maintain an action for conversion.

There remains for consideration this question: Did the evidence warrant the jury in awarding plaintiff damages on account of defendant's failure to care for the four hundred and sixty-six thousand feet of logs left at Misery Bay? There was evidence that these logs, in consequence of the failure to remove them, deteriorated in value, but there was no evidence by which the jury might say what portion of these logs belonged to the Tamarack Mining Company. (And to make up the one million feet belonging to that company there was still due it more than four hundred and seventy thousand feet.) Nor was there evidence of the amount of liens—and concededly there were liens upon this property. There was, therefore, no basis upon which the jury might find that this deterioration damaged plaintiff. The trial court should therefore have directed a verdict in favor of defendant.

Judgment reversed, and a new trial ordered.

McAlvay, Grant, Montgomery and Ostrander, JJ., concurred.

ON MOTION TO MODIFY OPINION.

CARPENTER, C. J. In a motion to modify our opinion deciding this case (ante, p. 677) plaintiff states that he did not concede, as therein stated, that the title to the one million feet of logs described in the mortgage "as heretofore sold to the Tamarack Mining Company" actually passed to that company. We supposed that plaintiff intended to make this con-

cession from several circumstances, the most significant of which was his failure to deny the assertion in defendant's brief that he did make it. We are now persuaded that he did not intend to make it, and we therefore state in this supplemental opinion that he did not make it.

⁵²² We think, however, that it is our duty to say that this statement will not change the effect of our former opinion, because it must be held as a matter of law that the title to the said one million feet did pass to the Tamarack Mining Company before the wrongs complained of by plaintiff were committed. Before the commission of those wrongs the joint agent of the Tamarack Mining Company and of defendant took possession of the mass of logs, of which the Tamarack Mining Company's logs were a part, for the purpose of sorting and delivering them "to the several respective parties entitled thereto." By this act, which was authorized by its contract of sale, the Tamarack Mining Company acquired title to such of the logs (viz., said one million feet) as it had agreed to purchase. In *Lamprey v. Sargent*, 58 N. H. 241, it was held: "In the case of a sale of a part of an entire mass of goods, such as coal, brick, flour and grain, if the purchaser is allowed to take possession of the whole for the purpose of enabling him to separate the part sold, the title to that part passes to the purchaser." See, also, 1 *Mechem on Sales*, sec. 703; *Iron Cliffs Co. v. Buhl*, 42 Mich. 86, 3 N. W. 269; *Crofoot v. Bennett*, 2 N. Y. 258; and *Weld v. Cutler*, 2 Gray (Mass.), 195.

McAlvay, Grant, Montgomery and Ostrander, JJ., concurred.

Conversion of Personal Property sufficient to sustain trover is the subject of a monographic note to *Bolling v. Kirby*, 24 Am. St. Rep. 795-819. A sale by one person of the goods of another is a conversion: *Leader v. Plants*, 95 Me. 343, 85 Am. St. Rep. 418.

DALLAVO v. SNIDER.

[143 Mich. 542, 107 N. W. 271.]

SLANDER—Nonactionable Words.—To say of a business-man, "He is not worth a dollar; everything is in his wife's name," unless said of him in relation to his business connections, is not slanderous per se. (p. 686.)

SLANDER—Nonactionable Words.—To say to sureties of a merchant, who has signed an indemnity bond in favor of such sureties on the bond of another, that such merchant "is not worth a dollar; everything is in his wife's name," is not said of him concerning his business, and is not slanderous per se. (p. 686.)

LIBEL—Words in Relation to Business.—It is libelous per se to publish of and concerning a merchant false statements touching him in his business, and naturally tending to injure him therein. (p. 686.)

SLANDER—Words in Relation to Business—Allegations and Proof.—In a case where the charge is the uttering of slanderous words, the allegations of the declaration must be sustained by proof that the words were actually spoken of and concerning the plaintiff in relation to his business, in order to make them slanderous per se. (pp. 686, 687.)

Cogger & Broomfield, for the appellant.

McKnight & McAllister and J. Barton, for the appellee.

542 **BLAIR, J.** This is an action of slander. The slanderous publication relied upon is charged in the declaration as follows, viz.: "Did on, to wit, the first day of December, A. D. 1902, at the said village of Remus in the county and state aforesaid, in a certain discourse which the said defendant then and there had with one Frank Simon, in the presence **543** and hearing of divers good and worthy persons, designedly, falsely and maliciously, speak, publish and declare of and concerning the said plaintiff in connection with his said trade, business and employment, these scandalous, malicious and defamatory words, to wit: 'Them indemnity bonds [meaning thereby the indemnity bonds given by one James R. Kaley upon which this plaintiff had become indemnity bondsman] are no good. He [meaning the said plaintiff] is not worth a dollar [meaning that plaintiff was not collectible and was insolvent]. His property [meaning said plaintiff's property] is all in his wife's name.' "

The plaintiff gave testimony as to his business relations, which was undisputed, tending to show that at the time of the publication of the alleged slanderous words, he was the owner

of and operating a mill at Wyman, some fourteen miles from Remus, and was buying and selling logs, lumber and ties, and manufacturing and selling lumber and shingles and ties in the country around Remus.

"In my mercantile business and in buying and selling timber and logs, I did some business on credit. I made some purchases without paying the cash immediately and, practically, I could deal more advantageously in that way. . . .

"In 1902, about in August, I bought a certain amount of interest in the Mansfield Mercantile Company at Remus. . . . The Mansfield Mercantile Company was a general store handling drygoods, clothing, shoes, groceries, crockery, etc. That was a stock company and I put seven thousand dollars of money in there. I continued to have that interest in that business until some time in February or March, 1903. I was vice-president of the company."

The circumstances surrounding the speaking of the alleged slanderous words were, substantially, as follows: The plaintiff's son in law, Kaley, was engaged in the saloon business and had given to the sureties upon his liquor bond an indemnifying bond signed by plaintiff to induce them to become such sureties. One of the sureties testified that after he signed the liquor bond he had a talk with defendant at the saloon of one Theisen.

"Jacob Snider says to me, 'You went Kaley's bond?' 544 I says, 'Yes, sir.' 'Well,' Jake says, 'I think you made a great mistake.' He says, 'He is not worth anything.' I says, 'I got Mr. Dallavo's— He gave me his indemnifying bond.' 'Well,' he says, 'he is not worth anything, he is not worth a dollar; everything is in his wife's name.' "

The other surety testified to substantially the same conversation. There was no proof or claim of special damages. The defendant introduced no evidence, but rested at the close of plaintiff's case.

Plaintiff's counsel requested the court to charge the jury, amongst other things, as follows:

"In this class of cases, slander per se, it is not necessary for the plaintiff to show malice. Malice is a presumption of law from the publication of words actionable per se and I charge you that these words are actionable per se and that malice is presumed. Malice is a presumption of law from the false and injurious nature of the charge.

"In this case the words are actionable per se and it is not necessary in this case for the plaintiff to allege or prove any actual damages. It is legally presumed that damages result from the utterance of such words, and that they cause injury as a natural and immediate consequence."

The trial judge refused to give either of these requests, but instructed the jury that the words were not actionable per se, and that malice must be proved, upon the ground that it did not appear that the words were spoken of the plaintiff, as charged in the declaration, with reference to his business.

"So we must go further than the words themselves and ascertain as far as we can from the evidence what were the surrounding circumstances that led up to the talk, in order to determine what was the spirit in which these words were used," etc.

The important question in this case is whether the words counted upon were slanderous per se. If the words were slanderous per se, the charge of the court was given upon an erroneous theory, which affected the entire charge. If the words were not slanderous per se, the charge was ⁵⁴⁵ too favorable to plaintiff, since no special damages were proved.

In determining whether words are slanderous per se, a distinction has generally been recognized between words written or printed and words spoken. An exception to this rule has, however, been made in the case of words affecting a person in his profession or business, and it has been held that in such cases the distinction does not exist. The principle upon which this exception rests was questioned by Mr. Justice Christiancy in *Weiss v. Whittemore*, 28 Mich. 366, and we are satisfied that it is unsound: See *Foster v. Scripps*, 39 Mich. 376, 33 Am. Rep. 403; *Tryon v. Evening News*, 39 Mich. 636.

The law is well settled that it is libelous per se to publish of and concerning a merchant false statements touching him in his business and naturally tending to injure him therein. And it might well be held that a statement of a merchant's insolvency printed in the public press, even though connected with some matter entirely distinct from his business, was libelous per se, since the inevitable tendency must be and is intended to be injurious to him in his business. But whatever the rule may be in such a case, we are satisfied that in a case where the charge is the uttering of slanderous words the alle-

gations of the declaration must be sustained by proof that the words were actually spoken of and concerning the plaintiff in relation to his business, in order to make them slanderous per se, and this rule, we think, is sustained by the weight of authority: *Van Epps v. Jones*, 50 Ga. 238; *Van Tassel v. Capron*, 1 Denio (N. Y.), 250, 43 Am. Dec. 667; *Oakley v. Farrington*, 1 Johns. Cas. (N. Y.) 129, 1 Am. Dec. 107; *Cassavoy v. Pattison*, 93 App. Div. (N. Y.) 370, 87 N. Y. Supp. 658; *Smedley v. Soule*, 125 Mich. 192, 84 N. W. 63.

In view of our conclusion that the trial judge did not err in holding that the words proved were not slanderous per se, the other assignments of errors become immaterial.

The judgment is affirmed.

Montgomery, Ostrander, Hooker and Moore, JJ., concurred.

If Defamatory Words falsely spoken of one prejudice him in business or occupation, they are actionable without proof of special damages: *Cooley v. Gaylon*, 109 Tenn. 1, 97 Am. St. Rep. 823; *St. James etc. Academy v. Gaiser*, 125 Mo. 517, 46 Am. St. Rep. 502. As to whether imputations regarding insolvency or commercial standing of a man are actionable, see *Hollenbeck v. Ristine*, 105 Iowa, 488, 67 Am. St. Rep. 306; *Brown v. Vannaman*, 85 Wis. 451, 39 Am. St. Rep. 860; *Mitchell v. Bradstreet Co.*, 116 Mo. 226, 38 Am. St. Rep. 592; *Hayes v. Press Co.*, 127 Pa. 642, 14 Am. St. Rep. 874.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

McCAFFERY v. BURKHARDT.

[97 Minn. 1, 105 S. W. 971.]

INDORSEMENT OF PAYMENT—Parol to Contradict.—An indorsement of payments on a negotiable instrument is in the nature of a receipt, not of a contract, and may be contradicted or explained by parol. (p. 689.)

INDORSEMENT OF PAYMENT—Parol to Contradict.—It may be shown by parol evidence that notes secured by mortgage have not been paid, although they bear indorsements of payment. (p. 689.)

George H. Selover, Ole J. Vaule and William P. Murphy,
for the appellant.

S. L. Campbell and Martin O'Brien, for the respondent.

* **JAGGARD, J.** This was an action brought to set aside the foreclosure of a prior mortgage lien in aid of plaintiff's execution on a judgment subsequent to the mortgage.

On December 15, 1890, defendant's father and mother had executed a mortgage on the premises. On June 23, 1894, plaintiff obtained a judgment in Wabasha county against the father of the defendant. That judgment was docketed in Polk county on September 26, 1894, and became a lien upon a lot in Crookston and a hotel situated thereon. On May 2, 1904, the premises were sold under execution sale under said judgment to the plaintiff for seven hundred and fifty-three dollars and thirty-six cents. On December 13, 1901, defendant obtained an assignment of the mortgage, and on October 24, 1903, bid in the premises at foreclosure sale. On January 22, 1904, the father and mother quit-claimed to the defendant. This action is brought to set aside the foreclosure, on the ground that the mortgage was paid in fact and was kept alive for the sole purpose of hindering,

delaying, and defrauding the plaintiff. At the trial the defendant produced the notes, which were introduced into evidence. There were a number of indorsements of payments on each of the notes. The court ordered judgment for the defendant. The plaintiff made a motion for a new trial. The court granted a new trial as to the amount of taxes and insurance paid, but in all other respects denied the motion. Plaintiff thereupon took this appeal.

1. The appellant contends that the notes and mortgages were paid and extinguished in toto prior to the purchase by the defendant. It may be conceded that the indorsements were prima facie evidence of payment and extinguishment, that it is immaterial that the money was paid by a third party, and that on the facts in this case there could be no subrogation. It is, however, the well-settled rule in this state that an indorsement of payments on a negotiable instrument is in the nature of a receipt, not of a contract, and may be contradicted or explained by parol: *Sears v. Wempner*, 27 Minn. 351, 7 N. W. 362; *Theopold v. Deike*, 76 Minn. 122, 77 Am. St. Rep. 607, 78 N. W. 977. "This being so," as Chief Justice Gillfillan said, in *Sears v. Wempner*, 27 Minn. 351, 7 N. W. 362, "the only question in the case is whether the evidence sustains the finding of fact by the court below." In this case there was no direct and explicit testimony by the defendant as to the time when he bought the notes and mortgage. Nevertheless, ² we think there was sufficient evidence to sustain the trial court within the familiar rule on that subject: *Dunnell*, Minn. Pr., sec. 1654. The facts show that defendant, not owning the premises, but only occupying them as a tenant, made payments of the notes secured by the mortgage on said premises from time to time; that these payments of principal and interest were marked, for example, "interest paid to March 20, 1900, without recourse"; again, on another note, "note and interest paid in full December 1st, 1900, without recourse." This is some indication of an understanding that the notes would travel farther. The defendant testified that he paid for the mortgage with his own money. "I bought it, because I thought it was my business to buy it before someone else got it. It was my place of business."

It is most significant that an assignment of the mortgage and notes was in point of fact made to defendant, and made only sixteen days after the last payment, and that the mort-

gage foreclosure sale antedates the filing of the transcript of the judgment. The only question was one of fact: Was the mortgage paid, or was it purchased? The judgment creditor was entitled to have that question settled. There is no issue of fraud in the transaction. The defendant had a legal right to buy the mortgage. The judgment creditor had no ground of complaint if he exercised that right. Under the familiar rule of presumption in favor of the findings of fact by the trial court, this court will not interfere with the conclusion of the trial court that the plaintiff had not sustained the burden of proof showing that the mortgage was paid in fact, and that it was kept alive for the sole purpose of hindering, delaying and defrauding this plaintiff.

2. Plaintiff further contends that, even allowing the defendant credit for all that had been paid by him on the mortgage as shown by the receipts, the court is still in error as to the amount due. The record does not show that any motion was made before the trial court to amend its findings in this regard. No reference whatever is made to this particular subject in the motion for a new trial. Under the circumstances there is nothing for this court to rule upon. It is obviously necessary that such matters of mere calculation should be fully called to the attention of the trial court. They will not be considered when they are suggested for the first time in this court.

Order affirmed.

A Memorandum of Partial Payment, indorsed by the holder on the back of a promissory note is a mere acknowledgment, in the nature of a receipt of payment, which is open to explanation or contradiction by parol: *Theopold v. Deike*, 76 Minn. 121, 77 Am. St. Rep. 607.

BOOGREN v. ST. PAUL CITY RAILWAY COMPANY.

[96 Minn. 51, 106 N. W. 104.]

ASSIGNMENT.—A Cause of Action for a Personal Tort is not assignable before judgment. (p. 693.)

ATTORNEY'S LIEN on, or Equitable Interest in Action for Tort.—Where a client agrees to pay his attorney a portion of his recovery in an action for personal injuries, in consideration of the attorney prosecuting the suit, and paying the expenses thereof, and on the trial the jury disagrees, and the case is continued and set for another time, the attorney does not acquire a lien on the cause of action nor become an equitable assignee of an interest therein. (p. 694.)

ATTORNEY AND CLIENT—Dismissal of Action by Latter.—Where a client agrees to pay his attorney a portion of his recovery in an action for personal injuries, in consideration of the attorney prosecuting the suit and paying the expenses thereof, and on the trial the jury disagreed, and the case is continued and set for another time, the client may then, without the consent of the attorney, compromise the claim, and dismiss the action. (p. 694.)

Shelton L. Smith, for the appellant.

Munn & Thygeson and W. R. Duxbury, for the respondent.

⁵² **ELLIOTT, J.** This is an appeal by the attorney for the plaintiff from an order discharging an order to show cause why the attorney should not be permitted to continue the action for the purpose of determining and enforcing his alleged interest therein.

Sometime prior to July, 1904, the plaintiff, Charles L. Boogren, claimed to have a cause of action against the St. Paul City Railway Company for damages for personal injuries alleged to have been occasioned by the negligence of the company. On July 15, 1904, Boogren entered into a contract with the petitioner, Joel E. Gregory, an attorney at law, by the terms of which Gregory agreed to prosecute the action as the plaintiff's attorney and to pay all expenses of the suit, and in consideration therefor Boogren agreed to ⁵³ "pay said party of the second part [Gregory], after the expenses of said suit and other expenses have been paid, fifty per cent of all moneys received from the St. Paul City Railway Company by party of the first part as compensation for said injuries in said case of Charles L. Boogren v. St. Paul City Railway Company."

An action to recover damages in the sum of ten thousand three hundred and fifty dollars was thereafter brought in

Ramsey county. On the trial the jury disagreed, and the case was continued to the January, 1905, term. On the defendant's motion the case was continued till the February term, and set for trial on February 14th. When the case was called for trial, the plaintiff did not appear, and his attorney stated that he was not able to find his client. The defendant's attorney stated to the court that the defendant had its witnesses subpoenaed and in court ready for the trial, but that he would consent to a continuance of the case until the April term of court. It was subsequently continued to the May term of court, and then to the June term, by agreement of the attorneys. On the call of the calendar on June 5th, the defendant objected to any further continuance, and the case was set for trial on June 9th. On June 8th the defendant filed a written dismissal of the action on the merits. This instrument bore date of January 24, 1905, and was signed by the plaintiff and defendant's attorneys. When the case was called for trial on June 9th the defendant informed the court that the action had been settled and that a dismissal had been filed.

The petitioner then stated to the court that he knew nothing of said dismissal, and asked that the action be held open to allow him to present a petition to be allowed to continue the action for the purpose of recovering his attorney's fees and expenses. This petition was granted, and petitioner thereafter made the petition herein, and the same came on for hearing on an order to show cause. The petition stated that the settlement between the defendant and plaintiff was made with the full notice and knowledge of the lien and rights of the petitioner and for the purpose of defrauding and cheating him out of his attorney's fees and expenditures, that his expenditures were three hundred and twenty-eight dollars and seventy-five cents, that the plaintiff's damages were five thousand dollars, ⁵⁴ and that plaintiff was insolvent. The defendant moved to dismiss the petition upon the grounds (1) that it did not state facts sufficient to warrant the court in granting the petitioner the relief prayed for; (2) because the court had no jurisdiction of the subject matter. The appeal is from an order dismissing the petition.

The defendant contends that the order should be affirmed because of the absence of a certificate of the judge or of the clerk that the return contains all the records and files in the

case. But it appears from the nature of the proceedings that the trial court disposed of the motion after consideration of the petition. The defendant in effect demurred to the petition, and it is perfectly apparent that nothing but the petition was before the court and under consideration. The petitioner bases his right to continue the action for the protection of his alleged interests upon the theory (1) that he has a lien which it is the duty of the court to protect, and (2) that he is the equitable assignee of an interest in the cause of action by reason of the contract between him and the plaintiff.

The order of the trial court was correct. The breach of professional ethics involved cannot affect the legal rights of the parties. The petitioner had no lien upon the cause of action. He had acquired no statutory attorney's lien (*Forbush v. Leonard*, 8 Minn. 267 (303); *Nielsen v. City of Albert Lea*, 91 Minn. 388, 98 N. W. 195); and it is the settled law of this state that a lien cannot be created by such a contract upon a right of action arising out of personal tort. As said in *Hammons v. Great Northern Ry. Co.*, 53 Minn. 249, 54 N. W. 1108: "The plaintiff had no lien—could not have any—on the cause of action. A cause of action for a personal tort is strictly personal. It is not in the nature of property, in the sense that anyone but the injured party can have any right in it. It is not assignable, and does not pass to the party's representatives, but dies when he dies: *Aunt v. Conrad*, 47 Minn. 557, 50 N. W. 614, 14 L. R. A. 512. It acquires the usual attributes of property only when it passes into judgment and ceases to be a mere right of action. It follows that no lien upon it while it remains a mere personal right of action can be created": See, also, *Anderson v. Itasca Lumber Co.*, 86 Minn. 480, 91 N. W. 12, 291, and *Nielsen v. City of Albert Lea*, 91 Minn. 388, 98 N. W. 195.

55 Even though the cause of action had been assignable, this contract is insufficient to constitute an assignment. It does not purport to be an assignment. It is merely an agreement by the plaintiff to pay his attorney a certain portion of what the plaintiff may recover from the street railway company. Boogren is to receive the entire amount of the verdict and pay to Gregory fifty per cent of all money thus received. The contract creates a personal obligation on his part to pay Gregory one-half of the amount thus received. It imposes no

obligation on the part of the company toward Gregory. He had no lien and no interest in the cause of action. It is thus immaterial that the company knew of the existence of his claim. Even an intent on the part of the railway company to deprive the attorney of his fees and disbursements cannot deprive the client of the right to agree to a settlement and to dismiss the action.

It has been said that the court will protect the attorney of a party to an action against a collusive settlement in fraud of his rights. This rule applies when the attorney has acquired a lien: *Weicher v. Cargill*, 86 Minn. 271, 90 N. W. 402. The language used in the New York and Georgia cases must be construed in the light of the statutes of those states, which gives the attorney a lien upon the client's cause of action: 3 Am. & Eng. Ency. of Law, 2d ed., 468. There are also serious practical difficulties in the way of such a procedure when the action is to recover unliquidated damages. The power to arrest or rescind the effect of a settlement is cautiously exercised in respect to suits for debts actually owing; and the power would be more cautiously applied to actions for torts, where it would be impracticable for the court, upon the opposing representations of the parties, and without hearing the proofs, to ascertain whether there was a just cause of action, or whether there was ground to distrust the justness of the settlement. The whole case would have to be tried before the court could pronounce that the suit was properly instituted, and that it afforded prima facie ground for the award of costs. As said by Butts, J., in *Peterson v. Watson*, 1 Blatchf. & H. 487, Fed. Cas. No. 11,037: "That manifestly could never be done without serious inconvenience and expense, and the ⁵⁶ better practical rule will doubtless be to leave the proctor to look to the responsibility of his client alone. Ordinarily he will take the precaution to secure himself against the mischances of suits of this character; and, if he does not, no urgent equity is thereby created for an extraordinary interference on his behalf by the court."

The policy of the law favors the adjustment of claims and the termination of litigation, and the courts are not disposed to limit the right of parties in this respect. This practice may occasionally work a hardship upon attorneys, but it is nevertheless a salutary rule. An attorney whose rights are prejudiced must look to his client for relief, or in a proper

case proceed directly against the party by whose fraudulent conduct he has been injured.

The order appealed from is affirmed.

A Client may Dismiss His Suit at pleasure, as a rule, without the intervention of his attorney: Tompkins v. Railroad, 110 Tenn. 157, 100 Am. St. Rep. 795. As to whether he loses his right by agreeing with the attorney that the latter shall have a portion of the recovery as compensation for his services, see the note to Cameron v. Boeger, 93 Am. St. Rep. 173; and the recent case of Lipscomb v. Adams, 193 Mo. 530, 112 Am. St. Rep. 500.

SPENCER v. SPENCER.

[97 Minn. 56, 105 N. W. 483.]

DIVORCE—Support of Child Awarded to Mother.—The legal obligation of a father for the support of his minor children is not impaired by a decree of divorce at the suit of his wife for his misconduct, which gives the custody of the children to her, but is silent as to their support. If he refuses or neglects to support them, under such circumstances, the mother may recover from him, in an original action, a reasonable sum for necessities furnished for their support, after such decree. The law implies a promise, on his part, to pay for such necessities. (p. 698.)

O. H. Comfort, for the appellant.

Humphrey Barton, for the respondent.

⁵⁷ **START, C. J.** This action was brought in the district court of the county of Ramsey, by the divorced wife of the defendant, against him to recover for money paid by her for the support of their minor son and to secure some provision for his future support. The cause was tried by the court without a jury, and judgment ordered for the defendant on the merits as a conclusion of law from the facts found. The plaintiff appealed from an order denying her motion for a new trial.

The complaint alleged that on September 22, 1892, the parties were married; on May 11, 1895, a son was born to them; on August 20, 1895, the defendant deserted and abandoned his wife and child; that on May 14, 1898, the marriage between the parties was dissolved, and the care and custody of their son awarded to the mother by the judgment of the district

court of the county of Saguache in the state of Colorado, in an action then pending in which the wife was plaintiff and the husband was defendant; that the plaintiff has supported the son ever since they were abandoned by the defendant, and has necessarily expended for such purpose the reasonable sum of nineteen hundred and eighty-four dollars, which the defendant promised to pay to the plaintiff, but has not. The answer admitted the marriage, birth of the son, and that the marriage was dissolved by a decree of divorce, but denied the other allegations of the complaint.

There was very little conflict in the evidence on the trial, except on the issue as to the defendant's alleged express promise to pay for the support of the child. On this issue the trial court found for the defendant, and being of the opinion that, inasmuch as the decree of divorce awarded the custody of the child to the mother and was silent as to his maintenance, the father was not legally bound to support the child; hence the law would not imply a promise on his part to pay for necessities furnished for the child. This presents the pivotal question in this case; for, if such be the law, the court was right in denying the plaintiff any relief.

⁵⁸ The facts established by the admissions of the parties in the pleadings and on the trial, and by the undisputed evidence, are these: The defendant deserted his wife and child on August 20, 1895, when his child was a little more than three months old; that the defendant has ever since been a resident of Minnesota, and has contributed nothing for the support of his child; that on May 14, 1898, the plaintiff obtained a divorce from him for his misconduct in the state of Colorado, and by the decree the custody of the child was awarded to her, but it was silent as to the maintenance of the child; that from her earnings as a household domestic the plaintiff has supported the child, who for the last three or four years has been afflicted with tuberculosis of one of his hips and is obliged to use crutches; that she came with the child to Minnesota about the beginning of the year 1905, and by her attorney made a demand upon the defendant for payment for supporting the child; and, further, that the defendant never owned any real estate, from which fact it may be inferred that he had no property in the state of Colorado at the time the divorce was granted, as he was then a resident of Minnesota, and presumably had his personal property with him.

The question presented by these facts is whether, under the circumstances stated, the law will imply a promise on the part of the defendant to pay for necessities furnished to his minor son by his mother. It is well settled that, if a decree of divorce is silent as to the custody of the children, the liability of the father to the divorced mother for the support of the children is the same as his liability to any other person, who furnishes them necessities for their support. The law in such case will imply a promise on his part to pay for such necessities where he has refused or neglected to furnish them: 2 Nelson on Divorce and Separation, sec. 982; 9 Am. & Eng. Ency. of Law, 2d ed., 871; 14 Cyc. 812. Where however, the decree of divorce awards the custody of the minor children to the mother, but is silent as to their maintenance, there is a serious conflict of judicial opinion as to the father's liability for their support. A number of the adjudged cases hold that the father is not liable for the support of the children of the marriage where the decree of divorce has granted their custody to the wife, but contains no provision for their support: 2 ⁵⁹ Nelson on Divorce and Separation, sec. 983; 9 Am. & Eng. Ency. of Law, 2d ed., 872. The following cases, with others, support this proposition: Hall v. Green, 87 Me. 122, 47 Am. St. Rep. 311, 32 Atl. 796; Brow v. Brightman, 136 Mass. 187; Brown v. Smith, 19 R. I. 319, 33 Atl. 466, 30 L. R. A. 680; Ramsey v. Ramsey, 121 Ind. 215, 23 N. E. 69, 6 L. R. A. 682; Hampton v. Allee, 56 Kan. 461, 43 Pac. 779; Cushman v. Hassler, 82 Iowa, 295, 47 N. W. 1036.

The reason urged in support of this rule is that the awarding of the custody of the children to the mother deprives the father of their services, and that support and service are in such a case reciprocal, and that the mother, to whom the custody of children is awarded, must, unless the decree provides otherwise, support them. This is not a good reason; for, if the divorce is granted for the father's misconduct, it is his wrongful act that deprives him of their services, and not the court, which intervenes for the protection of the children. Another reason urged is that the court, where it has awarded the custody of the children to the mother without expressly providing for their support, is presumed to have made all of the provisions for their support that it was necessary; hence the decree is conclusive as to the obligations of the husband,

unless modified in proceedings had in the original action. It would seem, if the court omits to make in its decree any provision for the support of the children, that the presumption would be that the court deemed it best to leave the matter of the support of the children to rest upon the father's legal liability to support them until its further order in the premises.

Again, in cases where the husband deserts his family in one state and becomes a resident of another state, leaving no property in the state where he left his wife and children, and where she commences an action against him for a divorce for his wrong, the court would have jurisdiction of the wife, of the marriage status, and of the custody of the children, but not of the husband or his property. It would be impracticable to make and impossible to enforce any decree as to the support of the children in such a case: *Thurston v. Thurston*, 58 Minn. 279, 59 N. W. 1017. If in such a case the decree awards the custody of the children to the mother, but is ^{so} silent as to their support, can it be presumed, in favor of the recreant husband, that the court determined that no order as to maintenance was necessary, and that it was intended to free the husband from his natural and legal obligation to support his children? We cannot concur in the doctrine of the cases which so hold.

Upon principle, and the weight of judicial authority, we hold that the legal obligation of a father for the support of his minor children is not impaired by a decree of divorce at the suit of his wife for his misconduct, which gives the custody of the children to her, but is silent as to their support. If, under such circumstances, he refuses or neglects to support them, the mother may recover from him in an original action a reasonable sum for necessities furnished for their support after such decree. The law implies a promise on his part to pay for such necessities: 2 Bishop on Marriage, Divorce and Separation, sec. 1223; 14 Cyc. 812; *Pretzinger v. Pretzinger*, 45 Ohio St. 452, 4 Am. St. Rep. 542, 15 N. E. 471; *Zilley v. Dunwiddie*, 98 Wis. 428, 67 Am. St. Rep. 820, 74 N. W. 126, 40 L. R. A. 579; *Gibson v. Gibson*, 18 Wash. 489, 51 Pac. 1041, 40 L. R. A. 587; *Holt v. Holt*, 42 Ark. 495; *Courtright v. Courtright*, 40 Mich. 633; *Stanton v. Willson*, 3 Day. 37, 3 Am. Dec. 255; *Plaster v. Plaster*, 47 Ill. 290.

The reasons upon which this proposition rests are well stated in a leading case (*Pretzinger v. Pretzinger*, 45 Ohio St.

452, 4 Am. St. Rep. 542, 15 N. E. 471), in which the court said: "The duty of the father to provide reasonably for the maintenance of his minor children, if he be of ability, is a principle of natural law; and he is under obligation to support them, not only by the laws of nature, but by the laws of the land. . . . This natural duty is not to be evaded by the husband so conducting himself as to render it necessary to dissolve the bonds of matrimony and give to the mother the custody and care of the infant offspring. It is not the policy of the law to deprive children of their rights on account of the dissensions of their parents, to which they are not parties, or to enable the father to convert his own misconduct into a shield against parental liability. . . . While in the decree no order was made for the child's maintenance, the father could not avoid liability for his reasonable support because an action against him for necessities had been commenced in another tribunal, or because ⁶¹ of his removal into another county. The natural obligation resting upon him in the forum of divorce would not become lifeless because its enforcement was not sought in the jurisdiction in which the divorce was granted."

Another leading case in support of this proposition is that of *Zilley v. Dunwiddie*, 98 Wis. 428, 67 Am. St. Rep. 820, 74 N. W. 126, 40 L. R. A. 579, in which the court said: "We think the case of *Pretzinger v. Pretzinger*, 45 Ohio. St. 452, 4 Am. St. Rep. 542, 15 N. E. 571, and other similar cases, indicate the true rule, and that they are in accordance with sound principles of public policy."

Mr. Bishop expressly approves of this rule, and the reason of these cases, in words following: "There have been differences of opinion, amounting in some instances to a stumbling on the not-thought-of rock as to the effect of a decree simply giving the custody to the wife, yet silent as to the maintenance. . . . We have one case (*Brow v. Brightman*, 136 Mass. 187) in which the court decided that because, after the decree, he had no right either to take the child and support it himself, or to employ anyone else to support it, without the mother's consent, he was not answerable for necessities furnished by a third person. But it was his own wrong that deprived him of the custody; and it is fundamental, equally in our law and in natural reason, that no one can cast off an obligation by refusing to keep it, or any duty by any evil-

doing. Therefore, a better reasoned case (*Pretzinger v. Pretzinger*, 45 Ohio St. 452, 4 Am. St. Rep. 542, 15 N. E. 571), holds that the duty of support is not to be evaded by the husband so conducting himself as to render it necessary to dissolve the bonds of matrimony and give to the mother the custody and care of the infant offspring": 2 Bishop on Marriage, Divorce and Separation, sec. 1223.

The case of *Fulton v. Fulton*, 52 Ohio St. 229, 49 Am. St. Rep. 720, 39 N. E. 729, 29 L. R. A. 678, cited by the defendant, is not in point, for the divorce in that case was granted to the husband for the misconduct of the wife.

It follows that the plaintiff, upon the admitted facts and uncontradicted evidence, was entitled to recover from the defendant such reasonable sum as she may have necessarily paid for the support of their son, and that the trial court erred in denying her any relief. Whether in this action she is entitled to have the court provide by ⁶² its judgment for the future support of the child is a question we are not able to determine with precision, for the reason that the record does not disclose, except by inference, whether the Colorado court had jurisdiction of the defendant and his property. It is undoubtedly true that if the divorce had been granted in this state, and the court in which the action was pending had jurisdiction of the person and property of the parties, the application for such relief would have to be made in the original action: Gen. Stats. 1894, sec. 4809. But, if the Colorado court had no jurisdiction of the person of the defendant or of any of his property, the court in this action, having jurisdiction of both parties, could in the exercise of its equitable powers grant such relief. It would be futile to send the plaintiff back to Colorado, when her husband and his property are in this state, to a court that has no jurisdiction of him: *Thurston v. Thurston*, 58 Minn. 279, 59 N. W. 1017.

Order reversed and new trial granted.

**DUTY OF FATHER TO SUPPORT CHILD AWARDED TO MOTHER
BY DECREE OF DIVORCE SILENT AS TO MAINTENANCE
OF CHILD.**

The duty of a father to support his child, whose custody has been awarded to the mother by a decree of divorce which is silent as to

the maintenance of the child, is a question upon which the authorities are not agreed. Some of the courts maintain that when a decree of divorce awards the custody of children to the mother, without making any provision for their support, the father is not liable for their maintenance: See the monographic note to *Hall v. Green*, 47 Am. St. Rep. 316; *Ramsey v. Ramsey*, 121 Ind. 215, 23 N. E. 69, 6 L. R. A. 682; *Cushman v. Hassler*, 82 Iowa, 295, 47 N. W. 1036; *Hampton v. Allee*, 56 Kan. 461, 43 Pac. 779; *Hall v. Green*, 87 Me. 122, 47 Am. St. Rep. 311, 32 Atl. 796; *Foss v. Hartwell*, 168 Mass. 66, 60 Am. St. Rep. 366, 46 N. E. 411, 37 L. R. A. 589; *Rich v. Rich*, 88 Hun, 566, 34 N. Y. Supp. 854; *Brown v. Smith*, 19 R. I. 319, 33 Atl. 466, 30 L. R. A. 680; *Demonet v. Burkart*, 23 App. D. C. 308.

One reason advanced for this rule is, that support and service are reciprocal duties, and as the father loses the services of his children by their being awarded to the mother, he is relieved of the responsibility for their support. The weakness of this argument is, that it is the father's wrongful act, if the divorce is granted for his misconduct, which deprives him of his right to the services of the children, the court only intervening to protect them. Besides, it is hardly just or reasonable for a father to escape responsibility for the support of his children by his own wrongful conduct. Another reason advanced for this rule is, that the court, when it awarded the children to the mother without expressly providing for their support, is presumed to have made all the provisions for their support that were necessary, and therefore the decree is conclusive as to the obligations of the husband, unless modified in proceedings had in the original action. If there is room for any presumption in such a case, which is doubtful, it would be as reasonable to conclude that when the court omits to make in its decree any provision for the support of the children, the presumption arises that the court deemed it expedient to leave the matter of support with the father, where ordinarily it legally belongs, until the further order of the court in the premises.

According to the sounder reason, and, perhaps, the weight of authority, the legal obligation of a father for the support of his minor children is not impaired by a decree of divorce at the suit of his wife for his misconduct, which gives the custody of the children to her, but is silent as to their support. If, under such circumstances, he refuses or neglects to support them, she may recover from him in an original action a reasonable sum for necessities furnished by her for their support after such decree, for the law implies a promise on his part to pay for them: See the principal case, ante, p. 695; note to *Green v. Hall*, 47 Am. St. Rep. 314; *Maddox v. Patterson*, 80 Ga. 719, 6 S. E. 581; *Parkinson v. Parkinson*, 116 Ill. App. 112; *Pretzinger v. Pretzinger*, 45 Ohio St. 452, 4 Am. St. Rep. 542, 15 N. E. 471; *Gibson v. Gibson*, 18 Wash. 489, 51 Pac. 1041, 40 L. R. A. 587; *Ditmar v. Ditmar*, 27 Wash. 13, 91 Am. St. Rep. 817, 67 Pac. 353; *Zilley v. Dunwiddie*, 98 Wis. 428, 67 Am. St. Rep. 820, 74 N. W. 126, 40 L. R. A. 579. After his

death she may enforce her claim for maintaining the children against his estate: *Lukowski v. Lukowski*, 108 Mo. App. 204, 83 S. W. 274; *Dolloff v. Dolloff*, 67 N. H. 512, 38 Atl. 19. In Delaware he can be made to answer a charge of desertion: *State v. Rogers*, 2 Marv. 439, 43 Atl. 250; *State v. Redmile* (Del.), 63 Atl. 575.

The reasons for this rule are so fully set forth by the Minnesota court in the principal case (*ante*, p. 695), that we refer the reader to it, and refrain from restating them here, except to quote the following extract from the recent case of *McAllen v. McAllen*, 97 Minn. 76, 106 N. W. 100: "The second question presented on the merits to the trial court was whether any allowance should be made for the support of the minor child, the custody of whom was committed to the mother by the decree of divorce. The obligation of progenitors to support their offspring rests upon an entirely different foundation from that upon which the law bases the duty of the husband to care for his wife. That obligation is at once legal and natural. It springs as necessarily from the law as from the primal instincts of human nature. Its consistent enforcement is equally essential to the well-being of the state, the morals of the community, and the development of the individual. Prolonged childhood is a condition of civilization as well as a product of conscience. The child, helpless in extreme infancy and required in the maturer years of its minority to obey the reciprocal duty of serving its parents, is not to be deprived of its natural and legal right of protection and support by its father, because of any family quarrel or of any agreement between husband and wife. It is not a party to divorce proceedings. It is not barred as to its rights by any decree therein."

If a divorce is granted to a husband on account of the misconduct of his wife, and the custody of their children awarded to her without any order providing for their maintenance, it has been affirmed that he is not liable to her for necessities furnished by her for the support of the children, in the absence of proof of a request by him that such support should be provided, or of a promise by him to pay therefor: *Fulton v. Fulton*, 52 Ohio St. 229, 49 Am. St. Rep. 720, 39 N. E. 729, 29 L. R. A. 678.

And where a divorced woman, to whom the care, management, and maintenance of her child was decreed, remarried, and her second husband, with full knowledge of the provisions of the decree, took the child to his home, and cared for it as his own, and never demanded compensation from the first husband, who resided near by, for the keeping, nor had any conversation or agreement with him concerning the same, the second husband cannot hold the father of the child liable for its support: *Johnson v. Ousted*, 74 Mich. 437, 42 S. W. 62.

A father is not liable, it has been held, for the board of his son, who voluntarily elects to leave him and to go and live with his mother, who has been divorced from the father; and her second husband cannot maintain an action for such board, where he has not communicated

with the father, and indicated that he expected to be compensated by him: *Foss v. Hartwell*, 168 Mass. 66, 60 Am. St. Rep. 366, 46 S. E. 411, 37 L. R. A. 589. The decree of divorce in this case did not award the custody of the child to either party. This decision is followed under a somewhat similar state of facts in *Glynn v. Glynn*, 94 Me. 465, 48 Atl. 105.

At any time after granting a decree of divorce, the court has jurisdiction to make an order requiring the father to maintain and support the children, although no such order was made in the decree, and although their care, custody and control were awarded by the decree to the mother: *McKay v. Superior Court*, 120 Cal. 143, 52 Pac. 147, 40 L. R. A. 585; *Meyers v. Meyers*, 91 Mo. App. 151. And when a court, by a decree of divorce granted a wife for the misconduct of her husband, awards the custody of a child to the wife, but makes no allowance for its maintenance, the power of the court extends to the subsequent revision and alteration of the decree, so as adequately to secure the full performance by the father of his legal and natural duty to care for his offspring, as by making an allowance for its support and education, and by requiring payment thereof by the father and so as to otherwise properly provide for the general welfare of the child: *McAllen v. McAllen*, 97 Minn. 76, 106 N. W. 100. This decision is supported by *Ostheimer v. Ostheimer*, 125 Iowa, 523, 101 N. W. 275, *McFarlane v. McFarlane*, 43 Or. 477, 73 Pac. 203, 75 Pac. 139, but it seems opposed by *Salomon v. Salomon*, 101 App. Div. 588, 92 N. Y. Supp. 184.

PARKS v. FOGELMAN.

[97 Minn. 157, 105 N. W. 560.]

AGENCY—Action by Agent in His Own Name.—If an agent, by mistake, pays to a third person money in his possession belonging to his principal, he may maintain an action in his own name to recover it back. (p. 706.)

R. A. Stone and C. B. Randall, for the appellant.

Smith & Beise, for the respondent.

¹⁵⁷ **START**, C. J. Action to recover money paid to defendant for plaintiff's use. The complaint alleged that the plaintiff on July 14, 1904, paid to the defendant one hundred dollars to the use and account of plaintiff; that he duly demanded of ¹⁵⁸ the defendant its repayment, which was refused. The answer was a general denial. The evidence on the part of the plaintiff was sufficient to establish these facts: On July 14, 1904,

the plaintiff was the agent of the Monarch Elevator Company in charge of their grain elevator at Cyrus, this state; that he had in his possession and control money belonging to the elevator company, and was authorized to purchase wheat and pay for it out of such money; that he purchased a quantity of wheat of the defendant, and by mistake overpaid him in the sum of one hundred dollars; and, further, that on the same day he discovered the mistake and demanded from the defendant the return of the one hundred dollars, which was refused. The evidence on the part of the defendant tended to show that he was not overpaid in any amount for his wheat. The jury returned a verdict for the plaintiff for the one hundred dollars and interest. Thereupon the defendant made a motion to set aside the verdict and for a new trial, which the court granted, and the plaintiff appealed from the order.

There is nothing in the record to indicate that the motion was granted upon the ground that the verdict was not justified by the evidence; hence it must be assumed that a new trial was granted on the ground of alleged errors of law occurring at the trial. The alleged errors relied upon by the defendant are to the effect that the trial court erred in denying his motion to dismiss the action, and, further, in not instructing the jury to return a verdict for the defendant, for the reason that the evidence on the part of the plaintiff did not tend to prove the cause of action alleged in the complaint, but, on the contrary, the evidence proved a cause of action in favor of a third party, the elevator company; or, in other words, that there was a fatal variance between the allegations of the complaint and the proof.

The case of *Dennis v. Spencer*, 45 Minn. 250, 47 N. W. 795, is cited in support of this contention. In that case the complaint alleged as the subject matter of the action a contract made between plaintiff and defendant. There was no evidence to prove such contract, but the evidence did tend to prove a contract between the defendant and a third party which had been assigned to the plaintiff. It was held that this was not a variance, but a failure of proof. The case, then, is not here in point, if the evidence in this case tended to prove the alleged cause¹⁵⁹ of action in favor of the plaintiff. The question here to be decided is whether an agent, having in his possession and control the money of his principal, may maintain an action in his own name to recover

it, if a stranger, having no interest therein, obtains it from the agent by mistake or fraud or trespass. It is clear that, if the defendant in this case had taken the money from the possession of plaintiff under circumstances constituting an actual conversion, the plaintiff could have recovered in his own right and name from the defendant the money he took from the plaintiff's possession: *Laing v. Nelson*, 41 Minn. 521, 43 N. W. 476; *Brown v. Shaw*, 51 Minn. 266, 53 N. W. 633.

In principle there can be no difference between such a case and this one, for here the money was in the possession of the plaintiff, and he was accountable for it to his principal; for he was not authorized to pay it to anyone without receiving an equivalent in wheat therefor, but the defendant, having no right to the money, obtained it by mistake from plaintiff's possession and refused to return it on demand, or, in other words, he converted it to his own use. The plaintiff's cause of action in his own right was then complete, for he had a special property in the money by reason of his possession and the fact that he was liable primarily for it to the general owner thereof, who was not bound to pursue the defendant. Therefore the plaintiff had no other way of indemnifying himself against loss by reason of the mistake, except to get the money back into his possession; and, the defendant having refused on demand to return it to the plaintiff's possession, the plaintiff could recover the money in an action for conversion, or waive the tort and recover it in an action for money had and received to the use of the plaintiff.

Counsel for the defendant urges that, even if it be conceded that an agent may maintain an action to recover the money of his principal which he has paid to a third party by mistake, the plaintiff should have pleaded his agency in the complaint. This was not necessary, for the plaintiff does not seek to recover the money either in the name or right of his principal, but, as already stated, in his own right. The case of *Kent v. Bornstein*, 12 Allen, 342, is directly in point. In that case the plaintiff had in his possession money of his principal, and at the request of a third party he gave him smaller bills in his possession,¹⁶⁰ which were a part of the money of his principal, in exchange for a fifty dollar bill which proved to be counterfeit. The agent in his own name brought an action against the third party to recover back the sum of fifty dollars so paid. The defendant contended that the agent had no

such interest in the subject of the suit as to entitle him to maintain the action. The court held otherwise, and said: "It is clear that the plaintiff exceeded his authority in exchanging the smaller bills in his possession for one of the denomination of fifty dollars, and he is liable to his employer for the loss occasioned by his unauthorized act. . . . It cannot, therefore, be said that the plaintiff has no beneficial interest in the cause of action on which this suit is brought. On the contrary, it plainly appears that his right to recover in this action is the only mode in which he can indemnify himself against the rightful claim of his employer for the loss caused by his abuse of the authority intrusted in him."

We hold, upon principle and authority, that if an agent by mistake pays to a third party money in his possession belonging to his principal, he may maintain an action in his own name to recover it back: 1 Am. & Eng. Ency. of Law, 2d ed., 1166; Story on Agency, sec. 398; Mechem on Agency, sec. 761. It follows that the evidence on behalf of the plaintiff tended directly to establish the cause of action alleged in the complaint, that there was neither a variance nor failure of proof, and that the trial court erred in setting the verdict aside and in granting a new trial.

Therefore it is ordered that the order appealed from be reversed, and the case remanded to the district court, with direction to cause judgment to be entered upon the verdict.

An Agent may Sue on a contract made in his own name: Sharp v. Jones, 18 Ind. 314, 81 Am. Dec. 359. Thus an agent in the possession of goods and selling them may sue for the price: Coggburn v. Simpson, 22 Mo. 351. And it is said that an agent who has taken in his own name a mortgage of chattels may sue therefor in trover as the trustee of an express trust: Close v. Hodges, 44 Minn. 204, 46 N. W. 335.

BONNESS v. FELSING.

[97 Minn. 227, 106 N. W. 909.]

JURY TRIAL—Expression of Opinion of Court on Facts.—In a civil case the court may express to the jury, in instructions, its opinion upon the facts, provided the ultimate determination thereof is left to the jury. If a party is apprehensive that the jurors may be unduly influenced thereby, he should specially request the court to instruct them that they, not the court, are the exclusive judges of all questions of fact. (p. 708.)

VENDOR AND VENDEE—False Representations by Former.—The vendors of standing timber cannot, in an action to recover back the purchase money paid, relieve themselves from the consequences of their false representations as to the existence of the timber, merely because the vendee could have ascertained the facts respecting its existence or nonexistence, or because he made an ineffectual attempt to do so. (p. 710.)

H. Steenerson and Charles Loring, for the appellants.

James H. Maybury, for the respondents.

BROWN, J. Defendants owned a tract of land which plaintiffs understood contained a large quantity of standing pine. With a proper description thereof plaintiffs' agent made an attempt to run the lines surrounding it, and confirmed, as he thought, the understanding of plaintiffs as respects the timber. He subsequently, on behalf of and for plaintiffs, negotiated a purchase of the timber, paying down upon the contract the sum of five hundred dollars; the balance of the purchase price being provided for by deferred payments. Subsequent investigation disclosed, as plaintiff's claim, that there was in fact no timber at all upon the land, and this action was brought to recover back the preliminary payment. The action is predicated upon the alleged fraudulent representations of defendants, by which plaintiffs were induced to enter into the contract, and upon which they relied in making the purchase, to the effect that the land contained about three hundred thousand feet of standing timber. It is alleged that the representation was false, and that there was in fact no timber of any consequence upon the land. Plaintiffs had a verdict in the court below, and defendants appealed from an order denying a new trial. Several questions are raised by the assignments of error in this court, only two of which require special mention.

1. It appears from the evidence that the land in question is in Beltrami county, some distance back in the forest, and

upon learning that defendants owned the same, plaintiffs' agent made an attempt to locate the lines thereof for the purpose of ascertaining the quantity of timber standing thereon. He supposed he located the land, but the evidence fairly shows that he was in error, and that he in fact examined a tract of land not owned by defendants at all. But subsequent to his examination of the land, and during the negotiations for the purchase, defendants represented that the tract contained in the neighborhood of three hundred thousand feet of pine. In the course of its instructions to the jury the trial court said: ²²⁹ "The evidence that has been offered tends to show that there was some mistake about it some way; that the pine was upon some other forty."

Of this instruction defendants complain, and the giving of it is assigned as error. It is urged in support of this contention that it was the expression of an opinion by the court of a material fact in the case, and an infringement of the right of defendants to have the facts passed upon by the jury. Whether this should be construed as the expression of an opinion by the court or not, it is clear that it was not reversible error. It was a passing remark, made in the course of the charge, that the evidence tended to show that there was some mistake or misunderstanding between the parties respecting the location of the land, the timber upon which plaintiffs contemplated buying, and, if it be conceded that it amounted to an expression of the court's opinion, there was no intention to take the question from the jury.

The rule in some of the states, founded upon statutory provisions, that it is error for the trial court to express an opinion to the jury concerning the facts in issue, is not in force in this state. The rule of the English courts and federal courts of this country has been adopted and followed by this court. Under that rule the trial court may in civil actions express its opinion upon the facts, provided the ultimate determination thereof is left to the jury. The form of instruction employed by the court below, in the case at bar, is commonly in use in this state. It is often followed, however, by the express statement that the jury are the ultimate arbiters of the fact, and upon them rests the responsibility of determining the truth of the matters in issue.

This subject was fully covered in the case of *Ames v. Cannon River Mfg. Co.*, 27 Minn. 235, 6 N. W. 787, where the court

in substance said that in the absence of a statute on the subject the trial court may express to the jury its opinion of the facts, though it may not, where there is a fair conflict of evidence, direct the jury how they shall find them. If the party fears undue influence upon the jury from what the court may say in reference to the facts, he may request an instruction that the jury, and not the court, are to determine what these facts are. That case was followed and applied in *First Nat. Bank v. Holan*, 63 Minn. 525, 65 N. W. 952, where the court said: "While as a general ²³⁰ rule the trial court ought to refrain from expressing any opinion upon a disputed question of fact, yet in a civil case it is not error to do so, providing the question is fairly left to the jury for their decision."

In criminal prosecutions the rule is different. Section 7333 of the General Statutes of 1894 provides that, if the court presents the facts to a jury in a criminal case, it shall, in addition to what it may say in reference thereto, expressly inform them that they are the exclusive judges of all such questions. But that statute does not apply to civil actions.

A careful examination of the entire charge, in the case at bar, leads to the conclusion that all disputed questions of fact were fairly left to the jury to determine, and the rule laid down in the cases cited applies. If defendants were apprehensive that the instruction, now complained of, was likely to prejudice their cause before the jury, a request to instruct that the jury were the exclusive judges of the facts should, under the decision in *Ames v. Cannon River Mfg. Co.*, 27 Minn. 245, 6 N. W. 787, have been made.

2. It is also urged that the court should have directed a verdict for defendants, because the evidence was wholly insufficient to sustain the allegations of fraud charged in the complaint. It is urged in this connection that if any mistake arose in reference to the particular tract of land owned by defendants, and whether it in fact contained any standing timber, it resulted entirely from plaintiffs' own neglect; that they had the means of ascertaining the fact and are not entitled to recover. The evidence fairly shows, as already stated, that pending the negotiations for the purchase of the timber defendants represented that the land contained about three hundred thousand feet of standing pine, and, though the plaintiffs may have had an opportunity to examine the land and determine for themselves its exact condition, still they had the

undoubted right to rely upon the representations made to them.

The case in its principal facts is like *Olson v. Orton*, 28 Minn. 36, 8 N. W. 878. In that case the defendant held a pre-emption right to a tract of government land, and entered into an agreement with the plaintiff by which he abandoned his rights, to the end that plaintiff might file the same, and to induce him to enter into the contract represented that the land covered by his entry included certain standing timber. The court held that, though the plaintiff might have ascertained by proper ²³¹ investigation whether the land in fact contained the timber, he had a right to rely upon the representations made to induce him to enter into the contract; that in such a case the seller cannot avoid the consequences of his false representations merely because the purchaser might have consulted the records of the official surveys, had the land surveyed, and thus ascertained whether the boundaries included the timber. See, also, *Porter v. Fletcher*, 25 Minn. 493, where it was held that where the seller, in offering certain city lots for sale, made representations to the purchaser as to their size and location, the latter is not required to examine the records for the purpose of ascertaining the truth of the representations, but may rely thereon.

Plaintiffs in the case at bar had a right to act on the assumption that defendants knew their own property, and, though they made an ineffectual effort to ascertain the fact respecting the existence of timber thereon, they are not precluded from relying upon the representations: *Kiefer v. Rogers*, 19 Minn. 14 (32). They were required to exercise only ordinary diligence in efforts to learn the true condition of the land: 14 Am. & Eng. Ency. of Law, 2d ed., 119. The case of *Cobb v. Wright*, 43 Minn. 83, 44 N. W. 662, is not in point.

The action being based upon the claim of fraud, plaintiffs could not, of course, recover upon the ground of mistake; and it is clear that the trial court did not submit the case to the jury upon that theory. The evidence, fairly construed, supports the allegations of fraud and is sufficient to justify the verdict. The other assignments present no reversible error.

Order affirmed.

A Material Fact Misrepresented by a Vendor of land, and relied on and acted upon by the vendee entitles the latter to a rescission of the sale: Perry v. Boyd, 126 Ala. 162, 85 Am. St. Rep. 17; Cressler v. Rees, 37

Neb. 515, 20 Am. St. Rep. 691. And means on the part of the vendee of discovering that a representation is false do not destroy his right to rescind: *Wilson v. Carpenter*, 91 Va. 183, 50 Am. St. Rep. 824. It is said, however, that the false representations of a vendor are not actionable, if the means of knowledge are as open to the vendee as to the vendor: *Lawson v. Vernon*, 38 Wash. 422, 107 Am. St. Rep. 880.

SKEFFINGTON v. EYLWARD.

[97 Minn. 244, 105 N. W. 638.]

MALICIOUS PROSECUTION—Probable Cause.—In an action for malicious prosecution, a conviction of the plaintiff, which was reversed on appeal, and the plaintiff discharged, is not conclusive, but strong *prima facie* evidence of probable cause, which may be rebutted, not only by evidence tending to show that the conviction was obtained by fraud or perjury, but also by any competent evidence which satisfies the jury that the prosecutor did not have probable cause for instituting the prosecution. (p. 714.)

William W. Pye, for the appellant.

A. B. Childress, for the respondent.

²⁴⁴ **START, C. J.** This is an appeal by the defendant from an order of the district court of the county of Rice denying his motion for a new trial in an action ²⁴⁵ for malicious prosecution, in which there was a verdict for the plaintiff for two hundred and fifty dollars.

The undisputed evidence establishes these facts: The defendant was chairman of the board of town supervisors of the town of Webster. Complaint having been made to him that the plaintiff had obstructed a public highway of the town, he investigated the charge, consulted with the county attorney with reference to the matter, and then made a complaint before the municipal court of the city of Northfield charging the plaintiff with such offense. The plaintiff pleaded not guilty to the charge, but upon a trial by the judge without a jury he was found guilty, and appealed from the judgment to the district court. The cause was dismissed and the plaintiff discharged in the district court upon motion of the county attorney.

1. The first contention of the defendant is that the conviction of the plaintiff by the municipal court is conclusive

evidence that the defendant had probable cause for instituting the prosecution. Therefore, there was no evidence to support the verdict. The jurisdiction of the municipal court of the city of Northfield in criminal cases triable within the county is the same as that of justice of the peace. We have, then, the question whether the conviction of a party in a justice or municipal court, which is reversed on appeal of the case to the district court, is conclusive or *prima facie* evidence of probable cause for instituting the prosecution.

The case of *Flikkie v. Oberson*, 82 Minn. 82, 84 N. W. 651, was an action for malicious prosecution. The evidence showed that upon the complaint of the defendant the plaintiff was arrested, tried and convicted in justice court upon the charge of having obstructed a public highway; that he appealed to the district court and was acquitted; and that such prosecution was the basis of the action for malicious prosecution, in which the plaintiff had a verdict. The defendant appealed to this court from an order denying his motion for judgment notwithstanding the verdict or for a new trial. The principal contention of the defendant in this court was that there was no evidence to sustain the verdict. This court held that the evidence was sufficient to support the verdict, and affirmed the order. In the case cited there was no evidence tending to show that the judgment in the justice ²⁴⁶ court convicting the defendant was obtained by fraud or perjury. It follows that this court, in affirming the order, necessarily held that the judgment was not conclusive evidence of probable cause for instituting the prosecution. There was, however, no claim made by the defendant that the judgment was conclusive evidence of probable cause. It seems to have been assumed by counsel for the defendant that, the judgment having been reversed by the district court, it was not conclusive, and that this court proceeded upon such implied concession without any discussion of the question.

While the decision in that case fully justified the learned trial judge in this case in holding that the conviction of the plaintiff in the municipal court was not a conclusive bar to his recovery of damages for the alleged malicious prosecution, yet in view of the circumstances under which that decision was made we would not follow it, if satisfied that it was unsound in principle. We have accordingly considered

the question on its merits. The question is not free from doubt, and the decisions of the courts are conflicting.

A number of cases, especially the earlier ones, hold that if the defendant in a criminal proceeding is convicted in the first instance, and appeals, and is acquitted in the appellate court, the conviction below is nevertheless conclusive of probable cause for his prosecution: Cooley on Torts, *185. Another class of cases, perhaps the greater number, hold that a judgment convicting the defendant in a criminal case, although reversed on appeal and the defendant acquitted, is conclusive proof of probable cause in an action by the defendant to recover damages for malicious prosecution, unless he alleges and proves that the judgment was obtained by fraud or perjury: Newell on Malicious Prosecution, 299; 19 Am. & Eng. Ency. of Law, 2d ed., 667. A third class of cases holds that a judgment convicting the defendant in a criminal proceeding, which is reversed on appeal, is not conclusive, but *prima facie*, evidence of probable cause, which may be rebutted by any competent evidence which clearly overcomes the presumption arising from the fact of the defendant's conviction in the first instance: 1 Jaggard on Torts, 618; Burt v. Place, 4 Wend. 591; Nicholson v. Sternberg, 61 App. Div. 51, 70 N. Y. Supp. 212; Goodrich v. Warner, 21 Conn. 432, Ross v. Hixon, 46 Kan. 550, 26 Am. St. Rep. 123, 26 Pac. 955, 12 L. R. A. 760; Barber v. ²⁴⁷ Scott, 92 Iowa, 52, 60 N. W. 497; Nehr v. Dobbs, 47 Neb. 863, 66 N. W. 864; Bechel v. Pacific Exp. Co., 65 Neb. 826, 91 N. W. 853.

It is difficult to see any substantial distinction between the first and second class of cases to which we have referred. If the presumption of probable cause, arising from a judgment in the first instance which is reversed on appeal, can only be rebutted by alleging and proving that the judgment was obtained by fraud or perjury, then the judgment is practically conclusive evidence of probable cause, because any judgment, although it imports absolute verity, may be impeached for fraud or perjury in a proper action or proceeding. The true and logical reason why a conviction, reversed on appeal and the defendant discharged, is relevant evidence on the issue of probable cause, is not that the judgment imports absolute verity; for, after the reversal and discharge there is in fact and law no judgment. The true reason, as

stated in the case of *Nehr v. Dobbs*, 47 Neb. 863, 66 N. W. 864, is the fact that, ordinarily, if a court having jurisdiction has upon a full and fair trial proceeded to conviction, it must have had before it such evidence as would convince a prudent and reasonable man of the guilt of the accused. Therefore, while a subsequent reversal may show that the accused was in fact innocent, yet it does not show that there was no probable cause for believing him guilty.

If such be the basis for receiving in evidence a judgment, which has been reversed, on a trial of the question of probable cause, it logically follows that it is not conclusive, but prima facie evidence of probable cause, which is entitled to serious consideration in determining the issue. It follows that, the presumption arising from such evidence being a rebuttable one, the evidence to rebut it cannot be limited to a direct impeachment of the judgment for fraud or perjury, but that any competent evidence is admissible which tends to show that the prosecutor did not have probable cause. We accordingly hold that, in an action for malicious prosecution, a conviction of the plaintiff, which was reversed on appeal and the plaintiff discharged, is not conclusive, but strong prima facie, evidence of probable cause, which may be rebutted, not only by evidence tending to show that the conviction was obtained by fraud or perjury, but also by any competent evidence which satisfies the jury that the prosecutor did not have probable cause for instituting the prosecution.

²⁴⁸ 2. It is further urged on behalf of the defendant that, because it was his official duty to prosecute all persons violating the provisions of the statute (Gen. Stats. 1894, sec. 1863), relating to the obstruction of public highways, he is not liable for a mistake of judgment, even if another has suffered by the mistake. If he acted upon probable cause, this would be true; otherwise not. The fact that he acted in his official capacity in making the complaint was, as the jury were instructed, a matter to be considered by them in determining the question of probable cause.

3. It is also claimed by the defendant that, treating the fact of the plaintiff's conviction by the municipal court as only prima facie evidence of probable cause, the verdict is not sustained by the evidence. The conclusion we have

reached from a consideration of the evidence is that it is sufficient to sustain the verdict, although the jury might well have found for the defendant.

4. The last alleged error urged is that the trial court erred in receiving evidence as to the defendant's statements and conduct with reference to the plaintiff's fence in the alleged public highway. The evidence was rightly received as tending to show the animus of the defendant: *Chapman v. Dodd*, 10 Minn. 277 (350); *Tykeson v. Bowman*, 60 Minn. 108, 61 N. W. 909.

Order affirmed.

The Malicious Prosecution of criminal charges is the subject of a note to Ross v. Hixon, 26 Am. St. Rep. 127-164; and the malicious prosecution of civil actions is the subject of a note to McCormick Harvesting etc. Co. v. Willau, 93 Am. St. Rep. 454-474.

HAYCOCK v. JOHNSTON.

[97 Minn. 289, 106 S. W. 304.]

LANDLORD AND TENANT.—The Abandonment of Leased Premises by the tenant, and the re-entry and reletting thereof by the landlord, operate to rescind a lease which contains no provision authorizing a re-entry upon default without working a forfeiture. (p. 716.)

Action by a landlord to recover from a tenant the difference between the rent reserved in the lease and the amount received from a reletting of the premises, the tenant having abandoned the property before the expiration of the term, and the landlord having then relet it to another. The trial court dismissed the action, upon the close of the plaintiff's testimony; and from an order denying a motion for a new trial he appeals.

C. D. & R. D. O'Brien, for the appellant.

Durment & Moore, for the respondent.

²⁸⁹ JAGGARD, J. In the previous decision of this case (*Haycock v. Johnston*, 81 Minn. 49, 83 N. W. 494, 1118) it was determined that the abandonment by the defendant and respondent here, of the premises leased to him by the plain-

tiff and appellant here, was not accepted, and a claim for rent accrued was there enforced against the defendant. The defendant there insisted that it was the duty of the plaintiff to have leased the house after he had abandoned it, for his benefit, and to apply the proceeds of rentals to reduce the damages for which the defendant was liable. Of that claim Brown, J., said: "Plaintiff did not accept ²⁹⁰ the defendant's surrender of the property, and had no right to re-rent it. If he had accepted it back, and re-rented it to some other person, a rescission of the contract of lease would have been thereby effected, and defendant wholly released from his obligation." This is in exact accord with authority: *Nelson v. Thompson*, 23 Minn. 508; *Bowen v. Haskell*, 53 Minn. 480, 55 N. W. 629; *Stern v. Thayer*, 56 Minn. 93, 57 N. W. 329; *Buckingham Apartment House Co. v. Dafoe*, 78 Minn. 268, 80 N. W. 974; 18 Am. & Eng. Ency. of Law, 2d ed., 366; 4 Current Law, 401. Subsequently to that decision, although there was no provision in the lease authorizing a re-entry by the landlord on breach of its terms without working a forfeiture, the plaintiff entered upon possession of the premises, continued to occupy a small portion himself, and rented the rest for a time, exceeding the period of the lease to this defendant. This constituted an acceptance of the surrender of the premises and operated to cancel the lease, within the rule just stated.

The case of *Smith v. Pendergast*, 26 Minn. 318, 3 N. W. 978, much relied upon by the plaintiff, is not inconsistent with this view. There a surrender by operation of law is defined, in the language of Baron Parke, in *Lyon v. Reed*, 13 Mees. & W. 285, as follows: "This term is applied to cases where the owner of a particular estate has been a party to some act, the validity of which he is by law afterward estopped from disputing, and which would not be valid if his particular estate had continued to exist." It is there held that, where it did not appear that the value of demised premises was impaired by a surrender of a portion of them, the landlord may recover the entire rent reserved, notwithstanding such partial surrender. In this case there is no question of a partial surrender; for, while the plaintiff used part of the premises himself, he leased all the rest to a person other than the defendant. No action for damages therefor lay for the breach of the terms of the lease, for it had been re-

scinded. There was no possible foundation for an action for the tort. Plaintiff, therefore, could not recover.

Order affirmed.

WHAT A LANDLORD MAY DO WHEN HIS TENANT ABANDONS THE PREMISES AND STILL HOLD HIM TO HIS OBLIGATION.

- I. Surrendering Premises in General, 717.
- II. Resuming Possession of Premises, 718.
- III. Repairing and Caring for Property, 718.
- IV. Receiving and Retaining Keys, 719.
- V. Reletting Premises to Others, 719.

I. Surrendering Premises in General.

A lessee cannot exonerate himself from liability under his lease by an abandonment or surrender of the premises (*Bonetti v. Treat*, 91 Cal. 223, 27 Pac. 614, 14 L. R. A. 151; *Lockwood v. Lockwood*, 22 Conn. 425; *Alschuler v. Schiff*, 59 Ill. App. 51; *Reynolds v. Swain*, 13 La. Ann. 193; *Prentiss v. Warne*, 10 Mo. 601; *Livermore v. Eddy's Admr.*, 33 Mo. 547; *Greene v. Waggoner*, 2 Hilt. 297; *Scheelky v. Koch*, 119 N. C. 80, 25 S. E. 713; *Barlow v. Wainwright*, 22 Vt. 88, 52 Am. Dec. 79), except where the lessor accepts the surrender: *Buckingham Apartment House Co. v. Dafeo*, 78 Minn. 268, 80 N. W. 974; *Elliott v. Aiken*, 45 N. H. 30; *Stotesbury v. Vail*, 13 N. J. Eq. 390; *Teller v. Boyle*, 132 Pa. 56, 18 Atl. 1069.

A surrender may be made by agreement of the parties or by operation of law, and, when made, the estate of the lessee terminates, and the relation of landlord and tenant ceases. Any acts which are equivalent to an agreement on the part of a tenant to abandon, and on the part of the landlord to assume possession of the demised premises on his own account amount to a surrender of the term by operation of law. An express agreement to accept the surrender need not be shown, for the assent of the landlord may be implied by operation of law from the manner in which he uses the property after its abandonment by the tenant: *Hayes v. Goldman*, 71 Ark. 251, 72 S. W. 563.

"Any acts which are equivalent to an agreement, express or implied, on the part of the tenant and landlord, that the former surrenders and the latter resumes the demised premises, constitute a surrender": *Buckingham Apartment House Co. v. Dafeo*, 78 Minn. 268, 80 N. W. 974. "When the minds of the parties to the lease concur in the common intent of relinquishing the relation of landlord and tenant, and execute this intent by acts which are tantamount to a stipulation to put an end thereto, there at once arises a surrender by act and operation of law": *Meeker v. Spalsbury*, 66 N. J. L. 60, 48 Atl. 1026; *Dennis v. Miller*, 68 N. J. L. 520, 53 Atl. 394. "A surrender by operation of law can be built up only by invoking and relying on the doctrine of estoppel. The effect of a surrender of this character is to terminate the

relation of landlord and tenant, and with it all the obligations of the parties to that relation. When there arises a condition of facts, voluntarily assumed, incompatible with the existence of the relation of landlord and tenant between the parties who have occupied that relation, there is a surrender of the lease by operation of law": *Stern v. Thayer*, 56 Minn. 93, 57 N. W. 329.

II. Resuming Possession of Premises.

If a landlord, after the abandonment of the leased premises by the tenant, takes possession thereof, without indicating to the tenant an intention to hold him for the rent, or to lease to others on his account, he thereby, as a general rule, accepts the abandonment, and releases the tenant from further obligation under his contract: *Rice v. Dudley*, 65 Ala. 68; *Williamson v. Crossett*, 62 Ark. 393, 36 S. W. 27; *Williams v. Vanderbilt*, 145 Ill. 238, 36 Am. St. Rep. 486, 34 N. E. 476, 27 L. R. A. 489; *Armour Packing Co. v. Des Moines Pork Co.*, 116 Iowa, 723, 93 Am. St. Rep. 270, 89 N. W. 196; *Kneeland v. Schmidt*, 78 Wis. 345, 47 S. W. 438, 11 L. R. A. 498; *Lawson etc. Co. v. Bowland*, 114 Fed. 639, 52 C. C. A. 335; *Watson v. Merrill*, 136 Fed. 359. The only liability of the tenant, in such a case, is upon the covenants in the lease, if any, which survive re-entry: *Vogel v. Piper*, 89 N. Y. Supp. 431. However, the mere fact that the landlord resumes possession, or puts others in possession, temporarily, without rent, does not necessarily constitute an acceptance of the surrender or abandonment: *Hayes v. Goldman*, 71 Ark. 251, 72 S. W. 563; *Way v. Myers*, 64 Ga. 760; *Hardison Whisky Co. v. Lewis*, 114 Ga. 602, 40 S. E. 702; *Joslin v. McLean*, 99 Mich. 480, 58 N. W. 467. The fact that the lessor advertises the abandoned premises for sale and offers immediate possession to the purchaser does not show an acceptance of the surrender: *Reeves v. McComesky*, 168 Pa. 571, 32 Atl. 96.

III. Repairing and Caring for Property.

When a tenant abandons the demised premises, the landlord may enter to care for the property (*Hayes v. Goldman*, 71 Ark. 251, 72 S. W. 563; *Bowen v. Clarke*, 22 Or. 566, 29 Am. St. Rep. 625, 30 Pac. 430), clean the windows (*Milling v. Becker*, 96 Pa. 182), or to make repairs (*Biggs v. Stueler*, 93 Md. 100, 48 Atl. 727; *Livermore v. Eddy's Admr.*, 33 Mo. 547; *Buck v. Lewis*, 46 Mo. App. 227; *Whitman v. Louten*, 3 N. Y. Supp. 754; *Breuckman v. Twibill*, 89 Pa. 58; *Texas Loan Agency v. Fleming*, 92 Tex. 348, 49 S. W. 1039, 44 L. R. A. 279), without necessarily thereby accepting the surrender. But if he enters and remodels the buildings, or makes extensive alterations, beyond any necessity for the preservation of the property, such acts will usually be construed as an acceptance of the surrender: *Lafferty v. Howe*, 63 Minn. 13, 65 N. W. 87; *Duffy v. Day*, 42 Mo. App. 838; *Mecker v. Spalsbury*, 66 N. J. L. 60, 48 Atl. 1026; *McKellar v. Sigler*, 47 How. Pr. 22.

IV. Receiving and Retaining Keys.

In case a landlord receives the keys of the premises from the tenant and retains them, upon the tenant abandoning the property, this is a circumstance which may tend to show on his part an acceptance of the surrender, and along with his other acts may be conclusive thereof: *Ledsinger v. Burke*, 113 Ga. 74, 38 S. E. 313; *Hesseltine v. Seacy*, 16 Me. 212; *Buckingham Apartment House Co. v. Dafoe*, 78 Minn. 268, 80 N. W. 974; *Elliott v. Aiken*, 45 N. H. 30. However, the fact that the landlord or his agent retains the key when sent or delivered to him by the tenant does not alone show an acceptance of the tenant's surrender: *Withers v. Larrabee*, 48 Me. 570; *Biggs v. Stueler*, 93 Md. 100, 48 Atl. 727; *Scott v. Beecher*, 91 Mich. 590, 52 N. W. 20; *Steele v. Pratt*, 122 Mich. 80, 80 N. W. 989; *Lucy v. Wilkins*, 33 Minn. 441, 23 N. W. 861; *Blake v. Dick*, 15 Mont. 236, 48 Am. St. Rep. 671, 38 Pac. 1072; *Landt v. Schneider*, 31 Mont. 15, 77 Pac. 307; *Ryan v. Jones*, 2 Misc. Rep. 65, 20 N. Y. Supp. 842; *Ladd v. Smith*, 6 Or. 316; *Bowen v. Clark*, 22 Or. 566, 29 Am. St. Rep. 625, 30 Pac. 430; *Milling v. Becker*, 96 Pa. 182; *Newton v. Speare Laundering Co.*, 19 R. I. 546, 37 Atl. 11. Where a tenant moves away and sends the keys to the landlord in a letter, his retention of them does not establish an acceptance of the tenant's abandonment: *Thomas v. Nelson*, 69 N. Y. 118. And the mere fact that a landlord picks up the key from his doorstep, where the tenant has thrown it, and keeps it, does not show an acceptance: *Diehl v. Lee (Pa.)*, 9 Atl. 865. Where a lessee undertakes to surrender the premises, but the lessor refuses the key, the fact that he afterward takes the key from a place where the lessee left it, against his will, and enters the premises, is, in itself, of no significance: *Long v. Stafford*, 103 N. Y. 274, 8 N. E. 522. And if a landlord accepts the key, stating that he receives it but not the premises, this will not be deemed an acceptance of the tenant's surrender: *Townsend v. Albers*, 3 E. D. Smith, 560.

V. Reletting Premises to Others.

When a tenant abandons the demised premises, the landlord is not bound to relet them to others in order to diminish his loss, but he may suffer them to remain vacant for the residue of the term and hold the tenant liable for the full rent: *Schuisler v. Ames*, 16 Ala. 73, 50 Am. Dec. 168; *Patterson v. Emerich*, 21 Ind. App. 614, 52 N. E. 1012; *Merrill v. Willis*, 51 Neb. 162, 70 N. W. 914; *Reich v. McCrea*, 59 Hun, 625, 13 N. Y. Supp. 650; *Clendinning v. Lindner*, 9 Misc. Rep. 682, 30 N. Y. Supp. 543; *Bowen v. Clarke*, 22 Or. 566, 29 Am. St. Rep. 625, 30 Pac. 430; *Racke v. Anheuser-Busch Brewing Assn.*, 17 Tex. Civ. App. 167, 42 S. W. 774. Indeed, if he relets the premises, the tenant may contend that the surrender is thereby accepted and himself absolved from further liability under the lease.

Nevertheless, it is generally conceded that a landlord may attempt to relet abandoned premises (*Gaines v. McAdam*, 79 Ill. App. 201;

Vincent v. Frelich, 50 La. Ann. 378, 69 Am. St. Rep. 436, 23 South 373; Scott v. Beecher, 91 Mich. 596, 52 N. W. 20; Joslin v. McLean, 92 Mich. 480, 58 N. W. 467; Spies v. Voss, 16 Daly, 171, 9 N. Y. Supp. 532; Dorrance v. Bonesteel, 51 App. Div. 129, 64 N. Y. Supp. 307; Lane v. Nelson, 167 Pa. 602, 31 Atl. 864), or actually relet them (Miller v. Benton, 55 Conn. 529, 13 Atl. 678; Brown v. Cairns, 107 Iowa, 727, 77 N. W. 478; Brown v. Cairns, 63 Kan. 584, 66 Pac. 639; Biggs v. Stueler, 93 Md. 100, 48 Atl. 727; Winant v. Hines, 14 Daly, 187; Rich v. Doyenu, 85 Hun, 510, 33 N. Y. Supp. 341), without necessarily accepting the surrender of the tenant or releasing him from his obligation, if he manifests an intention to hold the tenant, since such a course is to the advantage of the tenant, and is in accordance with the principle that an injured party should take reasonable measures to minimize his loss.

The rule as stated by some authorities is, that the landlord may re-enter and relet the premises to others for the benefit or on the account of the tenant, crediting him with the proceeds, without thereby releasing him from his obligation under the lease: Hayes v. Goldman, 71 Ark. 251, 72 S. W. 563; Humiston, Keeling & Co. v. Wheeler, 175 Ill. 514, 51 N. E. 893; Marshall v. John Grosse Clothing Co., 184 Ill. 421, 75 Am. St. Rep. 181, 56 N. E. 807; Brown v. Cairns, 107 Iowa, 727, 77 N. W. 478; Roumage v. Blatrier, 11 Rob. (La.) 101; Stewart v. Sprague, 71 Mich. 50, 38 N. W. 673; Doolittle v. Selkirk, 7 Misc. Rep. 722, 28 N. Y. Supp. 43. Having thus relet the premises, the landlord may recover as damages from the original tenant the difference between the rent received and what he would have received under the first lease, but no more: Respini v. Porta, 89 Cal. 464, 23 Am. St. Rep. 488, 26 Pac. 967; Minneapolis Baseball Co. v. City Bank, 74 Minn. 98, 76 N. W. 1024; Alsup v. Banks, 68 Miss. 664, 24 Am. St. Rep. 294, 9 South. 895, 13 L. R. A. 598; Whitman v. Louten, 3 N. Y. Supp. 754; Auer v. Penn, 99 Pa. 370, 44 Am. Rep. 114; Dulin v. Knechtel (Tex. Civ. App.), 51 S. W. 350. Of course, if the lessor accepts the surrender of the lessee, he has no claim against him for diminished rents thereafter paid by the new lessee: Everett v. Williamson, 107 N. C. 204, 12 S. E. 187.

In case the landlord resumes possession of the abandoned premises and relets, or attempts to relet, them on his own account, or under such circumstances that it is fair to assume that he does not intend to look to the tenant for the rent or any part thereof, he thus accepts the surrender and relieves the tenant from his obligation: Hayes v. Goldman, 71 Ark. 251, 72 S. W. 563; Welcome v. Hess, 90 Cal. 507, 25 Am. St. Rep. 147, 27 Pac. 369; In re Mahler, 105 Fed. 428; Ledsinger v. Burke, 113 Ga. 74, 38 S. E. 313; Palmer v. Myers, 79 Ill. App. 409; Biggs v. Stueler, 93 Md. 100, 48 Atl. 727; Duffy v. Day, 42 Mo. App. 638; Huling v. Roll, 43 Mo. App. 234; Sherman v. Engel, 18 Misc. Rep. 484, 41 N. Y. Supp. 959; Barkley v. McCue, 55 N. Y. Supp. 606, 25 Misc. Rep. 738; Crane v. Edwards, 80 App. Div. 333, 80 N. Y. Supp.

747; *Gutman v. Conway*, 45 Misc. Rep. 363, 90 N. Y. Supp. 290; *Gray v. Kaufman Dairy etc. Co.*, 162 N. Y. 388, 76 Am. St. Rep. 327, 56 N. E. 903, 49 L. R. A. 580; *White v. Berry*, 24 R. I. 74, 52 Atl. 682; *Pelton v. Place*, 71 Vt. 430, 46 Atl. 63.

Some authorities take the ground that if a lessor relets the abandoned premises without the consent of the lessee, or without an agreement, express or implied, with him, that a reletting may be made, then he will be held to have accepted the surrender and to have released the lessee from further liability. "He could," to quote from *Underhill v. Collins*, 132 N. Y. 580, 30 N. E. 576, "have left the premises vacant during the unexpired term of the lease, and required the tenant to pay the rent as it matured. The reletting of the premises for the benefit of the tenant relieves him in part of the burden he would have had to bear. He is therefore a gainer, rather than a loser, by reason of such reletting. It may be true that such reletting would operate as an acceptance of the surrender of the premises, unless there is an agreement, express or implied, that such reletting may be made. But under the facts disclosed in the testimony to which we have referred, such agreement or authority is implied."

Even more unequivocal on this point is the language in *Gaffney v. Paul*, 29 Misc. Rep. 642, 61 N. Y. Supp. 173: "It is a well-established principle that the right to relet, after an abandonment by the tenant, rests in contract, and does not flow from the mere relation of landlord and tenant. The rule applicable to certain classes of contracts, requiring a party complaining of a breach to minimize the resultant damage, has no applicability to contracts of lease. Without an agreement, either express or implied, a landlord has no right to relet demised premises, and, if he does so, he cannot hold the lessee responsible for any loss of rent. He may accept, or refuse to accept, the surrender, but if he relets without the sanction of an agreement, the tenant cannot be held liable for future rent. This agreement may be written or oral or inferred from circumstances, but agreement there must be."

We are inclined to believe that a majority of the authorities do not recognize this strict rule, although perhaps they cannot be said to expressly so hold. However, this question is raised in the recent case of *Oldewurtle v. Wiesenfeld*, 97 Md. 165, 54 Atl. 969, where the court decides that a landlord does not necessarily accept a surrender by re-renting the premises without the assent of the tenant. The following is an extract from the opinion: "But it is earnestly urged that the re-renting of the property for the benefit of the tenant without his assent was an acceptance of a surrender, an ouster of the tenant, and released him from liability for rent under the lease. There are some authorities to the effect that a re-entry and reletting of abandoned premises by the landlord without the consent of the tenant would create a surrender by operation of law. The best approved cases, however, assert the contrary doctrine, and hold that,

where a tenant repudiates the lease, and abandons the demised premises, and the lessor enters and relets the property, such re-renting does not relieve the tenant from the payment of the rent under the covenants of the lease: *Auer v. Penn*, 99 Pa. 370, 44 Am. Rep. 114; *Meyer v. Smith*, 33 Ark. 627; *Bloomer v. Merrill*, 1 Daly, 485; *Scott v. Beecher*, 91 Mich. 590, 52 N. W. 20; *Rich v. Doyenn*, 85 Hun, 510, 33 N. Y. Supp. 341; *Alsop v. Banks*, 68 Miss. 664, 24 Am. St. Rep. 294, 9 South. 895, 13 L. R. A. 598."

"The rule sanctioned by the decided weight of authority," to quote from the supreme court of Nebraska, "if indeed there can be said to be a diversity of opinion on the subject, is that the landlord may, at his election, relet the premises upon the abandonment thereof by the tenant, in which case the measure of his damage will be the agreed rental, less the amount realized on account of such reletting; or he may permit the premises to remain vacant until the end of the term, and recover his rent in accordance with the terms of the lease": *Merrill v. Willis*, 51 Neb. 162, 70 N. W. 914; approved in *Brown v. Cairns*, 63 Kan. 584, 66 Pac. 639.

When a lessor tells the lessee to quit the premises, and the lessee does quit, and the lessor then takes possession himself, or accepts rent from another, such a change of possession by mutual agreement operates as a surrender of the lease: *Boyd v. George* (Neb.), 89 N. W. 271.

If a lease authorizes the lessor to re-enter and relet the premises in case they are vacated by the tenant, a surrender by operation of law does not occur when the lessee vacates the premises and the lessor re-enters and relets them: *Grommes v. St. Paul Trust Co.*, 147 Ill. 634, 37 Am. St. Rep. 848, 35 N. E. 820; *Jones v. Rushmore*, 67 N. J. L. 157, 50 Atl. 587.

The mere receipt of rent by a landlord from an under-lessee does not evidence his assent to the abandonment of the demised premises by the original lessee, and is no proof of his acceptance of such under-lessee as a tenant: *Decker v. Hartshorn*, 60 N. J. L. 548, 33 Atl. 678. But when a new tenant has, by agreement with the landlord, been substituted and accepted in place of the old tenant, a surrender of the lease by operation of law arises: *Bowen v. Haskell*, 53 Minn. 480, 55 N. W. 629.

HOWE v. COATES.

[97 Minn. 385, 107 N. W. 397.]

MARKETABLE TITLE—Evidence Dehors Record.—A purchaser of land under a contract calling for a marketable title and entitling him to rely on the record title is not required to accept a title if there is a defect in the record title which can be cured only by a resort to parol evidence. (pp. 732, 733.)

MARKETABLE TITLE.—A Title is not Marketable where it depends necessarily upon matter in pais which is in itself a doubtful fact and never can be determined or established except by bringing every party interested into court, certainly others besides the immediate party to the suit for specific performance. (pp. 733, 734.)

MARKETABLE TITLE.—A Vendee is not Required to Accept a title on the court's assurance that it is good and marketable, and assume the risk of contesting the question in another action wherein the issues of law and fact may be differently determined by the same or some other court. (p. 735.)

A MARKETABLE TITLE Means a Title free from reasonable doubt and assures to the vendee the peaceable enjoyment of the property. (p. 736.)

A MARKETABLE TITLE Means a Title which a reasonable purchaser, well informed as to the facts and their legal bearing, willing and anxious to perform his contract, would, in the exercise of that prudence which business men ordinarily bring to bear upon such transactions, be willing to and ought to accept. (p. 737.)

A MARKETABLE TITLE is One Reasonably Free from Any Doubt which should interfere with the sale or market value of the land. (p. 737.)

MARKETABLE TITLE—Opinion of Attorneys.—If a vendee's attorney in good faith declines to accept a title on behalf of his client, and two district judges selected by the parties as arbitrators are unable to agree upon the questions of law involved, the title cannot fairly be said to be marketable. (p. 738.)

Washburn, Bailey & Mitchell and Stewart & Browe, for the appellant.

Calhoun & Bennett, Taylor & Jenks and Reynolds & Roeser, for the respondents.

385 ELLIOTT, J. This is an appeal from an order denying the plaintiff's motion for a new trial. There is little, if any, controversy over the material facts. 386 It appears that upon March 12, 1902, the appellant, the plaintiff below, and the respondents, entered into a written contract, whereby, in consideration of the sum of fifty thousand dollars in hand paid and in consideration of the covenants and agreements therein contained, the vendors granted, bargained, and sold to the vendee (the appellant herein), his heirs, and as-

signs the exclusive right, privilege, and option to purchase certain lands in Itasca county, Minnesota, known as the "Arcturus Mine," at any time on or before July 12, 1902, for the sum of seven hundred and fifty thousand dollars. The appellant paid fifty thousand dollars, which under the contract was to apply upon the purchase price if he elected to consummate the sale. The grantors covenanted that they were the owners in fee simple of the premises, free from all encumbrances, and that they had good right and authority to sell and convey the same. Among other provisions, the contract contained the following:

"It is further agreed that the said parties of the first part shall furnish an abstract of the title to said premises to the said party of the second part, as soon as the same can reasonably be obtained, with all tax and judgment certificates necessary to cover any liens that may be upon the said premises, and at all events to furnish the said abstract within the next fifteen days, and that thereupon the said party of the second part shall cause the same to be examined, and in case he shall find the title to said property or the record title thereof defective, unmerchantable or encumbered, he shall, within a reasonable time and as near as may be within fifteen days from the date of the delivery of such abstract, notify the said parties of the first part, by notification to said Daniel H. Freeman, mailed to him at St. Cloud, Minnesota, of such defects, and the said parties of the first part shall thereupon proceed to correct and cure such defects as speedily as possible, and at all events shall have such corrections complete on or before June 15, 1902; in case the title to said premises shall be defective and the said parties of the first part shall fail to perfect the same within the time above specified, and they are notified thereof, then this agreement, at the option of the said party of the second part, shall cease and determine altogether, and the moneys hereinbefore provided to be paid shall be refunded, in ³⁸⁷ which case there shall be no claim for damages by either party; but the parties hereto may agree upon a further reasonable time for the correction of such title. In case a difference arises between the counsel for the said party of the second part, who may be employed to examine the title to said premises, and the counsel for the said parties of the first part, with respect to any alleged defect in the title or in the record of

the title to said premises, as to whether the same is a substantial defect requiring correction within the spirit and terms of this agreement, or as to whether such defects as may have been discovered in the examination of such title shall have been substantially and sufficiently cured, then and in such event the matters of difference shall be submitted to Hon. D. B. Searle and Hon. Homer B. Dibell, two of the judges of the district court of the state of Minnesota, who shall determine the same, failing to agree in which they may call in a third judge of the said district court within said state, and the decision of the majority shall prevail and be conclusive and binding upon the parties hereto."

It will thus be seen that the respondents agreed to furnish an abstract of title to the property, with all taxes and judgment certificates, within fifteen days after the contract was signed, and the grantee was to have the same examined, and, if he found the title or the record title to be defective, unmerchantable, or encumbered, he should, within a reasonable time, as near as may be within fifteen days from the day of the delivery of the abstract, notify the respondents of such defects, and respondents should proceed to correct and cure such defects as speedily as possible, and in all events have such corrections completed on or before June 15, 1902. It was provided that, "In case the title to said premises shall be defective and the said parties of the first part shall fail to perfect the same within the time above specified and they are notified thereof, then this agreement at the option of the said party of the second part shall cease and determine altogether and the moneys hereinbefore provided to be paid shall be refunded, in which case there shall be no claim for damages by either party."

§§§ It is further agreed between the parties "That time is of the essence of this agreement in respect to all matters and things herein by the respective parties hereto agreed to be done and performed."

In case a difference shall arise between the counsel of the respective parties with respect to any alleged defect in the title, or in the record title, as to whether the same is a substantial defect, requiring correction within the spirit and terms of the agreement, or as to whether such defects had been sufficiently cured, then the matters of difference shall

be submitted to two district judges of the state, named in the agreement, who shall determine the same, "failing to agree in which they may call in a third judge of the said district court within said state and the decision of the majority shall prevail and be conclusive and binding upon the parties hereto."

Within a few days after the contract was signed the respondents delivered an incomplete abstract of title which had been used in some prior transaction, and requested appellant's attorney to have it brought down to date. The abstract as brought down and completed by the register of deeds at the instance of appellant's attorney disclosed the matters which give rise to the controversy respecting the title and the record title to the property. The alleged defects, so far as of present importance, grew out of the existence of two previous leases which have been referred to as the Foley and Snider leases.

(a) It appeared from the abstract that while Josiah E. Hayward, the ancestor of the respondents, owned the lands in question, he on March 19, 1892, his wife joining, executed and delivered to Timothy Foley and Daniel H. Freeman a mining lease for the greater portion of the land. This lease ran for a period of fifty years from its date. It provided for the payment of a nominal rental until the lapse of a period of five years after a railroad should have been completed to within one mile of the property, and thereafter there should be paid a royalty upon the iron ore mined and removed from the premises. This lease further granted an option for and throughout the full period of the lease to the lessees, their heirs, or assigns to purchase the premises for one hundred thousand dollars. The instrument was recorded in Itasca county.

The abstract also showed an assignment recorded in the same county ³⁸⁹ of a four-sevenths interest therein to Josiah E. Hayward, Henry C. Waite, Datus E. Meyers, and Frank E. Searle, and an assignment from these assignees and the original lessees of the entire lease and contract to the Foley Mining Company. No wives joined with any of these assignors in making the assignment. It is admitted that the assignors were all married men at the time of the making of such assignment and their wives were then living. There

was nothing upon the abstract or records to show that the rights and interests of these married women, whatever they were, had been acquired or extinguished or surrendered.

There was nothing on the abstract or record to show any surrender or termination of the estate or rights of the Foley Mining Company, except what purported to be a certified copy of a judgment in an action to determine adverse claims brought by the female respondents herein, as plaintiffs, wherein the Foley Mining Company was the sole defendant. The copy of the judgment was recorded February 13, 1899, but the certificate of comparison of the certified copy so recorded was dated February 20, 1899, and the copy of the judgment bore date February 25, 1899. The files in the clerk's office showed that this judgment was not entered in any form in the clerk's office until twelve days after the record of the certified copy in the office of the register of deeds, and that no judgment was ever entered in the judgment book in said action unless a judgment in an action entitled Mary O. Coates, Clara H. Freeman, Flora H. Holden, and Jean O. McClure v. Foley Mining Company, was such judgment.

(b) The abstract also showed that on November 29, 1895, the respondents entered into an agreement with one Margaret E. Snider, which was recorded February 17, 1896, whereby, for a valuable consideration, therein acknowledged, respondents sold and agreed to convey to the said Margaret E. Snider, on or before January 1, 1900, the greater portion of the land covered by the contract between the appellant and respondents. This agreement provided that said Snider, her heirs, or assigns, should, not later than January 1, 1896, commence explorations on the premises for the discovery of iron ore and prosecute the same with reasonable diligence until either ten thousand dollars should have been expended or four hundred tons of iron ore be discovered in the said premises, or until ten thousand dollars should have been paid on the contract. The agreement provided for deferred payments to be made at different intervals, ³⁹⁰ aggregating ninety thousand dollars, and for a credit on the purchase price for all iron ore taken out at the rate of twenty-five cents per ton, and provided that in the event of default the first parties to the contract might terminate the same by serving notice in writing upon the holder of the contract, first giving sixty days within which to comply with its terms. On March

9, 1897, the respondents caused a notice or declaration to be recorded in the office of the register of deeds claiming a default in the contract in the payment of said sum of ten thousand dollars. But there also appeared of record a new and modified agreement in writing entered into between the Arcturus Iron Company and the respondents on or about May 13, 1897, reciting the former agreements and alleged default, by which last agreement, for valuable considerations therein acknowledged, the alleged forfeiture and dissolution were withdrawn and canceled, and the time for the making of the various payments extended, one or more parcels of the premises released and additional payments agreed to be made. It also provided that the same might be terminated by serving notice as provided by chapter 223, page 431, Laws of 1897.

This latter contract appeared of record and was entered on the abstract and was encountered by the appellant in making an examination of the title. There was nothing of record to show any release of this contract or the rights or estate granted thereunder, and the only thing which appeared, or has ever been made to appear, respecting the termination of this contract, or the extinguishment of the rights or estate therein granted, is the record on February 13, 1899, of a notice without date in the office of said register of deeds which recites certain alleged defaults in the making of said payments required by the contract, and specified that the contract should be canceled and determined December 20, 1897, unless the conditions and agreements as to which default had been made should have been complied with on or before that date. Accompanying this notice was proof that it had been published.

The title was examined by Mr. Washburn, as attorney for the appellant, and while engaged in his investigations he was informed by interested parties that they still claimed rights under the Snider contract. On March 5 and 24, and April 5, 1902, he sent letters to Mr. Taylor, the attorney for the respondents, calling his attention to the alleged defects in the record title, and insisting that they were material ³⁹¹ and should be cured. In the latter part of May Mr. Taylor informed Mr. Washburn that "we have concluded to arbitrate." Thereupon, on May 26, 1902, appellant sent to respondents a communication which contained the following language:

"We must insist upon the substantial character of the objections raised and assuredly cannot waive them, and we are extremely anxious, as the time is now growing short, to have the matter determined, and this communication is sent to you for the purpose of bringing to a speedy hearing the reference of these questions before the district judges mentioned in the contract as arbitrators. The objections raised to the title and to the record title, the character and validity of which are to be determined by such arbitration, are:

"1. Whether the interest and estate in said property under a mining lease executed by Hayward and wife, to Timothy Foley and Daniel H. Freeman in 1892, have been extinguished and terminated, and whether the same has been done so as to clear the record title to the premises thereof and of all persons who may claim thereunder, including Foley Mining Company and the wives of Josiah E. Hayward, Henry C. Waite, Datus E. Meyers and Frank E. Searle.

"2. Whether the interest and rights of the Arcturus Iron Company under a certain contract of sale made by you to Margaret E. Snider November 29, '95, and assigned by said Snider to Arcturus Iron Company, have been determined and extinguished and sufficiently determined and extinguished of record to remove the cloud thereof from the title. . . .

"As your counsel has advised my counsel that you desire to arbitrate the validity of these objections, I respectfully ask that you at once arrange for a hearing before the arbitrators at the earliest possible time."

After some further correspondence the parties met at St. Paul, June 14, 1902, and submitted their respective claims to Judge Searle and Judge Dibell, the arbitrators named in the contract. No claim was made on the part of the respondents that they had cured any alleged defects in the title or the record title, but they stood on the claim that ³⁹² they were not such defects as they were required to cure under the contract; that is, they were not substantial defects. The arbitrators were unable to agree, and each prepared and submitted an opinion supporting his views; the last, that of Judge Dibell, being dated July 1, 1902. From this time on plaintiff made earnest efforts to have a third judge selected and a final determination made. The trial court has found that "The plaintiff and his attorney by letters, telegrams, and oral requests used their utmost efforts and endeavors to

obtain a decision by a board of arbitrators as to the defendants' title to the land in controversy; that neither of the judges named as arbitrators in the contract between the plaintiff and defendants are in fault or in any way responsible for the failure to call in a third arbitrator, or for the failure to have a determination of the question of title arrived at."

The evidence amply supports the conclusion that the appellant used every effort to secure the selection of the third arbitrator, and, waiving the question of the location of the fault, we are satisfied that the appellant was clearly justified in refusing to longer urge the arbitration or rely upon the respondents' right thereto and in seeking to have the question of his rights determined by the courts. On June 17, 1902, the appellant served notice upon the respondents that, as they had failed to comply with the contract in regard to furnishing a perfect title and a perfect record title, he elected to terminate the contract and tendered a proper release of his interest in the lands, and demanded the return of the money which he had paid. An action to recover the fifty thousand dollars which had been paid to the respondents was then brought and resulted in a decision in favor of the defendants therein. The court found, among other things, "That on March 12, 1902, the defendants, Mary O. Coates, Clara H. Freeman, Jean O. McClure and Elora H. Holden, were, ever since have been, and now are, the owners in fee simple of the land described in the contract, . . . and had during all of said time a good record title thereto, and that their title to said land and the record title thereof was not defective, unmerchantable or encumbered."

³⁰³ The entire case is involved in the correctness of this finding.

1. We are not able to accept the respondents' theory for the construction of this contract. It calls for a title of record, merchantable and unencumbered. The vendors agreed to furnish such a title by June 12, 1902, and the language, as well as the entire structure, framework, and import of the contract, shows that the parties intended to make time of the essence of the contract. The respondents' contention rests upon the assumption that the title was such as they were required to furnish. Assuming this important fact, it is argued that the appellant was required to make his elec-

tion to purchase the property before July 12, 1902. The contract requires a written notice of the intention to elect to exercise the right to consummate the purchase, and provides that, "In case the said party of the second part shall elect not to exercise the right and option herein granted to purchase the said premises and not to consummate the purchase thereof, then and in that event the said sum of fifty thousand dollars, the payment of which is hereinbefore acknowledged, shall be forfeited to the said parties of the first part as liquidated damages and as being a reasonable consideration for this agreement. In case the said party of the second part shall fail to give the notice of his election to purchase hereinbefore provided . . . the same shall be deemed to be an election not to consummate such purchase."

The contract must be read as a whole, giving due force and effect to all its provisions. This provision for the forfeiture of the fifty thousand dollars must rest upon the condition that the vendee has refused, without cause, to consummate the contract. It was, of course, never intended that the money should be forfeited in the event that the vendor failed to furnish a title such as called for by the contract. If the vendor tendered a marketable record title before June 12, 1902, the vendee was required to complete the contract or lose the money he had paid. If the title was not tendered by that date, he had the right to cancel the contract and recover the amount he had paid. The respondents elected to stand upon their title as it was, and under those conditions they were not entitled to a notice giving them further time. Had the arbitration ³⁹⁴ been determined in favor of the appellant, he would have been entitled to recover his payment; but, if it had been determined in favor of the respondents, the appellant must have carried the contract to completion according to its terms or forfeited the fifty thousand dollars which he had paid. The rights of the parties, so far as they depended upon the conditions of the title, were fixed upon June 12, 1902, and all future proceedings, whether before arbitrators or courts, were for the purpose of determining their rights as of that date. The notice given on June 17, 1902, was all that the respondents were entitled to receive under the circumstances and conditions then existing. We confess our inability to grasp the force of the respondents' contention that the appellant is claiming a forfeiture. Nor

does the suggestion that he is insisting upon his pound of flesh seem appropriate.

2. As we construe this contract, it calls for an abstract which shows a good title of record in the vendors and which discloses sufficient of record to defeat the claim of any adverse claimant: *George v. Conhaim*, 38 Minn. 338, 37 N. W. 791. It requires respondents to furnish an abstract of title within fifteen days, and thereafter the vendee must cause the same to be examined, and in case he shall find the title of said property, or the record title thereof, defective, unmerchantable or encumbered, he shall notify the vendors of the defects.

A somewhat similar requirement was considered in *Horn v. Butler*, 39 Minn. 515, 40 N. W. 833. The contract there provided: "Abstract of title to be furnished without delay. . . . In case the title shall be ascertained to be unmarketable to such an extent as to warrant the purchaser in refusing the same and shall so refuse the same upon that ground," earnest money shall be returned. The abstract failed to show a good title in the vendor, and the court said: "In determining the marketability of defendant's title to the property described in the contract, in ascertaining the validity of his alleged title, plaintiffs were justified in relying solely upon the abstract furnished by him for their guidance. If it did not disclose his ownership, the marketable character of his title, they were not obliged to examine further or elsewhere. Their refusal to proceed was warranted. It may be the fact that defendant's title was, or could be made, complete, but no provision was made in the contract for the perfecting thereof, should it be found defective." ³⁹⁵ The marketable character of the title depended on the record, and this would or should be shown by the abstract": *Lessenich v. Sellers*, 119 Iowa, 314, 93 N. W. 348; *Kane v. Rippey*, 22 Or. 296, 23 Pac. 180.

A contract "to convey unto the second party by warranty deed with an abstract showing a good title" refers to the record title which might be epitomized on the abstract. Such a contract calls for a good title on the abstract, or at least of record: *Fagan v. Hook* (Iowa), 105 N. W. 155; *Spooner v. Cross*, 127 Iowa, 259, 102 N. W. 1118; *Martin v. Roberts*, 127 Iowa, 218, 102 N. W. 1126. In *Brown v. Widen* (Iowa), 103 N. W. 158, the court said: "The contract called for an

abstract showing good title, and nothing less than this would satisfy the condition, no matter what the vendor's real title might be": See *Boas v. Farrington*, 85 Cal. 535, 24 Pac. 787; *Noyes v. Johnson*, 139 Mass. 436, 31 N. E. 767; *Zunker v. Kuehn*, 113 Wis. 421, 88 N. W. 605; *Heller v. Cohen*, 154 N. Y. 299, 48 N. E. 527; *Howe v. Hutchinson*, 105 Ill. 501; *Gwin v. Calegaris*, 139 Cal. 384, 73 Pac. 851; *Bruce v. Wolfe*, 102 Mo. App. 384, 76 S. W. 723.

This contract calls for a title good in fact and for an abstract showing a good title of record, but it was evidently not contemplated that the vendee should rely entirely upon the abstract. It was not so construed by the parties. An admittedly incomplete abstract was delivered to the vendee's attorney and accepted by him with the understanding that he would have it brought down to date and made to show the whole record title of the vendors. It was the record title, and not the abstract, upon which the vendee was entitled to rely.

3. A purchaser under such a contract is not required to resort to evidence dehors the record. It is not sufficient that the title is good in fact; that is, capable of being made good by the production of affidavits or other oral testimony. It must be good of record. So even a good title may be unmarketable: *Block v. Ryan*, 4 App. Cas. (D. C.) 283; *Speakman v. Forepaugh*, 44 Pa. 363; *Close v. Stuyvesant*, 132 Ill. 607, 24 N. E. 868, 3 L. R. A. 161. As far as the principle is concerned, it seems to be immaterial whether the contract authorizes the vendee to rely upon the abstract or the record. In either case he cannot be required to resort to oral evidence. In *Fagan v. Hook* (Iowa), 105 N. W. 155, the court said: "The title may be good; but one to whom an abstract showing ³⁹⁶ good title has been promised as a condition precedent is not bound to accept any evidence thereof, except that contained in the abstract. The vendee in such a case is not required to accept or rely on parol evidence of title or information dehors the record, or the word of the vendor." It was, therefore, held that the purchaser was not obliged to accept the title which was bad of record, although capable of being made good by evidence showing adverse possession for the statutory period of time: *Carolan v. Yoran*, 104 App. Div. 488, 93 N. Y. Supp. 935; *Fagan v. Hook* (Iowa), 105 N. W. 155; *Noyes v. Johnson*, 139 Mass. 436, 31 N. E. 767;

Page v. Greeley, 75 Ill. 400; Gwin v. Calegariis, 139 Cal. 384, 73 Pac. 851; Bruce v. Wolfe, 102 Mo. App. 384, 76 S. W. 723; Zunker v. Kuehn, 113 Wis. 421, 88 N. W. 605.

A title is not marketable where it "depends necessarily upon matter in pais, which is in itself a doubtful fact and never can be determined or established except by bringing every party interested into court, certainly others besides the immediate party to the suit for specific performance": *Rutherford L. & I. Co. v. Sanntrock* (N. J.), 44 Atl. 938; *Ruess v. Ewen*, 34 App. Div. 484, 54 N. Y. Supp. 357, affirmed, 165 N. Y. 633, 59 N. E. 1130; *Smith v. Death*, 5 Madd. 371, 21 R. R. 314. This rule was applied in *Austin v. Barnum*, 52 Minn. 136, 53 N. W. 1132. The record there disclosed an unsatisfied mortgage, and its date showed that it might have been, and inferentially was, barred by the statute of limitations, but as this might depend upon matters which did not appear of record the title was held to be unmarketable. The action was to recover the money which had been paid under the contract, and the court said: "Because of the mortgage which of record was unsatisfied and undischarged the title was defective, and respondent's right of action accrued. The time for payment of the debt may have been extended by agreement of the parties, or partial payments may have been made, operating to prevent the running of the statute of limitations against the mortgage security, thus keeping it still alive."

Where the vendor is required to furnish a title good in fact and in law, without reference to the record, he may, of course, rest upon the bar of the statute of limitations, provided it clearly appears that the entry of the real owner is barred: *Pratt v. Eby*, 67 Pa. 396. The application of this rule disposes of the respondents' contentions, unless their record title was clearly marketable and unencumbered. We are not ³⁹⁷ called upon to determine the validity of any claim which may be made by the *Arcturus Mining Company* or its successors under the *Snider* contract. It is certainly not clear beyond any reasonable doubt that the rights which were created by that contract were terminated by the giving of the notice provided by chapter 223, page 431, Laws of 1897. If the company was in default when the notice was given, it had a legal right to remove the default within the time limited by the notice. Whether it was in fact in default, and, if

so, whether such default was removed, does not appear of record and would necessarily have to be established by oral evidence.

4. The question whether this title was such as was called for by the contract cannot be determined by an examination of the record alone. In *Ladd v. Weiskopf*, 62 Minn. 29, 64 N. W. 99, 69 L. R. A. 785, and *Mathews v. Lightner*, 85 Minn. 333, 89 Am. St. Rep. 558, 88 N. W. 992, it was held that a title is not unmarketable when no question of fact is involved, but only one of law arising exclusively upon the construction of a record muniment of title and all the parties in interest are before the court, so that its decision will be a final determination of the matter. But even if the present case involved only a question of law arising upon the construction of the record, it could not be controlled by this rule because all the parties in interest are not before the court. If this court should hold, for instance, that the claims of the *Arcturus Mining Company* were cut out by the service of the notice of default, it would not bind that company or its successors in interest. The claimants would be entitled to their day in court, and upon a full hearing a different conclusion might be reached. A vendee will not be required to accept a title on the court's assurance that it is good and marketable and assume the risk of contesting the question in another action wherein the issues of law and fact may be differently determined, by the same or some other court: *Townshend v. Goodfellow*, 40 Minn. 312, 12 Am. St. Rep. 736, 41 N. W. 1056, 3 L. R. A. 739; *Heller v. Cohen*, 154 N. Y. 299, 48 N. E. 527; *Fleming v. Burnham*, 100 N. Y. 1, 2 N. E. 905; *Brokaw v. Duffy*, 165 N. Y. 391, 59 N. E. 196.

5. The distinction which once prevailed as to marketable titles between courts of law and equity no longer exists. An action at law by the vendee to recover back purchase money paid must now be based upon the grounds which would justify a court of equity in refusing to compel ³⁹⁸ him to accept the title: *Ladd v. Weiskopf*, 62 Minn. 29, 64 N. W. 99, 69 L. R. A. 785; *Moore v. Williams*, 115 N. Y. 586, 12 Am. St. Rep. 844, 22 N. E. 233, 5 L. R. A. 654; *Brokaw v. Duffy*, 165 N. Y. 391, 59 N. E. 196. In *Sugden on Vendors* (chapter 10, section 3) it is said: "A court of equity is anxious to protect a purchaser and give to him reasonable security for his title, not compelling him to take a title without knowing whether

it is good or bad. The inclination of the court is in favor of the vendee and a vendor claiming to be exempted from the general rule is required clearly to establish a case of exception. To enable equity to enforce the specific performance against a purchaser, the title to the estate ought, like Caesar's wife, to be free even from suspicion, for it would be an extraordinary proceeding for a court of equity to compel a purchaser to take an estate which it cannot warrant to him. It has, therefore, become a settled and invariable rule that a purchaser shall not be compelled to accept a doubtful title; and the courts will not have regard to its own opinion only, but will take into account what the opinions of other competent persons may be."

But the standard set by Caesar for his wife is a little higher than the law requires for a title: *Street v. French*, 147 Ill. 342, 35 N. E. 814. In *Vreeland v. Blauvelt*, 23 N. J. Eq. 483, Vice-Chancellor Dodd said: "A court of equity will not compel a purchaser to take a doubtful title. If there is such an uncertainty about the title as to affect its marketable value, even though a court might consider it good, still the contract may not be specifically enforced. But there must be some debatable grounds on which the doubt can be justified." A marketable title means a title free from reasonable doubt—what Lord Eldon, in *Stapylton v. Scott*, 16 Ves. Jr. 272, called a rational doubt: *Austin v. Barnum*, 52 Minn. 136, 53 N. W. 1132; *Hedderly v. Johnson*, 42 Minn. 443, 18 Am. St. Rep. 521, 44 N. W. 527; *Richmond v. Koenig*, 43 Minn. 480, 45 N. W. 1093; *Fleming v. Burnham*, 101 N. Y. 1, 2 N. E. 905; *Kilpatrick v. Barron*, 125 N. Y. 751, 26 N. E. 925; *Holmes v. Woods*, 168 Pa. 530, 32 Atl. 54; *Morrison v. Waggy*, 43 W. Va. 405, 27 S. E. 314; *Downey v. Seib*, 102 App. Div. 317, 92 N. Y. Supp. 431; *Muller v. Palmer*, 144 Cal. 305, 77 Pac. 954; *Jeffries v. Jeffries*, 117 Mass. 184; *Collard v. Sampson*, 1 Eq. R. 262; *Wilde v. Fort*, 4 Taunt. 334, 13 R. R. 616. It means a title which would insure to the vendee the peaceable enjoyment of the property: *Barnard v. Brown*, 112 Mich. 452, 67 Am. St. Rep. 432, 70 N. W. 1038. ²⁹⁹ "Every title is doubtful which invites or exposes the party holding it to litigation. If there be color of outstanding title which may prove substantial, though there is not enough in evidence to enable the chancellor to say so, a purchaser will not be held to take it and encounter the hazard of litigation": *Her-*

man v. Somers, 158 Pa. 424, 38 Am. St. Rep. 851, 27 Atl. 1050; Corbett v. McGregor (Tex. Civ. App.), 84 S. W. 278; Frazier v. Boggs, 37 Fla. 307, 20 South. 245; Trustees v. Rother, 83 Md. 289, 34 Atl. 843; Daniell v. Shaw, 166 Mass. 582, 44 N. E. 991. But the doubt must be such as affects the value of the land and interferes with its sale: Vought v. Williams, 120 N. Y. 253, 17 Am. St. Rep. 634, 24 N. E. 195, 8 L. R. A. 591; Schenck v. Wicks, 23 Utah, 576, 65 Pac. 732.

A marketable title means a title "which a reasonable purchaser, well informed as to the facts and their legal bearing, willing and anxious to perform his contract, would, in the exercise of that prudence which business men ordinarily bring to bear upon such transactions, be willing to and ought to accept": Todd v. Union D. S. Inst., 128 N. Y. 636, 28 N. E. 504; Hunting v. Damon, 160 Mass. 441, 35 N. E. 1064; Paulmier v. Howland, 49 N. J. Eq. 364, 24 Atl. 268. "A purchaser ought not to be compelled to take property, the possession of which he may be obliged to defend by litigation. He should have a title which will enable him to hold his land free from probable claim by another, and one that, if he wishes to sell, would be reasonably free from any doubt which should interfere with its market value": McPherson v. Schade, 149 N. Y. 16, 43 N. E. 527; Turner v. McDonald, 76 Cal. 177, 9 Am. St. Rep. 189, 18 Pac. 262; Appeal of Clouse, 192 Pa. 108, 43 Atl. 413; Harding v. Olson, 177 Ill. 298, 52 N. E. 482; Heller v. Cohen, 154 N. Y. 299, 48 N. E. 527; Irving v. Campbell, 121 N. Y. 353, 24 N. E. 821, 8 L. R. A. 620; Griffith v. Maxfield, 63 Ark. 548, 39 S. W. 852. The purchaser "must get such a title as he can force down upon a repurchaser from him": Magennis v. Fallon, 2 Moll. 578. A purchaser "should not be left upon receiving a deed to the uncertainty of a doubtful title or the hazard of a contest with other parties which may seriously affect the value of the property if he desires to sell the same": Jordan v. Poillon, 77 N. Y. 518. "It has been often held that a title is not marketable where it exposes the party holding it to litigation": Swayne v. Lyon, 67 Pa. 436. "The title tendered need not in fact be bad in order ⁴⁰⁰ to relieve him from his purchase, but it must either be defective in fact or so clouded by apparent defects, either in the record or by proof outside of the record, that prudent men, knowing the facts, would hesitate to take it": Greenblatt v. Hermann, 144 N. Y. 13, 38 N. E. 966.

In *Townshend v. Goodfellow*, 40 Minn. 312, 12 Am. St. Rep. 736, 41 N. W. 1056, 3 L. R. A. 739, this court said: "The purchaser is entitled to a marketable title, one clearly shown to be good. It must, therefore, be free from reasonable doubt. . . . It is not necessary that the title be shown to be bad, nor is it enough, even, that the court may on the whole consider it good, if there be doubt or uncertainty about it sufficient to form the basis of litigation; for, if there be a doubt, it cannot be thrown upon the purchaser to contest that doubt. . . . It cannot be said that there is no question or doubt about the title tendered by the plaintiff, and the marketable value of the land will naturally be affected by the doubt and uncertainty resting upon the title. . . . The devisees, including infant heirs, are not parties, and would not be bound by the judgment of the court in this case. A purchaser might, we think, well hesitate to accept such a title, and a court of equity will not compel its acceptance, and cast upon him the risk of litigation and the embarrassment of a questionable title."

Numerous elements necessarily enter into the question of what constitutes a marketable title. In this case the plaintiff's counsel, acting in good faith, guided by ample professional knowledge and with evident desire to see the transaction consummated, declined to accept the title on behalf of his client. The two arbitrators selected by the parties for their judicial standing, knowledge, and experience were unable to agree upon the questions of law involved. It cannot fairly be said that a title which is thus viewed by able lawyers who have no conceivable motive for reaching a biased opinion is marketable. No reasonably prudent man would accept such a title in the ordinary course of business, especially in a transaction of the magnitude and importance of this, in which the vendee is required to pay three-quarters of a million dollars for the property. The opinion of counsel that a title is bad or unmerchantable may or may not in itself be sufficient to create a doubt which would justify the vendee in refusing to accept it.

There are authorities to the effect that it is not sufficient (see *Montgomery* ⁴⁰¹ v. *Pacific Coast L. Bureau*, 94 Cal. 284, 28 Am. St. Rep. 122, 29 Pac. 640), but the adverse opinion of counsel is certainly a material fact, and its importance and value in a particular case must depend upon the counsel and the circumstances under which he is acting:

See *Ladd v. Weiskopf*, 62 Minn. 29, 64 N. W. 99, 69 L. R. A. 785. In *Walker v. Gillman*, 127 Mich. 269, 86 N. W. 830, the court approved the claim that "if the rejection of the title was based upon the good faith opinion of counsel, and if any of the questions involved were doubtful questions of law, defendant was justified in refusing to perform the contract." In *Miller v. Bronson*, 26 R. I. 62, 58 Atl. 257, it was held that a title to real estate is not a marketable title where a loan company declines to take a mortgage on the property because its counsel will not certify the title. There is ample authority to support this general proposition, although we are not called upon, in this case, to accept it in its entirety: See *Moore v. Williams*, 115 N. Y. 586, 12 Am. St. Rep. 844, 22 N. E. 233, 5 L. R. A. 654; *Kane v. Rippey*, 22 Or. 296, 23 Pac. 180; *Harrass v. Edwards*, 94 Wis. 459, 69 N. W. 69; *Vought v. Williams*, 46 Hun, 639; *Herman v. Somers*, 158 Pa. 424, 27 Atl. 1050; *McCroskey v. Ladd* (Cal.), 28 Pac. 216; *Ford v. Wright*, 114 Mich. 122, 72 N. W. 197.

Without determining whether the respondents had a title to the land in question which was good in fact, we are satisfied that the record did not disclose a title which was marketable, "merchantable," and unencumbered. There was a serious and reasonable doubt as to whether the interests of the *Foley Mining Company*, the *Arcturus Mining Company*, and the inchoate interests of the wives of the assignees of the *Hayward contract* had been determined and extinguished. These questions were fairly debatable and cast such a doubt upon the title of the vendors as to render it unmarketable: *Hedderly v. Johnson*, 42 Minn. 443, 18 Am. St. Rep. 521, 44 N. W. 527; *Fairchild v. Marshall*, 42 Minn. 14, 43 N. W. 563; *Richmond v. Koenig*, 43 Minn. 480, 45 N. W. 1093. Under the evidence as disclosed by this record no prudent business man could be expected to accept the title, and no court should require him to do so. The risk of litigation and embarrassment of title should not be cast upon the purchaser.

The order appealed from is reversed, and a new trial granted.

A Marketable Title to land is one of such character as assures to the purchaser the quiet and peaceable enjoyment of the property, free from encumbrance: *Barnard v. Brown*, 112 Mich. 432, 67 Am. St. Rep. 432. A title is unmarketable when there is a reasonable doubt, in law or in fact, as to its validity: *Hedderly v. Johnson*, 42 Minn. 443, 18 Am. St. Rep. 521; *Herman v. Somers*, 158 Pa. 424, 38 Am. St. Rep.

851. A marketable title is one that is free from reasonable doubt: *Vought v. Williams*, 120 N. Y. 253, 17 Am. St. Rep. 634. A good title means not merely a title valid in fact, but a marketable title, which can be sold to a reasonable purchaser or mortgaged to a person of reasonable prudence as security for the loan of money: *Moore v. Williams*, 115 N. Y. 586, 12 Am. St. Rep. 844.

FRED v. BRAMEN.

[97 Minn. 484, 107 N. W. 159.]

HOMESTEAD—Exemption of Proceeds of Sale.—The proceeds of the sale of a homestead intended for use in the purchase of another homestead may be reached by garnishment. (p. 741.)

S. R. Child and Benjamin Drake, Jr., for the appellant.

Anthony T. Grotte, for the respondents.

485 JAGGARD, J. This appeal raises this single question: Does the process of garnishment reach money owing by the garnishee which was derived from the sale of the homestead of the defendants, and which the defendants intended at the time of the service of the garnishee summons to use in the purchase of another homestead within one year from the time the premises were sold?

The decision of that question depends entirely upon the relevant statutes. Section 5521 of the General Statutes of 1894 provides: "A homestead . . . shall not be subject to attachment, levy or sale upon execution, or any other process issuing out of any court within this state."

Section 5528 authorizes the owner of a homestead to sell and convey it without subjecting it to the claims of creditors. The vendee of such person acquires title free and clear from such claims of creditors. Section 5529 permits the owner of a homestead to remove therefrom for a period of six consecutive months without losing his homestead exemptions. He may prolong that period by filing an appropriate notice.

None of these sections provide in terms or contemplate the exemption of the proceeds of a sale of a homestead. To sustain the exemption claim in this case this court would not only have to read into the statute that moneys owing from the sale of a homestead were exempt, but that they remained exempt for the period of one year from the time of sale

whenever the original owners of such homestead intend to use the money in the purchase of a homestead within that year. We are of opinion that it would be judicial legislation to do in this respect what the legislature had failed to do. It is well settled that "the general rule is that all the property of a debtor is applicable to the payment of his debts. The effect of the exemption laws is to create exceptions to this general rule, so that a debtor claiming an exemption on any portion of his property must bring himself strictly within the terms of the law allowing exemptions; otherwise, the general rule must take its course. ⁴⁸⁶ The homestead law should be fairly, perhaps liberally, interpreted, but must not be strained": Berry, J., in *Ward v. Huhn*, 16 Minn. 142 (159).

The general rule is in accordance with this conclusion. "As a general rule, we think that it must be held, in the absence of any statutory provision to the contrary, that the voluntary sale of a homestead by a husband and wife is a complete extinguishment of the homestead right, and that the proceeds of the sale, until invested in other exempt property, are subject to execution": *Freeman on Executions*, sec. 235; *Thompson on Homesteads*, sec. 745; *Mann v. Kelsey*, 71 Tex. 609, 10 Am. St. Rep. 800, 12 S. W. 43; and see *Casebolt v. Donaldson*, 67 Mo. 308; *Giddens v. Williamson*, 65 Ala. 439. It is true that in *Watkins v. Blatschinski*, 40 Wis. 347, the Wisconsin court held otherwise.

The conclusion thus reached can affect the past only, for section 3458 of the Revised Laws of 1905 expressly provides that: "The owner may sell and convey the homestead without subjecting it or the proceeds of such sale for the period of one year after sale, to any judgment or debt from which it was exempt in his hands."

Order reversed.

LEWIS, J., Dissenting. I am very clear that under section 5528 of the General Statutes of 1894, the proceeds from the sale of a homestead are exempt from execution. This section expressly provides that the owner of a homestead may sell and convey the same, and the reasonable and fair construction is that the owner may have the benefit of the sale. I agree with the Wisconsin decision which was based upon a similar statute. As to the other cases cited they

are not applicable. But in the absence of statute the rule adopted by the majority is correct. I therefore dissent.

For Authorities upon the question decided in the principal case, see *Mann v. Kelsey*, 71 Tex. 609, 10 Am. St. Rep. 808; *Freiberg v. Walzem*, 85 Tex. 264, 34 Am. St. Rep. 808; *Wright v. Westheimer*, 2 Idaho, 962, 35 Am. St. Rep. 269; *Schuttloffel v. Collins*, 98 Iowa, 576, 60 Am. St. Rep. 216; *Johnson v. Agura*, 116 La. 634, ante, p. 562.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

HALEY v. MISSOURI PACIFIC RAILWAY COMPANY.

[197 Mo. 15, 93 S. W. 1120.]

RAILROADS—Negligence—Sufficiency of Complaint.—An allegation in a complaint that the defendant railroad company ran its train at a speed greater than fifteen miles an hour, and in that connection alleges the conditions then and there existing, which are such as to suggest the degree of care that ought to be exercised, is equivalent to alleging that the running of the train at that rate of speed under such conditions was negligence, and states a good cause of action for common-law negligence. (p. 748.)

NEGLIGENCE—Pleading.—Several acts of negligence of the same nature, all of which may be true and either of which, or all of which together, may have caused the accident, may be pleaded in one count. (p. 749.)

RAILROADS—Negligence—Excessive Speed.—It is the duty of a railroad company running its train through the street of a populous city to use ordinary care to regulate the speed of the train so as not to injure anyone, and a failure to exercise such care is common-law negligence. (p. 749.)

RAILROADS—Negligence—Speed in Cities.—In the absence of statute or ordinance regulating the rate of speed at which railroad trains may be run through city streets, the question of whether or not a given rate of speed is negligence is, ordinarily, one of fact, depending on the conditions surrounding the act. (p. 749.)

RAILROADS—Negligence—Speed in City Streets.—If, in an action to recover for injuries sustained by plaintiff in a collision between his team and a railroad train, the evidence shows such train, consisting of twenty freight-cars, propelled by two engines, came through a curve into a public street, where it was so narrow that the train could not pass a wagon therein without striking it, but where such wagon was liable to be; that the train was running at the rate of twenty miles per hour and at such speed that plaintiff did not have a reasonable time in which to drive out of danger; and that it was doubtful if the trainmen could, by the exercise of ordinary care, have stopped the train in time to have avoided the accident after discovering the danger, the question whether it was negligence to run such train at that rate of speed must be submitted to the jury. (p. 750.)

RAILROADS—Negligence—Speed in City.—The fact that the grade of a railroad track in a street of a populous city is such that a
(743)

freight train cannot ascend it without the aid of the momentum to be acquired by a high rate of speed does not justify the railroad company in running its train at such rate of speed, if to do so renders it liable to kill or cripple people who, without negligence on their part, are liable to be on the street, or if to do so renders it impossible for the engineer to stop in time to avert an accident after he has come in view of the danger. (p. 750.)

RAILROADS—Negligence—Pleading.—If it is sought to recover against a railroad company for injury to one on its track, allegations charging negligence in the matter of speed, and also that it negligently failed to stop its train in time to avoid the accident after the danger was apparent, are not necessarily inconsistent. (p. 750.)

RAILROADS—Negligence—Excessive Speed.—While it is negligence to run a railroad train into a place where danger of collision is to be expected, at such a rate of speed that it cannot be quickly stopped on the appearance of danger, still it is not negligence on the part of the railroad company, if it fails to stop its train after discovering the peril, if in fact the speed was such that the engineer could not stop in time to avoid the peril. (p. 750.)

RAILROADS—Contributory Negligence.—If a person injured in collision between his wagon and a railroad train knew that he was liable to encounter a train in the street where he was driving when the accident occurred, and that the street was so narrow at that point that he could not pass a train with his wagon, these facts do not render him guilty of contributory negligence per se. (pp. 750, 751.)

M. L. Clardy and H. G. Herbel for the appellant.

E. C. Eliot and V. M. Porter, for the respondent.

¹⁷ VALLIANT, J. Defendant has a railroad track extending from the south along the wharf or levee, as it is usually called, turning west into Poplar street, ¹⁸ thence along Poplar street west to a distant point in the city. While the plaintiff, on February 12, 1901, was driving a two-horse wagon in Poplar street a locomotive drawing a freight train on defendant's road struck the wagon, causing the plaintiff to be thrown therefrom and severely injured.

In the petition it is stated that there was at that time a city ordinance forbidding the running of a locomotive or train on a steam railroad in the city at a greater rate of speed than six miles an hour; that this was a steam railroad and that this locomotive and train were running at a speed in excess of that rate. After pleading the ordinance and the facts requisite to constitute a violation of it, the petition goes on to state that the defendant then and there "negligently and wrongfully ran its train . . . at a great and unlawful speed, to wit, at a rate of speed greater than six miles an hour and greater than fifteen miles an hour." Then follow averments

to the effect that the width of defendant's engine and cars was such that they so occupied, monopolized and obstructed the street that there was not left sufficient space in the street for an ordinary wagon or the wagon plaintiff was driving to pass without being struck by the engine, and under those conditions the defendant so wrongfully and negligently ran its train as to render it impossible for plaintiff to pass or escape; that it was a long train propelled by a locomotive at the rear end pushing, and another at the front drawing, and that defendant thus so operated the train that the man in charge of the rear engine could not see to the front in time to foresee and avoid collision; that the train was so negligently operated that it was not stopped or arrested as soon as might have been done after the engineer of the front engine discovered the plaintiff on the street and knew, or by the exercise of ordinary intelligence would have known, that only by prompt stopping of the train could the collision be avoided. The petition then charges¹⁹ that from those wrongful and negligent acts the accident resulted.

The answer was a general denial and a plea of contributory negligence. Reply, general denial.

The testimony for the plaintiff tended to prove as follows: Poplar street runs east and west; in that part of it to which our attention is now directed it is narrow. There is a stone curbing on each side marking off the space for sidewalks; the sidewalks are of cinders. The width of the street is twenty feet eight inches from curb to curb. When a train is on the track there is not space between it and the curb on either side for a wagon of ordinary width to pass. Defendant's track comes from the south along the levee and curves west across a vacant lot into Poplar street. Main street, running north and south, crosses Poplar street. From the west line of the levee to the east line of Main street the distance is two hundred and twenty-six feet. Main street there is thirty-eight feet six inches wide. Between Main and the next parallel street west there is an alley which comes from the north and ends in Poplar street. On the south side of Poplar street opposite the mouth of the alley is a vacant lot. From the east line of this alley to the west line of Main street the distance is one hundred and sixty-one feet; so that from the east line of the alley to the west line of the levee the distance is four hundred and twenty-five feet six inches. Standing at a point

in the center of the alley on the north line of Poplar street looking east one could see an object on the railroad track on the levee five hundred and forty or five hundred and forty-five feet distant. From the levee to the alley the track rises in grade one foot nine inches to the one hundred feet, making a total rise in that distance of ten feet eleven and one-half inches.

Plaintiff was a teamster for the Charter Oak Stove Company. He was driving a two-horse stake wagon, the driver's seat of which was seven or eight feet above ²⁰ the ground. He was going south in the alley; his aim was to go to the Iron Mountain depot, which was south of Poplar street; when he came to Poplar street, knowing that the railroad was there and that a train was liable to be coming one way or the other, he stopped a few feet from the mouth of the alley and listened for a train; hearing none he drove out of the alley into the street and looked each way but saw no train; he drove across the railroad track to the south side of the street, turned east, and drove twenty-five or thirty feet when he heard the whistle of the locomotive, and immediately thereafter saw it coming around the curve from the levee into Poplar street; it was coming fast and he realized his danger, he knew there was not space between the track and the curb for his wagon to pass the train; he estimated he was too close to the curb to cross it without swinging out so as to approach it at a more favorable angle and that he could not get into Main street on the south for the same reason; therefore, in the emergency, he turned his team to the northeast, aiming to cross the track and escape into Main street on the north. He had almost succeeded, his horses and the front part of the wagon had got into Main street, but the locomotive caught his east hind wheel, drew the wagon back into Poplar street, forced it through the side of the old brick house, breaking a hole into the wall, the plaintiff falling into the breach and the bricks of the broken wall falling on him, inflicting such injuries as resulted in the amputation of his left leg. It was a long freight train with a locomotive at each end and was going fifteen or twenty miles an hour. It was necessary for the train to go that fast in order to climb the grade of the curve.

One of plaintiff's witnesses, a mail carrier, testified that as he was opening a mail box that stood at the southwest corner of Main and Poplar streets he heard the whistle of the locomotive at Gratiot street, which was a few squares south, and he

saw a watchman then ²¹ come out of his watchhouse with a white flag in his hand and cross to the north side of the track; witness went into an office which was a few feet from the mail box, delivered some mail there, and when he came out the watchman was standing where he last saw him holding the flag in his hand; witness turned west on the south side of Poplar street and saw the plaintiff as he drove out of the alley across the track and turn east; just then the train came in sight around the curve. The plaintiff testified that he did not see the watchman until about the time he also saw the train. The watchman was waving a white flag. Plaintiff was familiar with the locality—said he had been over it a thousand times. On other occasions he had heard the whistle of coming trains at Gratiot street, but did not hear a whistle there at this time; the first he heard of this train was the whistle on the curve as it turned into Poplar street which was after he had driven across the track.

At the close of the plaintiff's evidence the court gave an instruction that forced the plaintiff to take a nonsuit with leave, but afterward the court sustained the plaintiff's motion to set aside the nonsuit, and the defendant appealed.

1. The first point of difference between appellant and respondent to which our attention is called is in reference to the allegations of negligence in the petition. As appellant construes the petition it charges only two acts of negligence, viz., a violation of the city ordinance regulating the speed of locomotives, and a failure to use ordinary care to avoid the injury after the engineer saw the plaintiff in peril. Respondent construes it to charge also common-law negligence as to speed. The significance of this feature of the plaintiff's case is in the fact that there was at the time of this accident no such ordinance as that pleaded in force in that part of the city, and, therefore, unless there was in the petition a charge of common-law negligence in ²² the matter of speed there was no charge of negligent speed at all. The fact is there had been a city ordinance limiting the speed of locomotives to six miles an hour at that place, but it had, before this accident, been repealed. That the plaintiff in the beginning relied, in part at least, on that ordinance, is shown by the fact that it is specifically pleaded by number, title and legal effect, and is followed by averments of facts constituting a violation of its terms. Before the trial, however, the plaintiff discovered

that the ordinance had been repealed and therefore made no offer of it in evidence.

But following the statements in the petition which set forth the supposed ordinance and facts constituting a breach of its requirements is another paragraph in which, without reference to the ordinance, it is said that the defendant then and there "negligently and wrongfully ran its train . . . at a great and unlawful speed, to wit, at a rate of speed greater than six miles an hour and greater than fifteen miles an hour."

Perhaps if the pleader when he drafted the petition had known that he could place no reliance on the ordinance he would have worded this other clause so as to leave it less liable to doubt that it was intended to state a case of common-law negligence in the matter of the speed of the locomotive. But we think it is sufficient as it is, taken in connection with what follows describing the situation. To say that the defendant negligently ran the train at a speed greater than fifteen miles an hour, and in that connection to state the conditions then and there existing, which are such as to suggest the degree of care that ought to be exercised, is equivalent to saying that the running of the train at that rate of speed, under those conditions, was negligence.

This ruling is not inconsistent with what was said in *McManamee v. Missouri Pac. R. R. Co.*, 135 Mo. 447, 37 S. W. 119, *Chitty v. St. Louis etc. R. R. Co.*, 148 Mo. 64, 49 S. W. 868, or *Cole v. Armour*, 154 Mo. 333, 55 S. W. 476, to which we are cited. In those cases it was said that a plaintiff cannot sue on one cause of action and recover on another, and that we say now. And in the *McManamee* case we said that when the plaintiff makes the general averment that the injury was caused by the negligence of the defendant, and follows that averment by averments of specific acts constituting negligence, the petition will be construed to mean that the negligence charged in the general averment was that which was constituted by the specific acts pleaded, and the plaintiff could not recover on proof of other acts constituting negligence not pleaded. That is the law. But in the case at bar the charge of common-law negligence does not rest on an averment of negligence followed by specifications of facts constituting a violation of the ordinance, but, after the pleader has done with the supposed ordinance, and the facts alleged constituting its

breach, in a new paragraph he charges that the defendant negligently ran its train at a great and unlawful speed and followed that charge with specifications of facts going to show the negligence without reference to the ordinance; we hold, therefore, that the petition charges common-law negligence.

If the supposed ordinance had been in existence the plaintiff would have had the right to plead it as he did, and to plead also that the train was running at a rate of speed which, under the circumstances, amounted to negligence at common law, because the facts stated as constituting a violation of the ordinance might be true and those stated as constituting common-law negligence might also be true. Several acts of negligence of the same nature, and all of which may be true, and either of which or all of which together may have caused the accident, may be pleaded in one count.

2. It is the duty of a railroad company running its train through a street of a populous city to use ordinary ²⁴ care to regulate the speed of the train so as not to injure anyone, and failure to use such care is negligence at common law. In the absence of a statute or ordinance on the subject, the question of whether or not a given rate of speed is negligence is, ordinarily, one of fact, not of law, and it depends on the conditions surrounding the act. A rate of speed that would be entirely safe under some conditions would be recklessly dangerous under other conditions. In the case at bar the evidence tended to show that the train was running eighteen or twenty miles an hour. If that was all there was to sustain the charge of negligence in the matter of speed, it would not be sufficient to raise the question and the court would not submit it to the jury. But in addition to that fact the evidence tended to show that the train, consisting of twenty or more freight-cars, propelled by two engines, one in the rear and one in front, came through the curve into the street at a point where the street was so narrow that the train could not pass the wagon without striking it, and where, it being a public street, a wagon of that kind was liable to be, and therefore to be expected, and that the speed at which the train was running was such as that the plaintiff did not have reasonable time in which to drive out of danger and such as to render it doubtful if the engineer on the front engine could, by the exercise of ordinary care, have stopped it in time to have avoided the collision after he discovered

the danger. Under those conditions it became the duty of the court to submit to the jury the question whether or not it was negligence to run the train at that rate of speed. If the grade was such that the train could not ascend it without the aid of the momentum to be acquired by a high rate of speed, that fact would not justify the defendant in running its train at such speed, if to do so rendered it liable to kill or cripple people who, without negligence on their part, were liable to be on the street, or if to do so rendered it impossible for the engineer to ²⁵ stop in time to avert such an accident after he should come in view of the danger. In such case there should be a watchman or watchmen stationed and the engineer should wait until the watchman signaled him to come and the watchman should be sure the street was clear before he gave the signal.

The petition charged that the defendant was negligent in the matter of speed and it also charged that the defendant negligently failed to stop the train in time to avoid the collision after the danger was apparent. These two charges are not necessarily inconsistent, because they might both be true—that is, the train might have been moving at a rate of speed that under the circumstances was negligent, and yet it might be that the engineer could have stopped it in time to have avoided the accident by the use of ordinary care. But the defendant would not be liable, under what we call the humanitarian doctrine, if the speed of the train was such as to render it impossible for the engineer by the exercise of ordinary care to have stopped it in time, although the speed may have been negligent. Therefore, whilst it is negligence to run a train into a place where danger of collision is to be expected at such a rate of speed that it could not be quickly stopped on appearance of danger, still it cannot be said that the defendant is liable for failing to stop the train after discovering the peril if in fact the speed was such that the engineer could not stop it.

Appellant insists that the evidence shows that the respondent was guilty of contributory negligence. Respondent was familiar with the locality; he said that he had been there a thousand times. That may have been a hyperbole, but it justifies the conclusion that he knew he was liable to encounter a train in that street, and that the street was so narrow he could not pass a train with his wagon; under those

circumstances the law imposed on him the duty of exercising a degree of care commensurate ²⁶ with the danger to be expected. But knowledge of the danger did not render it negligence per se for respondent to drive his wagon in the street. There are many streets in a great city in which driving in any kind of a vehicle is attended with well-known danger, yet that fact does not place one who attempts to do so entirely beyond redress if he is injured by the negligence of another while he himself is using the care that the dangerous conditions demand. Did this plaintiff in driving into that street exercise that degree of care that a man of ordinary prudence, under like circumstances and knowing the danger that was to be apprehended would have exercised?

Before driving out of the alley, he said he stopped and listened for a train but heard none. He said that on the east side of the alley was a board fence nine feet high. That fence, however, would seemingly not have obstructed his east view if his estimate of its height and that of the driver's seat on the wagon was correct. But he testified that when he drove out of the alley he looked each way for a train and none was in sight, that then he drove in a southeast direction across the railroad track to the south side of the street to a point twenty-five or thirty feet east of the alley, then he heard the whistle, and immediately thereafter the engine came in sight coming around the curve into the street. He said he was then too close to the curbstone to cross it without first swinging his wagon out and then turning in, and he could not turn south into Main street for the same reason, therefore in the emergency he decided that his only way of escape was into Main street on the north, and this he attempted with all his might, but unfortunately did not entirely succeed.

Gratiot street is several squares south of Poplar street; that is a whistling point for trains coming as this was. Plaintiff testified that on former occasions he had heard the whistle of trains at Gratiot street, but ²⁷ that he heard none there on this occasion. The mail carrier testified that he heard the whistle of this train at Gratiot street and that when the whistle sounded the watchman came out of his watch-house, which was at the south sidewalk of Poplar street a few feet east of Main street, and crossed over to the north side of the track waving a white flag, and that he was there

when the plaintiff drove out of the alley. Plaintiff testified that he did not see the watchman until after he had driven across the street. There was a vacant lot across the street into which the plaintiff might have driven if he had seen the train when he first emerged from the alley, but after he had driven to the south side of the street and to a point twenty-five or thirty feet east of the alley he could not have reached the vacant lot without turning his wagon around. and that he said he could not do so quickly as he could drive northeast into Main street.

The trial court could not, under this evidence, have said as a matter of law that the plaintiff was guilty of contributory negligence. Whether or not he was, was a question for the jury. The trial court was right in setting aside the non-suit. The judgment is affirmed.

Brace, C. J., Gantt and Lamm, JJ., concur.

Burgess and Fox, JJ., concur in the result.

Graves, J., dissents.

The Speed at Which a Railway Company may operate its cars without being chargeable with negligence is governed largely by circumstances and surrounding conditions: See Keiser v. Lehigh Valley R. R. Co., 212 Pa. 409, 108 Am. St. Rep. 872, and cases cited in the cross-reference note thereto. The speed of a street railway car is a fact from which negligence may be inferred, and whether such speed in any particular case constitutes negligence is a question for the jury: Marden v. Portsmouth etc. St. Ry., 100 Me. 41, 109 Am. St. Rep. 476.

The Violation of a Speed Ordinance by a Railroad company is generally regarded as prima facie negligence: Chicago etc. R. R. Co. v. Crose, 214 Ill. 602, 105 Am. St. Rep. 135, and cases cited in the cross-reference note thereto. One who is thereby injured, however, must ordinarily be free from contributory negligence, in order to recover therefor: Reidel v. Philadelphia etc. R. R. Co., 87 Md. 153, 67 Am. St. Rep. 328; Blanchard v. Lake Erie etc. Ry. Co., 126 Ill. 416, 9 Am. St. Rep. 630.

O'DONNELL v. KANSAS CITY, ST. LOUIS AND CHICAGO RAILROAD COMPANY.

[197 Mo. 110, 95 S. W. 196.]

CONSTITUTIONAL LAW—Appellate Jurisdiction.—If a case involving the constitutionality of a statute has been decided by the state supreme court and is pending in the United States supreme court on writ of error, the constitutionality of such statute is still an open question, and the state court will take jurisdiction of an appeal in a subsequent case involving the same question. (p. 754.)

CARRIERS—Passengers—Relation, How Created.—The relation of carrier and passenger arises out of a contract, express or implied, and it must be a contract between the individual and the carrier, and not between the individual and the carrier's agent, although the carrier may contract through its agent, but the contract must be the carrier's, not the agent's. (p. 758.)

CARRIERS—Passengers—Contract with Freight Brakeman.—A contract made by a person with a freight brakeman to allow such person to ride on his train in consideration of his rendering assistance in loading and unloading freight along the way is outside the scope of the brakeman's authority, not binding on the railroad company, and renders such person a trespasser, and not a passenger. (p. 758.)

RAILROADS—Passengers—Freight Trains—Burden of Proof.—A person who claims to have been a passenger and to have been injured by the failure of the railroad company to exercise in his behalf that high degree of care which the law in such case prescribes, and in his proof shows that he was riding in a boxcar on a freight train having a caboose attached thereto, into which he never presumed to enter, he has the burden of proof to explain before he can be adjudged to have been a passenger. (p. 758.)

RAILROADS—Passengers—Contract with Freight Brakeman.—The giving, by a person, of a small sum to a freight brakeman to induce him to allow such person to ride on his train, is for the benefit of the brakeman alone, and of no advantage to the railroad company. Such arrangement is beyond the scope of the authority of such brakeman, in violation of the known rights of the company, and constitutes such person a trespasser on the train, and not a passenger, nor a licensee. (p. 759.)

MASTER AND SERVANT—Contract by Third Person With Servant.—One who knowingly makes a contract with a servant to violate his duty to his master cannot be heard to say that such contract is binding on the master, or that out of that contract such a condition of affairs has arisen as gives him a right of action against the master. (p. 759.)

RAILROADS—Passengers on Freight Trains.—There is nothing in the fact of seeing a man handling freight from a freight train to justify a jury in drawing the inference that the conductor on such train knew that he had made a contract with the brakeman to ride on such train in consideration of handling freight at way stations. (p. 760.)

RAILROADS—Passengers on Freight Trains—Tacit Agreement.—The law will not imply a tacit agreement on the part of a

conductor of a freight train to constitute a person riding thereon a passenger in the absence of any circumstances, either that he considered himself a passenger, or that the conductor so considered him, and it will not imply such agreement from the mere fact that the conductor saw him on top of a freight-car in the train, where no passenger had a right to be, and when there is a caboose on the train provided for passengers. (p. 761.)

RAILROADS—Trespassers on Freight Trains.—A person who pays the brakeman of a freight train a trifling sum to be allowed to ride on such train, and by that means is received thereon, is not a passenger or a licensee, but a trespasser, even if he is received with the knowledge of the conductor, and the railroad company owes him no duty, except not to injure him, if, in the exercise of ordinary care, injury can be avoided after his peril is discovered. (p. 762.)

Scarritt, Griffith & Jones, for the appellant.

C. F. Mead and L. W. McCandless, for the respondent.

¹¹² VALLIANT, J. Plaintiff recovered a judgment for two thousand five hundred dollars as damages for injuries sustained by him in a train wreck on defendant's road. The trains in the wreck belonged to the Chicago and Alton Railway Company, ¹¹³ the lessee of the defendant's railroad. The appeal was taken by the defendant in this court because there is a constitutional question in the case—that is, the defendant, the lessor, contends that so much of section 1060 of the Revised Statutes of 1899, on which this suit is founded, which declares that the owner of a railroad in this state which leases its road to a corporation of another state "shall remain liable as if it operated the road itself," is in violation of certain sections of the constitution of Missouri and the fourteenth amendment to the constitution of the United States.

1. We have, in the case of *Markey v. Louisiana etc. R. R. Co.*, 185 Mo. 348, 84 S. W. 61, said all that we deem necessary to say on that question, but since, as we understand, that case is now pending before the supreme court of the United States on a writ of error, we will not now say that for the purpose of giving this court jurisdiction the constitutionality of that clause of that statute can no longer be drawn in question. We will therefore entertain jurisdiction of this appeal.

2. The case stated in the petition is substantially this: The railroad belongs to the defendant; it is leased and operated by the Chicago and Alton Railway Company. On June 6, 1902, the plaintiff was at Odessa, a station on the

railroad, aiming to go to Kansas City; a C. & A. freight train being there, the plaintiff asked a brakeman on the train the privilege of riding on it to Kansas City; the brakeman consented on condition that plaintiff would help unload freight along the route, to which terms plaintiff agreed. "Said arrangement was immediately called to the attention of the conductor of said train, and he, acting within the scope of his employment, expressly assented to it and permitted the plaintiff to ride upon said train until same was wrecked as hereinafter stated." The train on which the plaintiff entered under this agreement passed on to ¹¹⁴ a station seven miles west of Independence, where it stopped on the main track, and while standing there a regular passenger train, going fifty or sixty miles an hour on the same track, collided with it, with the consequence that plaintiff was thrown to the ground and severely injured. It was a rule of the Chicago and Alton Railway Company that freight trains were to keep out of the way of passenger trains with ten minutes or more time space, and also that when any train stopped between stations, one of the crew should go back half a mile or a mile with flag or lantern and place torpedoes on the track to warn an approaching train, and that was not done in this case. This freight train was four or five hours late and was running on the time of the passenger train, which it had no right to do. The men in charge of this freight train knew that the passenger train was due then and there, and they had opportunities to sidetrack their train and get it out of the way, but neglected to do so, and after the train stopped on the main track as it did they neglected to send back a flagman or to place torpedoes on the track, "so that when said passenger train approached around a curve the employes operating it had not sufficient notice of the presence of the freight train to stop and prevent the collision, but same became inevitable and unavoidable."

The answer was a general denial, and a plea that plaintiff was a trespasser on the train, concealed from view of the trainmen; that defendant was not liable for the acts of the Chicago and Alton Railway Company, and that plaintiff for a valuable consideration had executed a release of all claim for damages growing out of the accident. The reply put the new matter in the answer in issue.

The testimony on the part of the plaintiff tended to prove as follows: The plaintiff, with a companion named Doyle, started from Springfield, Illinois, to go to Kansas City. ¹¹⁵ Their purpose was to travel by railroad, but not to pay railroad fare. They managed to travel on different freight trains from Springfield, Illinois, to Odessa, Missouri. From Springfield to Jacksonville they paid nothing, from Jacksonville to Roodhouse they paid a brakeman fifty cents, and between Roodhouse and Odessa they paid another brakeman seventy-five cents. They were not in a caboose at any time, but on freight-cars. At Odessa they approached a brakeman and asked him to let them ride to Kansas City; the brakeman agreed to let them do so on condition that they would help unload freight, which they agreed to do, and during the journey they did assist in unloading freight at one or two stations. At one of these stations the conductor stood by and saw them at work and directed the plaintiff where to put the freight. From Odessa to a way-station, plaintiff and Doyle rode on a car loaded with rock ballast; after that car was dropped out of the train, they rode on top of a box freight-car, sitting on the running board, and the conductor passed them once or twice while they were there. At a point about five miles west of Independence the train came to a sidetrack on which some cars were standing which it was the business of this train to take in. The train ran past the switch and stopped on the main track. In stopping the train the conductor came out of the cupola of the caboose and set the brakes on the car on which the plaintiff was riding. As soon as the train was stopped it was started back and came to the switch and was going to back in on the switch, and just then the passenger train came around the curve and collided violently with the freight train, breaking several cars into fragments, the plaintiff and Doyle were thrown to the ground and injured. As soon as the freight train in backing reached the point of the switch and before it had quite stopped, the conductor and one of the brakemen got off and walked over to the cars on the switch track, and began taking the numbers of the cars ¹¹⁶ that were to be taken into the train, and were so engaged when the collision occurred.

On the part of the defendant the testimony tended to show that neither the conductor nor any one of the train crew

knew that these men were on the train. At Odessa a party of young men, fifteen or twenty, took passage on the train for Oak Grove, where there was to be a ball game played; the train was late and these young men, in order to make time, volunteered to assist in handling the freight at the stations and did so. It was not unusual along the line of that road for draymen who came to the stations and wanted to get the hauling to also assist the trainmen in handling freight, and the conductor testified that whilst he saw some men helping in that way he thought they were either these young men going to the ball game or draymen; he did not know that anyone was on the train with the understanding that he was to help handle freight in consideration of being carried; that he never saw either the plaintiff or Doyle until he saw them in the hospital the next day. The conductor also testified that whilst he had a time card showing that this passenger train was due there at that time and if he had thought of it he would have known it, yet the fact was he had for the moment forgotten it.

There was a good deal of testimony on both sides relating to the extent of the plaintiff's injuries, his treatment and the alleged release, but the foregoing is substantially the tendency of the evidence on both sides relating to the question of the plaintiff's right to recover at all.

At the close of the plaintiff's evidence the defendant asked an instruction in the nature of a demurrer to the evidence which was refused and exception taken.

Did the plaintiff by his pleading and proof make out a *prima facie* case?

The plaintiff in his brief contends that he was a passenger. If he is correct in that contention then he ¹¹⁷ is entitled to recover, provided his right of action has not been released, because the stopping of the freight train on the main track, when and where it was liable to be struck by the passenger train, was not the exercising of that high degree of care that a carrier owes to its passengers. But this plaintiff was not a passenger even by his own showing. The relation of carrier and passenger arises out of a contract, not necessarily an express contract, for it may be implied, but it is based on contract of one kind or another: 5 Am. & Eng. Ency. of Law, 2d ed., 486-513; 3 Thompson on Negligence, p. 105, sec. 2642; p. 737, sec. 3320; Reynolds v. St. Louis T. R. R., 189 Mo. 408, 107 Am. St. Rep. 360, 88 S. W. 50.

And the contract must be one between the individual on the one side and the carrier on the other; if the carrier is to be bound by the contract it must be a contract which he has made. When the carrier is a corporation it can contract only through its agent, but that does not alter the case; if it is to bind the corporation it must be the contract of the corporation, not that of the agent. Men dealing with corporations of a public character like that of a railroad company are presumed to know the ordinary scope of the duties of a servant of the company with whom the public is brought into daily contact; they know the ordinary scope of the duties of a brakeman, a locomotive engineer and a conductor. No man of ordinary common sense needs to be told that neither a locomotive engineer nor a brakeman has authority to make a contract in behalf of the corporation for the carrying of passengers or to receive the price of carriage; no man offers to make such a contract with either such servant with an honest purpose.

Men of ordinary common sense and common experience know the difference between a freight train and a passenger train, and the purpose of each, and they know the difference between a caboose in a freight train and a freight-car. Therefore, when a man comes into court claiming to have been a passenger and to have been injured ¹¹⁸ by the failure of the carrier to exercise in his behalf that high degree of care which the law in such case prescribes, and in his proof he shows that he was riding in a boxcar on a freight train, to which train there was a caboose attached into which he never presumed to enter, he has much to explain before the court will adjudge him to have been a passenger.

The plaintiff in this case realized in the beginning that to establish his claim to the character of passenger he must show that he was on the train by virtue of a contract, and therefore in his petition he said that before entering upon the train he made a contract with the brakeman whereby in consideration that he would help the brakeman handle freight the brakeman would allow him to ride on the train. The law charges the plaintiff with common sense and common knowledge in such matters, and therefore charges him with knowledge that the brakeman had no authority to make such a contract.

There is no difference in a legal point of view between the contracts this plaintiff made with the two other brakemen severally, whereby he paid fifty cents to one to allow him and his companion to ride from Jacksonville to Roodhouse, and to the other seventy-five cents between Roodhouse and Odessa; it was a corrupt bribe in each case, the money paid to the two other brakemen was for their use, not for the railroad company, and the agreement to assist in handling the freight which the railroad company had employed this brakeman, to do was a benefit, if benefit at all, to the brakeman, and in no sense an advantage to the corporation. Not only, therefore, was the alleged contract not within the scope of a brakeman's duties, but it was an agreement for a consideration personal to himself to induce him to violate his duty. Can one who knowingly makes a contract with a servant to violate his duty to his master be heard to say that that contract is binding on the master, or that out of that contract ¹¹⁹ such a condition of affairs has arisen as gives him a right of action against the master? If one by bribing your servant induces him to violate his duty to you, and either to take of that in the servant's care which belongs to you, or to impose on you a service which the servant had no authority from you to impose, who is the injured party, you or the man who tampered with your servant?

In popular estimation the giving of a small sum to a brakeman on a freight train to induce him to allow one to ride on the train in violation of the rights of the railroad company seems to be generally considered a trivial affair and we are not now intending to magnify it, we are not discussing it from a moral standpoint, but when a plaintiff comes into court pleading such a contract and basing his right to recover upon it, the contract must be classed under its proper head and called by its right name. It is a fraud. Here the plaintiff has come into court actually pleading his fraudulent contract and asking that by virtue of it he be adjudged, if not a passenger, at least a meritorious licensee for whose protection the railroad company was under a contractual obligation.

The petition says that this contract which the plaintiff made with the brakeman was immediately called to the attention of the conductor and he, "acting within the scope

of his employment, expressly assented to it." There was no proof of that allegation. There was proof on the part of the plaintiff tending to show that the conductor saw him handling freight at one of the stations, and saw him and his companion on top of a freight-car, from which the inference might be drawn that the conductor knew that the plaintiff was on the train; that is the extent of the legitimate inference to be drawn from that evidence. There is nothing in the mere fact of seeing the man handling freight to justify the jury in drawing the inference that the conductor knew that he had made a contract with the brakeman¹²⁰ of the kind pleaded. If the making of such contract had been within the scope of the brakeman's authority, there might be some reason for the contention that seeing the man handling the freight was a circumstance from which the conductor should draw the inference that he was employed under such a contract, but when the conductor knew that the brakeman not only had no such authority, but that to do so would be a violation of his duty, he had no right to draw such an inference. The defendant's testimony on that point was that the young men going to the ball game also assisted, and that it was not unusual for draymen who came to the station to get a job of hauling to assist in handling freight. Whilst, of course, the defendant's testimony is not to be taken into account on a demurrer to the plaintiff's evidence, yet when it is quoted by the plaintiff as an admission of the conductor that he was aware of the contract, all that the conductor said on that point is to be considered. Strictly construing the plaintiff's petition, he would not be entitled to prove a ratification by implication, because the petition in express terms pleads an express ratification, but conceding his right to prove a ratification by implication he has not done so. There is, therefore, no necessity for us to consider the question of whether one servant could ratify an illegal contract made by another servant in fraud of a common master.

This plaintiff is not here claiming that he was on the train by invitation, express or implied, of the conductor; he is claiming that he was there by right, by virtue of that contract.

We have referred to cases where it has been held that a person who goes upon a train at the invitation of the con-

ductor with the understanding that no fare is to be paid, or who enters the train without intending to pay and is permitted by the conductor to remain and be carried, is nevertheless a passenger, and entitled to the watchful care that is due a passenger. ¹²¹ But in such case the person was received as a passenger, acted as a passenger, and was carried in a vehicle provided for the carrying of passengers: *Wilton v. Middlesex R. R. Co.*, 197 Mass. 108, 9 Am. Rep. 11; *Whitehead v. St. Louis etc. R. R. Co.*, 99 Mo. 263, 11 S. W. 751, 6 L. R. A. 409. A learned text-writer on this subject has said: "Upon this question decisions are found which hold that, even where the conductor or other person in charge of the train has no right, as between himself and his principal, to invite or permit persons to ride free on the train, yet such a person, so riding free by invitation or permission of the conductor or trainmaster, will be entitled to the rights and to the protection of a passenger, unless he knows, or has reasonable ground to believe, that the conductor or trainmaster is inviting or permitting him so to ride in violation of his duty": 3 Thompson on Negligence, sec. 3321.

In the case at bar the conduct of the plaintiff indicated that he did not consider himself a passenger, he did not go into the caboose which was the only vehicle on the train provided for passengers and the only place on the train where the conductor would be sure to see him. His conduct was that of a man avoiding being seen by the conductor, and if he was seen it was by accident. The law will not imply a tacit agreement to constitute the plaintiff a passenger in the absence of any circumstances indicating either that he considered himself a passenger or that the conductor so considered him; it will not imply such a tacit agreement from the mere fact that the conductor saw him on the top of a freight-car in the train where no passenger had a right to be and when there was a caboose on the train provided for passengers.

But the plaintiff contends that if he was not a passenger he was a licensee, and therefore if not entitled to the high degree of care that belongs to a passenger he was entitled to the ordinary care which is the due of one who is on the train by leave, though not by right.

¹²² The only ground on which the plaintiff claims that there was any difference between his case and that of a mere

trespasser is his alleged contract—that is, he was on the train by permission of the brakeman and with the knowledge of the conductor.

If a visitor approaches your house in the usual way and is admitted by your servant, he cannot be said to be a trespasser, even though you had previously ordered your servant to admit no one. But if, knowing your order, the intruder should bribe your servant and by that means gain admission, in what respect is he better than a mere trespasser? If the plaintiff, knowing that he has no right to ride on a train without paying fare (and everybody knows that), gives a brakeman fifty cents to allow him to ride, and by that means is received on the train and carried, does that transaction raise an obligation on the part of the corporation to treat the plaintiff with more care and consideration than it would be required to treat him if he had merely intruded on the train stealthily and without leave? We have no fault to find with those decisions that hold that the conductor of a train en route is as to the government of that train the corporation, and that when he invites or knowingly permits one to ride free on his train, that person, in the absence of fraud on his part, is entitled to be treated as a passenger. But in such case, since the act of the conductor is out of the usual course, his invitation or permission will not be implied from equivocal circumstances and never in aid of a fraudulent scheme to avoid payment of fare.

Our conclusion is that the plaintiff on this train was a mere trespasser, and the railroad company owed him no duty except not to injure him, if by the exercise of ordinary care after his peril was discovered the injury could be avoided. The evidence shows that the conductor, unmindful for the time being that a passenger train was due then and there, negligently stopped his train on the main track, and was preparing ¹²³ to pick up some cars that were on the side-track, and while his mind was on that work the passenger train came in sight around the curve and it was then too late to do anything to avoid the collision.

It was negligence in the conductor to forget that a passenger train was due then and there, and for a passenger injured the company would be liable, but there is nothing in the evidence to justify the inference that the conductor knew that this train was coming; the most that can be said against him is

that he ought to have known it. Whilst it appears from the evidence that he did not send back a flagman or cause torpedoes to be put on the track, it does not appear that between the time he stopped and the time the passenger train came there was time enough to have done so. Assuming that the conductor knew that the plaintiff was on the train he did not know the peril in which the plaintiff was until he saw the passenger train coming, and then there was nothing he could do to avoid the collision.

Our conclusion is that the instruction in the nature of a demurrer to the evidence should have been given. The judgment is reversed.

All concur.

Persons Riding on Freight Trains by the invitation or permission of employes of the railroad company are not passengers: See the monographic note to *Illinois Cent. R. R. Co. v. O'Keefe*, 61 Am. St. Rep. 91. As to the duty and liability of the company toward such persons, see *Baltimore etc. Ry. Co. v. Cox*, 66 Ohio St. 276, 90 Am. St. Rep. 583, and cases cited in the cross-reference note thereto.

A Person Who Pays a Brakeman for the privilege of riding on a train, and is told to get on the platform of a baggage-car, and to get off at stopping places in order to keep out of sight, is not a passenger: *Mendenhall v. Atchison etc. Ry. Co.*, 66 Kan. 438, 97 Am. St. Rep. 380.

BARREE v. CITY OF CAPE GIRARDEAU.

[197 Mo. 382, 95 S. W. 330.]

MUNICIPAL CORPORATIONS—Torts—Liability for Act of Servant.—If a personal injury is inflicted upon another by the servant of a city while in the exercise of a corporate franchise conferred upon such city for the public good, and not for corporate, private advantage, the city is not liable for the wrongful acts of such servant; but if such servant was in the exercise of a power conferred upon the city for its private benefit, then it is liable for his wrongful act. (p. 766.)

MUNICIPAL CORPORATIONS—Liability for Act of Employé.—Corporations, whether municipal or aggregate, are held to the same liability as individuals; and if an agent or servant of the corporation, in the line of his employment, is guilty of negligence or commits a wrong, the corporation is liable in damages. (p. 766.)

MUNICIPAL CORPORATIONS—Liability for Wrongful Act of Servant.—A municipality is liable for negligence in the construction of its streets or sewers, and if it does such work by its servants, negligently, or in the line of their employment they injure some one by assaulting him or the like, the city is liable in damages. (p. 768.)

MUNICIPAL CORPORATIONS—Assault by Employé.—If an employé of a city deposits on its street a large quantity of gravel, while repairing the street, thus obstructing a street-car track thereon, and a street-car employé is assaulted by such city employé while engaged in removing such gravel, for the purpose of passing such obstruction, the city is liable for the injury thus inflicted by its employé. (p. 769.)

MASTER AND SERVANT—Liability for Injury by Servant.—If an agent or servant is employed to perform a certain piece of work, and, while in the line of his duty, injures another, even though he exceeds his authorized powers or disobeys his instructions, his employer is liable to the person injured for the damages sustained. (p. 769.)

S. M. Green and R. G. Ranney, for the appellant.

L. Caruthers and R. L. Wilson, for the respondent.

³⁸⁵ **BURGESS, P. J.** This is an action for ten thousand dollars damages alleged to have been sustained by plaintiff by reason of the wrongful and unlawful acts and assault by one Fritz Brunke, agent and servant of defendant, upon plaintiff.

The petition, leaving off the formal parts, is as follows:

“Plaintiff for his cause of action, by leave of court first had and obtained, for his amended petition herein, states that at all times hereinafter mentioned he was the lessee of the Cape Girardeau Street Railway Company, a corporation duly incorporated under and by the laws of the state of Missouri, and which said corporation was and is the successor or assign of W. A. Penney and L. S. Joseph, to whom was granted by the ³⁸⁶ defendant, by ordinance No. 484, duly passed and adopted by said defendant, the right to construct and operate a street railway within the City of Cape Girardeau, Missouri, and especially over and along and through Spanish street of said city; that by the terms of his said agreement with said street railway company he had the same right to operate and run street-cars over said streets in said city that the said street railway company has and had at said times, and the plaintiff was at the times hereinafter mentioned running and operating street-cars, under and by virtue of his said agreement, over the said streets within said city.

“That the defendant is and was at all said times a municipal corporation, organized and existing under the laws of the state of Missouri, and was and is a city of the third class, exercising all the powers and bound by all the duties of cities of that class. That at all said times said Spanish street of said city was a public highway, and it became and was then

and there the duty of the defendant to at all times keep the same in repair and free from obstructions; but not regarding its duty in that behalf, on or about the twenty-first day of August, 1902, the said defendant, by its agents, servants and employés, and especially its agent and servant Fritz Brunke, did, carelessly, negligently and wrongfully, place and deposit in and on said Spanish street, near Merriwether street, a large quantity of gravel or broken stones; and in so doing carelessly, negligently and wrongfully covered up and thereby obstructed the rails or track on which plaintiff's cars had to run, with said gravel or broken stones, so that it became and was then and there impossible for plaintiff to operate and run his cars over said streets and carry his passengers to their destinations without great danger to his said car and passengers. Thereupon plaintiff stopped his car, and for the purpose of avoiding said danger began to remove said gravel or broken stones from his said ^{ss7} rails and tracks; and the said Fritz Brunke, being then and there the agent and servant of the defendant, and engaged in placing said gravel or broken stones on said street for the purpose of repairing the same, and seeing the plaintiff removing said stones from his said rails and tracks, ordered him, the said plaintiff, not to interfere with said gravel or broken stones which had been placed on said rails as aforesaid by the said city defendant, and upon plaintiff's refusal to obey said order, the said Fritz Brunke then and there seized plaintiff by the right arm and jerked him away with great force and violence; and the plaintiff, to save himself from being dragged over the streets and injured, caught hold of one of the iron rods on his car with his left hand; but the said Brunke, as the said agent and employé of the defendant and still trying to prevent said gravel and stones from being interfered with, and for the purpose of protecting the defendant's streets from interference by the plaintiff, then and there negligently, carelessly and wrongfully jerked plaintiff's hand loose from said car with such force and violence that plaintiff's left arm was thereby greatly strained, bruised and injured. And to further protect defendant's streets and to prevent said gravel and broken stones from being removed, the said Brunke then and there struck, beat and otherwise abused this plaintiff by dragging him over the streets, taking him away from his car, and attempting to lock him up in a dungeon in a remote

part of the said city. That by reason of said injuries plaintiff's said left arm has been rendered useless and permanently disabled; that he has suffered great pain of body and distress of mind; that in consequence of said injuries inflicted as aforesaid he has been forced to give up his said contract with said street railway company, and ever since has been wholly incapacitated for any kind of labor; and altogether he has been damaged by reason thereof in the sum of ten thousand dollars, for which he asks judgment."

³⁸⁸ Defendant city demurred to the petition upon the ground that it does not state facts sufficient to constitute a cause of action. The demurrer was sustained, and, plaintiff, refusing to plead further, judgment was rendered for defendant on the demurrer. Plaintiff then filed motion for new trial, which was overruled. He appeals.

The principal question for consideration is whether defendant city is liable to respond in damages to plaintiff under the petition, admitting all of the material facts therein alleged to be true. By the charter of Cape Girardeau the general power is conferred upon the city to "open and improve streets, avenues, alleys and other highways, and to make sidewalks and build bridges, culverts and sewers within the city, and to exercise exclusive control over streets and alleys, and establish grades therefor."

It stands admitted by the demurrer that Fritz Brunke was the servant of defendant at the time of the commission of the injury complained of by plaintiff; but if the injury was committed while Brunke was in the exercise of a corporate franchise conferred upon the corporation for the public good, and not for private corporate advantage, the corporation is not liable for the wrongful acts of its servant. On the other hand, if Brunke was in the exercise of a power conferred upon defendant corporation for its private benefit, then the defendant is liable for the wrongful acts of its servant, as in the case of a private individual: *Murtaugh v. City of St. Louis*, 44 Mo. 479; *Williams on Municipal Liability for Tort*, sec. 11. In *Hilsdorf v. City of St. Louis*, 45 Mo. 94, 100 Am. Dec. 336, it is said: "Corporations, whether municipal or aggregate, are now held to the same liability as individuals, and will not be permitted to screen themselves behind the plea that they are impersonal, and that their acts are but the acts of individuals; and if an agent or servant

of a corporation, in the line of his employment, shall ³⁸⁹ be guilty of negligence or commit a wrong the corporation is responsible in damages."

The making and improving of the streets by the city and keeping them in repair is a ministerial function, and relates to corporate interests only. It is well settled in this state that a municipality is liable for negligence in the construction of streets or sewers: *Broadwell v. Kansas City*, 75 Mo. 213, 42 Am. Rep. 406; *Werth v. City of Springfield*, 78 Mo. 107; *Wegmann v. Jefferson City*, 61 Mo. 55; *Thurston v. City of St. Joseph*, 51 Mo. 510, 11 Am. Rep. 443.

In *McKenna v. St. Louis*, 6 Mo. App. 320, it is said: "Municipal corporations are considered by law in two aspects. In one, their functions are chiefly ministerial, and relate to corporate interests only. These include the making and improving of streets, the construction of sewers and other improvements and keeping them in repair, the holding of property for corporate purposes, etc. But as to these matters of strictly corporate interest there are often duties to be performed of a legislative or judicial character. In the other aspect, the corporation is regarded as holding a quasi delegated sovereignty for the preservation of the public peace and safety and the prevention of crime. This includes the maintenance of a police force, the appointment of officers charged with the public health, the establishing of regulations for the suppression of vice, and other matters of public concern in which all people have a common interest which it is the chief end of every good government to protect." The same rule is announced in *Donahue v. Kansas City*, 136 Mo. 657, 38 S. W. 571.

In *Bullmaster v. City of St. Joseph*, 70 Mo. App. 60, it is said the authorities "make plain the distinction between those powers of a municipal corporation which are public governmental functions delegated to it by the state and conferred upon it exclusively for the public good, such, for instance, as that to maintain a city ³⁹⁰ workhouse or hospital, or that to abate, prevent and remove nuisances, or that to establish a fire department and to pass ordinances to extinguish fires, or those relating to the public peace and good order, or the suppression of vice and immorality, or preserving the public health, caring for the poor, or providing for education, or those relating to the general welfare coupled

with judicial or legislative discretion touching the manner and mode of their exercise and the like; and those powers which are of a proprietary or private character which have been conferred for the private advantage of the municipality, as, for instance, those to construct and maintain sewers, to provide water for the use of the city and its inhabitants, or to make and repair streets, and other like powers granted for private municipal advantage and emolument. The officers of the municipality exercising the former class of powers are to be regarded as agents of 'the greater public,' while those of the latter are the agents of the lesser public. When the agents of 'the greater public' are guilty of nonfeasance or misfeasance in the exercise of any one of the former class of powers the principles of the maxim of respondeat superior do not apply, but the maxim does apply when the agents of the lesser public are guilty of nonfeasance or misfeasance in the exercise of the latter class of powers."

In *Maximilian v. Mayor*, 62 N. Y. 160, 20 Am. Rep. 468, it is said: "And the duty of keeping in repair streets, bridges and other common ways of passage, and sewers, and a liability for a neglect to perform that duty, rests upon an express or implied acceptance of the power and an agreement so to do. It is a duty with which the city is charged for its own corporate benefit, to be performed by its own agents, as its own corporate act: *Conrad v. Trustees of Ithaca*, 16 N. Y. 158. It is not always easy to say within which class a particular case should be placed. But when it is determined that the power ³⁹¹ and duty are given and taken for the benefit of the corporation as a corporate body, and the act to be done is to be done by it through agents of its appointment and under its control and power of removal, there is no doubt of its liability for negligent omission or negligent attempt at performance. When the powers created and duly enjoined are given and laid upon officers to be named by the corporation, but for the public benefit and as a convenient method of exercising a function of general government, and the corporation has no immediate control nor immediate power of removal of those officers, nor of their subordinates and servants, then it is not liable for their negligent omission or action."

It is true there are cases, some of which are cited in behalf of defendant, which are seemingly supposed by de-

fendant's counsel to be in conflict with the views we have expressed, but they are clearly distinguishable, and have for their bases principles quite in harmony with those relied upon as supporting this action. When the duty is upon the city itself and not upon public officers appointed by it, when it accepts the duty and has the power to perform it, and by its own agents, servants or employés, does the work, and does it in a negligent way, or while in the line of their employment, its servants injure some one, whether intentionally or by carelessness, it may be held liable: *Jones v. City of New Haven*, 34 Conn. 1.

The petition charges that it was the duty of defendant city to keep its streets in repair; that it was in the act of repairing the same when the injury occurred; that Fritz Brunke was the agent and servant of the defendant in making the repairs, and that the injury was inflicted in trying to prevent the repairs from being interfered with.

It is a well-settled principle of law that when an agent or servant is employed to perform a certain piece of work, and, while in the line of his duty, he injures ³⁹² another, even though he exceeds his authorized powers or disobeys his injunctions, his employer is responsible to the party injured for damages sustained by reason of such injury: *Harriman v. Stowe*, 57 Mo. 93; *Douglass v. Stephens*, 18 Mo. 362; *Minter v. Pacific R. R. Co.*, 41 Mo. 503, 97 Am. Dec. 288; *Garretzen v. Duenkel*, 50 Mo. 104, 11 Am. Rep. 405; *Ephland v. Missouri Pac. R. R. Co.*, 137 Mo. 187, 59 Am. St. Rep. 498, 37 S. W. 820, 38 S. W. 926; *Perkins v. Missouri Pac. R. R. Co.*, 55 Mo. 201; *Dillon on Municipal Corporations*, 4th ed., sec. 974.

Our conclusion is that the petition states a cause of action, and that the demurrer thereto should have been overruled. The judgment is therefore reversed and the cause remanded, to be proceeded with in accordance with the views herein expressed.

All concur.

The Liability of Cities for the Torts of its officers and employés is the subject of a monographic note to Goddard v. Harpswell, 30 Am. St. Rep. 376-413. As respects the performance of mere corporate duties, the rule of respondeat superior applies, and a city becomes liable for the acts of its servants or agents which it has authorized or adopted. It is otherwise, however, when the acts of its officers

Am. St. Rep., Vol. 114—49

pertain to political or governmental affairs: See *Rhobidas v. Concord*, 70 N. H. 90, 85 Am. St. Rep. 604, and cases cited in the cross-reference note thereto. If a city, in the exercise of its police power, employs a person to cut the weeds and grass in an alley, it is not answerable for his negligence in operating a mower whereby a child is injured: *McFadden v. Town of Jewell*, 119 Iowa, 321, 97 Am. St. Rep. 321.

JOPLIN BREWING COMPANY v. PAYNE.

[197 Mo. 422, 94 S. W. 896.]

ADVERSE POSSESSION—Color of Title.—Though Jurisdiction is not obtained over the person of the defendant in divorce proceedings, a sheriff's deed on a sale under execution based on a personal money judgment for alimony is color of title upon which adverse possession may be based. (p. 772.)

CONVEYANCES—Color of Title.—Any instrument in writing which purports to convey a certain tract of land, describing it, constitutes color of title in the grantee. (p. 773.)

ADVERSE POSSESSION—Color of Title.—If a person and those under whom he claims title were in actual, adverse, notorious and exclusive possession of a certain lot of land for ten consecutive years or more under color of title to the whole lot, or to part of the lot, claiming title to the whole, he becomes the absolute owner of the whole lot. (p. 773.)

ADVERSE POSSESSION—Homesteads.—A statute providing that no action for the recovery of lands or the possession thereof shall be commenced by any person unless he was, or those under whom he claims were, seised or possessed, within ten years prior to the action, applies to lands claimed as a homestead. (p. 774.)

DOWER—Adverse Possession as Bar.—A widow's right of action for the assignment of her dower accrues immediately upon the death of her husband, and is barred by ten years' adverse possession next thereafter. (p. 775.)

HOMESTEADS—Right to, When Vests in Wife.—A homestead right does not vest in a wife and her children at the time her husband abandons them and the homestead, but such right vests in them only upon his death. (p. 775.)

HOMESTEADS—Interest of Wife—Conveyance.—The interest of a wife in a homestead cannot be sold nor conveyed during the lifetime of her husband, and nothing passes by her quitclaim deed during such lifetime. (p. 775.)

H. S. Miller, for the appellant.

C. H. Montgomery and A. E. Spencer, for the respondent.

426 **BURGESS, P. J.** This is a suit to ascertain, determine and quiet the title to lot numbered 73, in Porter's addition to Murphysburg, now in the city of Joplin, Jasper county,

Missouri. The suit was commenced in the circuit court of Jasper county, but was by a change of venue transferred to the Barton circuit court, being tried at the January term, 1903, of said court.

The plaintiff claims title to the real estate in question by adverse possession under color of title, the color of title being claimed through a deed executed by the sheriff of Jasper county to G. W. Keller, on the sixteenth day of June, 1881, and also a quitclaim deed executed by Rosanna Hicks, formerly Rosanna Payne, wife of M. V. Payne, on June 16, 1881, to said Keller.

The defendants are the lawful heirs of Martin V. Payne, deceased; both parties to the suit admit that the common source of title was in Martin V. Payne.

The judgment on which execution was issued against Martin V. Payne and under which the lot in question was sold by the sheriff was a personal money judgment for alimony in favor of said Rosanna Payne, wife of Martin V. Payne, by reason of a divorce proceeding instituted by said Rosanna Payne against her said husband. The property was sold by the sheriff and purchased by G. W. Keller for one hundred and fifty dollars. Said Keller and wife, by quitclaim deed, dated February 4, 1884, transferred and sold said property to George Muennig and Nicholas Zentner. On August 7, 1888, Muennig and wife transferred their half interest in said property to said Zentner. Nicholas Zentner and wife, on March 8, 1894, sold and transferred, by warranty deed, said property to the plaintiff, the Joplin Brewing Company.

⁴²⁷ The material facts developed by the testimony are as follows:

Martin V. Payne bought the lot in question in 1875, and lived thereon with his wife and family of five children until 1879, when he abandoned his family and went to Texas. On April 12, 1880, Rosanna Payne filed a petition for divorce from her husband, said Martin V. Payne, on the ground of adultery; publication service was had, and the divorce was granted December 16, 1880. She was awarded the care and custody of her two infant children, and the court gave her a personal judgment for alimony for two hundred and fifty dollars on publication service. After Payne had gone to Texas, Mrs. Payne rented the place to Marion Hicks, her son in law, and for a time she lived with her said son in law.

Afterward she married another man named Hicks and went with him to North Missouri and made her home there on a farm. Her family were nearly all grown at this time; the youngest, Martin V. Payne, twelve years old at the time of the sale to Keller (died November 19, 1887), had lived with his sister and brother in law, Marion Hicks, until he moved off from the lot in controversy before the sale to Keller, and went to live with his sister, Mrs. Mefford, in Galena, Kansas.

James Walter Hicks, sixteen years old in 1881, worked in Lone Elm, and went to the house of his brother in law on Saturday nights.

Nancy Elizabeth Payne married Marion Hicks, who lived on the place in controversy until a few weeks before the sale to Keller.

Charles Lewis Payne, born in 1861, went to North Missouri in 1880, and made his home there.

Anna Mefford married some years before, and made her home in Galena, Kansas.

On June 16, 1881, when the lot was sold by the sheriff to Keller, Mrs. Payne executed to Keller a quitclaim deed to said property, but her then husband, Hicks, did not join with her in said deed. The money ⁴²⁸ for the lot was paid her, and she then went to North Missouri, where she made her permanent home. According to the evidence, Rosanna Payne Hicks died on May 25, 1900, and Martin V. Payne, her former husband, on November 19, 1887.

All the Paynes left the lot, remained away therefrom, and never made any claim thereto for more than twenty-one years, or until the defect of plaintiff's record title was pointed out by plaintiff's suit to quiet title.

The evidence tended to prove that the plaintiff and its grantors had been in adverse possession of the property in controversy for twenty-one years, and the defendants offered no evidence to rebut the evidence of plaintiff's witnesses in this regard.

The court, under the evidence submitted, found that for more than twenty-one years before the Payne heirs claimed the lot, the plaintiff and its grantors had been in the open, notorious, peaceable, adverse and continuous possession thereof, under color of title and claim of ownership, and that plaintiff is the absolute owner of the lot in controversy, and that the Paynes had no right or title in or to said lot. That the

homestead right, if not abandoned, was in the husband, Martin V. Payne; that the divorce of Mrs. Payne did not change his status with regard to the property; that the statute of limitations commenced to run against Martin V. Payne during his lifetime, and having commenced to run, did not stop at his death.

Defendants duly filed motion for new trial, which was overruled, and they appeal.

While the judgment on which execution was issued against Martin V. Payne, and under which the lot in question was sold by the sheriff, was a personal money judgment for alimony in favor of his wife, Rosanna Payne, in a suit for divorce by her against her said husband, and was void for the reason that the court had not acquired jurisdiction over said Martin V. ⁴²⁹Payne by service of process or otherwise, it does not follow that the sale of said lot to Keller and deed made to him by the sheriff on June 16, 1881, under execution issued upon said judgment, was not color of title. We think it was. Any instrument of writing which purports to convey a certain tract of land, describing the same, is color of title: *Hamilton v. Boggess*, 63 Mo. 233; *Hickman v. Link*, 97 Mo. 482, 10 S. W. 600; *Allen v. Mansfield*, 108 Mo. 343, 18 S. W. 901; *Suddarth v. Robertson*, 118 Mo. 286, 24 S. W. 151; *Wilson v. Taylor*, 119 Mo. 626, 25 S. W. 199; *Quick v. Rufe*, 164 Mo. 408, 64 S. W. 102.

Keller, on the sixteenth day of June, 1881, obtained from Rosanna Hicks (late Payne) a quitclaim deed to the same lot, and on the same day entered into the actual possession thereof, claiming title thereto, and so remained in possession until the fourth day of February, 1884, when he and his wife conveyed said lot, by deed, to George Muennig and Nicholas Zentner, from whom plaintiff, by mesne conveyances, acquired color of title to said property.

If, as the evidence tends to show, plaintiff and those under whom it claims title, were in the actual, adverse, notorious and exclusive possession of the lot in question for ten consecutive years or more, under color of title to the whole lot, or to part of the lot, claiming title to the whole, it is the absolute owner of said lot: *Rev. Stats. 1899, sec. 4266*; *Stevens v. Martin*, 168 Mo. 407; *Cunningham v. Snow*, 82 Mo. 587; *Allen v. Mansfield*, 82 Mo. 688; *Plaster v. Grabeel*, 160 Mo. 669, 61 S. W. 589; *Scannell v. American Soda Fountain*

Co., 161 Mo. 606, 61 S. W. 889. The statute of limitations began to run against Martin V. Payne when Keller took possession in 1881, and having been put in motion did not stop when Payne died, on November 19, 1887, nor would the fact that Mrs. Payne became entitled to dower, after adverse possession of the lot was taken by Keller, affect the operation of the statute: *Jones v. Thomas*, 124 Mo. 586, 28 S. W. 76.

⁴³⁰ Section 4262 of the Revised Statutes of 1899 provides: "No action for the recovery of any lands, tenements or hereditaments, or for the recovery of the possession thereof, shall be commenced, had or maintained by any person, whether citizen, denizen, alien, resident or nonresident of this state, unless it appear that the plaintiff, his ancestor, predecessor, grantor or other person under whom he claims was seised or possessed of the premises in question, within ten years before the commencement of such action."

It will be observed that this statute makes no exception of land claimed as homestead, but is broad enough to cover all kind of land, however held or occupied. It must, therefore, apply to the lot in question. The homestead law at the time Payne abandoned his family and homestead only exempted the homestead from attachment and execution for debts contracted after the acquisition of the homestead, and did not prohibit the mortgaging or sale of it by him; and it would seem that if these things could be done under the homestead law the statute of limitations would apply to land claimed as a homestead as well as to lands not so occupied. To hold otherwise would be to legislate into the statute of limitations a provision exempting homesteads from the operation thereof, which this court has no power or authority to do. It makes no difference whether Payne left his family and homestead with the intention of abandoning them or not. When Keller acquired possession of the homestead, with the intention of holding and claiming it as his own, his possession was adverse from that time on.

But defendants insist that, according to the evidence, Martin V. Payne and family occupied the homestead in question at their home, which was all the property they owned, from the time of its purchase, in 1875, until Mrs. Payne conveyed the lot by quitclaim deed to Keller on June 16, 1881; that the homestead became vested in her at the time

her husband abandoned his ⁴³¹ family; that she had the right to occupy the premises until dower was assigned, or during her life, and that as dower was never assigned, and she did not die until May 25, 1900, there could be no adverse possession of the property until that time. But the homestead right did not become vested in the wife and children of Payne until his death, November 17, 1887 (Rev. Stats. 1879, c. 39, sec. 2693), long after the statute of limitations had begun to run against him. Nor until the death of Payne was the wife entitled to dower, and if such right she had she never asserted it during her life so far as the record discloses, and no one can do so now that she is dead. Besides, her right of action for assignment of her dower accrued immediately upon the death of her husband, Payne, and was barred by ten years' adverse possession next thereafter: *Robinson v. Ware*, 94 Mo. 678, 8 S. W. 153; *Long v. Kansas City Stock Yards Co.*, 107 Mo. 298, 28 Am. St. Rep. 413, 17 S. W. 656.

In *Quick v. Rufe*, 164 Mo. 408, 64 S. W. 102, Marshall, J., speaking for the court, said: "The only obstacle in the way of the running of the statute of limitations, therefore, that has been suggested, is that the widow's dower had never been assigned to her, and therefore she was entitled to quarantine until her dower was assigned. But even this will not avail the plaintiffs, for, as pointed out, such quarantine is only a personal right of the widow to remain in the mansion-house of the deceased husband until her dower was assigned her, and the widow abandoned that right in 1866, when she sold the property, and in any event she has not attempted to exercise it since 1881."

But even if Mrs. Payne had a right of homestead, such right, during the lifetime of her husband, who was the owner of the lot in fee, was not such an interest in the homestead as could be sold; hence nothing passed from her to Keller by her quitclaim deed. In *Thompson on Homesteads and Exemptions*, section 452, it is said: ⁴³² "Whatever views are entertained as to the interest in land created by a statute of homestead—whether it rises to the dignity of an estate, or sinks to the level of a mere negative immunity from dispossession—all courts agree that it is not such an interest in lands as is alienable separately from the fee. In this respect it sustains a strict analogy to the right of dower.

Either may be released to the alienee of the fee so as to merge therein, but neither can be aliened separately. The same rule obtains as to exempt chattels. The chattel itself may be sold, and it will be exempt or not, in the hands of the vendee, accordingly as he answers the description of the statute of exemptions; the thing may be sold, but the exemption is a personal privilege, incapable of alienation."

Mrs. Payne abandoned the property as a homestead, and turned the possession thereof over to Keller, and there can be no question that, thereafter, his possession was adverse.

The trial court found that plaintiff and those under whom it claimed title to the lot in question had been in the open, notorious, peaceable, adverse and continuous possession thereof, under color of title and claim of ownership, for twenty-one years, and that plaintiff is the absolute owner thereof, and that neither of the defendants had any right, title or interest in or to said real estate. The finding was well supported by the evidence, and the conclusion reached was in accordance with the law of the case. Our opinion is that the judgment should be affirmed. It is so ordered.

All concur.

Any Instrument may Constitute Color of Title, within the meaning of the law of adverse possession, which purports to convey the land and shows the extent and boundaries of the premises claimed, although it is void as a muniment of title: See the monographic note to *Power v. Kitching*, 88 Am. St. Rep. 704. Thus a deed under a void decree, purporting to pass the owner's title, gives color of title to support adverse possession: *Waldron v. Harvey*, 54 W. Va. 608, 102 Am. St. Rep. 959. And a sheriff or other officer's deed, inoperative as a conveyance of title because of the invalidity of the judgment, or sale, or defects in the instrument itself, may be sufficient to support adverse possession: See the monographic note to *Power v. Kitching*, 88 Am. St. Rep. 723.

TOPPER v. PERRY.

[197 Mo. 531, 95 S. W. 203.]

MARRIAGE, COMMON-LAW—Declarations to Establish.—Declarations and admissions of a deceased that he was married to the plaintiff are competent evidence to establish the existence of a valid, common-law marriage, in an action by her to quiet the title to land owned by him in his lifetime. (pp. 783, 784.)

MARRIAGE, COMMON-LAW, Declarations in Disparagement of.—On the issue as to the existence of a common-law marriage, declarations of the alleged husband not in the presence of his alleged wife are admissible to disprove such marriage. (p. 784.)

MARRIAGE, COMMON-LAW—Mutual Agreement.—When consent to marry is manifested by words *de praesenti*, a present assumption of the marriage status is necessary in order to constitute a common-law marriage. (p. 786.)

MARRIAGE, COMMON-LAW—Sufficiency of Evidence to Establish.—Evidence that while a woman and man were riding together, he said that she was his wife, that a marriage ceremony was unnecessary if they would hold married relations, that she agreed to hold such relations with him, that afterward he acknowledged her as his wife, but that they did not live openly together as man and wife until five months thereafter, and that they were not regarded in the neighborhood as lawfully married, is not sufficient to establish a legal common-law marriage. (p. 788.)

W. B. Skinner and H. Brumback, for the appellants.

J. T. Burgess and French & Mayhew, for the respondents.

⁵³⁵ GANTT, J. This is an action brought to determine the title to certain real estate in Lawrence, Barry and Laclede counties, Missouri, under section 650 of the Revised Statutes of 1899.

The plaintiffs claim title to said real estate: the said Anna, a life estate by way of homestead and dower as the widow of Ambrose G. Topper, deceased, by virtue of a common-law marriage; and the minor, an estate by homestead and in fee simple as the only child and heir at law of said Ambrose G. Topper. The defendants are alleged to claim title to said real estate as heirs at law of said Ambrose G. Topper, deceased, but ⁵³⁶ plaintiffs deny that they are such heirs and that they have title, estate or interest whatsoever in said lands.

The petition prays that the court shall ascertain and determine the title and interest of the said parties respectively in and to such real estate. In their answer the defendants

admit that Ambrose G. Topper died intestate, leaving no bodily heirs, and assert that the defendants are the brothers and sisters of the deceased, the father and mother being dead, and that they are the next of kin and by virtue of the statutes of this state entitled to inherit said property. Further answering, the defendants say that Ambrose G. Topper, deceased, was never married to Anna D. Topper, as she now subscribes her name, neither at common law or otherwise; that said pretended marriage on the part of plaintiff to said Ambrose G. Topper, deceased, is only a pretense, and only claimed for the purpose of obtaining the property of said Ambrose G. Topper, deceased, and further answering they state that they have no knowledge whatever as to the existence of Ambrose G. Topper, Jr., and deny that any child was born to Anna D. Topper of which Ambrose G. Topper, deceased, was the father. They deny each and every other allegation in the petition.

The cause was tried at the November term, 1902, of the circuit court of Lawrence county, and taken under advisement until March, 1903, when final judgment was rendered for the defendants. A motion for new trial was filed in due time and was overruled and exceptions duly saved and an appeal taken to this court.

The evidence in substance on the part of the plaintiffs tended to prove that the plaintiff's, Anna D. Topper's, maiden name was Hoover; that at the time of the trial she was forty-four years old; that prior to her alleged marriage to Ambrose G. Topper she was the widow of one Stringer, and was residing with her brother, Mr. James H. Hoover, near Monett. She testified that her former husband, Stringer, was dead. ⁵³⁷ She had one child before she was ever married and had one child, Ernest Stringer, still living, who was born in 1879; that after Stringer's death, she made her home with her father until his death on the 13th of December, 1890, and after her father's death she resided with her mother until September 13, 1894, and after her mother's death, with her brother, for whom she kept house. She testified that she was first engaged to be married to Ambrose G. Topper in April, 1900; that he came to see her every Saturday and Sunday. As to her marriage with Ambrose G. Topper, she testified that he and she had been to a picnic at Aurora, and on the road home, midway between Aurora and

Verona, he acknowledged her to be his wife and she acknowledged him to be her husband; he said that she was his wife under obligations and wanted to hold marriage relations with her, and at first she objected, but he persisted that she was his wife. She wanted to have a ceremony before they held marriage relations, and he said it was not necessary; that marriage was simply a contract between a man and a woman, and that she was just as much his wife as she would be if the ceremony was said if they would hold marriage relations, and he insisted, and so then she agreed to hold marriage relations with him, and from that time on he acknowledged her as his wife. This was on the night of the Fourth of July, 1901. The marriage between Mr. Topper and her was kept secret, and she continued to live with her brother, Mr. Hoover, just as she had prior to the Fourth of July, 1901, but it was talked in the neighborhood and they were accused of being married, and she was called Mrs. Topper. On December 9, 1901, she went to live with deceased Topper, on his farm east of Monett. Before moving into the house on the farm, it was necessary that the same be repaired. Topper had used it for a granary to store his wheat and corn. He went to work to have the house repaired; during that time he was boarding at Mr. J. H. Hoover's. When they got ready to paper the house he ~~was~~ asked her if she could not come down and help him paper it, and she agreed to do so. She went to Pierce City and bought the material and then helped him and the young man put the paper on the house. Finally, when they got ready to move into the house, they moved all of her things from her brother's down to his place, and from that time she continued to live with him. She stated that Mr. Topper told her that some of the neighbors were coming to his house and they would be asking questions, and he told her to tell them that they were married. She stated that after they moved into the house she insisted that they have a ceremony performed, and he said it was not necessary; he said, "Annie, you are just as much my wife as Katie is old Bill Jones' wife," and said, "I will show you," and he went upstairs and got a book from his trunk and brought it down and read to her that marriage was just a contract for her to agree to be his wife and for him to agree to be her husband. He said that that was all there was of it; that the ceremony

was mannish; that it did not amount to anything. She testified that it was true that she was trying to get Topper to have a ceremony performed; that their relations were just the same as if she was his wife; she was not satisfied. She was going to hold on to her contract, was going to follow him and go with him just the same as if the ceremony was said; that he was good to her, and held out all the time he would be a man, and was going to carry out all of his obligations. Her son, Ernest Stringer, killed Mr. Topper. She was asked if he did not kill him over this question of Topper refusing to marry her according to law, and she answered, they did talk of having the ceremony performed and Mr. Topper had been out to Mr. Jones' in the evening; he was awful angry and threatened to kill Ernest. Ernest asked him what he meant by telling Jones he was going to fix him (Ernest), and Mr. Topper said he meant what he said, and got a shotgun, and Ernest got behind her and ⁵³⁹ began to shoot. Ernest insisted upon Mr. Topper procuring a marriage license, and offered to go himself to Mt. Vernon and get it. Mr. Topper said he would attend to his own business. She testified that during her stay at Topper's residence, she slept with Mr. Topper part of the time and part of the time in another room. She named a number of people who addressed her as Mrs. Topper in the presence of Mr. Topper, and that he made no objections to it. Other witnesses testify that they had said to Mr. Topper that they had heard that he was married, and he said, "Yes, he was married." Others testified that they had been at his house and that he and the plaintiff were living just like man and wife live. One woman, Mrs. Jones, said she talked to him about the relations he bore to Mrs. Stringer, and he said it was no one's business the way they were living but their own, and that they were man and wife in the sight of God. There was a great deal of talk in the neighborhood about them living together without a marriage ceremony, and the ladies in the neighborhood would not visit her on that account. Other neighbors testified to seeing them riding around the neighborhood in a buggy together. On the part of the defendants various other witnesses testified that Topper said to them that he was not married to plaintiff. Various other witnesses testified that they were not reputed to be married by the neighbors in the neighborhood.

P. C. Watson testified that he wanted to buy some ground from Topper in Monett and Topper agreed to sell it to him, whereupon Watson said to him, "It is rumored that you are married, and if you are, we want your wife to come down and sign the deed," and Topper said, "He was not married and his title would be good." Other witnesses testified that they were reputed to be married. All or nearly all of these witnesses testified that they understood that to be lawfully ⁵⁴⁰ married it was necessary to have a license and have the ceremony performed by a justice or a priest.

The testimony was that Ambrose G. Topper, Jr., the minor plaintiff in this case, was born March 31, 1902, and Ambrose G. Topper, deceased, was killed February 14, 1902. Other facts may be noted in the course of the opinion.

Two propositions are advanced by the plaintiffs to reverse the judgment of the circuit court. The first is that the circuit court erred in admitting on behalf of the defendants statements and declarations of Ambrose G. Topper, to the effect that he was not married to the plaintiff, alleged to have been made in her absence, to various witnesses, on the ground that such declarations were self-serving, and such in their nature as Ambrose G. Topper could not have introduced in his own behalf in his lifetime, and did not become competent after his death; and, second, that upon the whole evidence the court erred in rendering judgment in favor of the defendants.

1. The right of the plaintiffs to the lands in suit depends, of course, upon whether there was a valid marriage according to the common law between plaintiff Anna and Ambrose G. Topper, deceased. Upon this issue plaintiffs assumed the affirmative and offered, among other things, evidence of the declarations and admissions of Ambrose G. Topper that he was married to the plaintiff Anna; that those declarations and admissions were competent there can be no doubt whatever under the long line of adjudications in this country. But the defendants on their part also offered evidence that Ambrose G. Topper in his lifetime on various occasions stated that he was not married to the plaintiff Anna, and these statements of the deceased were admitted by the circuit court over the objections and exceptions of the plaintiffs, and it is this ruling of the court which forms the basis of the first assignment ⁵⁴¹ of error. This evidence pro and con was

directed to the proof of the acknowledgment by Ambrose G. Topper that plaintiff Anna was his wife.

In *Cargile v. Wood*, 63 Mo. 501, this court, in discussing this point, said: "The evidence adduced by the defendants strongly tends to show that Cargile, after he came to this state, treated Cynthia as his wife by holding her out to the community as such on all occasions; that he introduced her as his wife, requesting people to visit her, paid her bills, and applied to her in the presence of others such titles as husbands are accustomed to apply to their wives. . . . On the other hand, the plaintiffs introduced a strong array of testimony in contradiction to the defendants' evidence, and which tended to prove that Cargile and Cynthia were never married; that on many occasions they both declared they never had been married, and that Cargile said he never would marry her." It is true in that case no objections or exceptions were taken to the introduction of Cargile's statements that he was never married, and that he would never marry Cynthia.

In the very recent case of *Imboden v. St. Louis Trust Co.*, 111 Mo. App. 220, 86 S. W. 263, this question arose and was directly in issue, and the court of appeals said: "To rebut this evidence [that is, evidence tending to prove declarations of Imboden that they were married] the respondent offered evidence, over the objection of appellant, that Imboden, after the alleged contract of marriage, and not in the presence of appellant, made oral and written declarations that he was single and unmarried. . . . The admission of this testimony is assigned as error. In the *Berkeley Peerage Case*, 4 Camp. 415, Lord Mansfield said: 'From the necessity of the thing, the hearsay of the family as to these particular facts (marriage, birth and the like) is not excluded' if made before the dispute has arisen. In *Cope v. Pearce*, 7 Gill, 247, it is said: 'The term "pedigree" embraces not only descent and relationship, ⁵⁴² but also the facts of birth, marriage and death, and the times when these events happened,' and that in case of pedigree, the declarations of the deceased persons and of deceased members of the family are admissible to prove per se not only the issue but the fact of marriage. In *Craufurd v. Blackburn*, 17 Md. 49, 77 Am. Dec. 323, the plaintiff, to obtain letters of administration on

the will of Dr. David Craufurd, offered testimony to show that he was the son of Thomas B. Craufurd, deceased who was the son of Dr. David Craufurd. The maiden name of the mother of plaintiff was Betsy Taylor. To prove that she was lawfully married to Thomas B. Craufurd, the appellant offered, with other evidence, the declarations of Thomas B. Craufurd, made on several occasions, to the effect that Betsy Taylor was his wife; and also called his mother to the stand, who testified that she and Thomas B. Craufurd were married by a Catholic priest in the city of Washington, in 1835. To rebut this evidence, the appellee offered the declarations of Thomas B. Craufurd, made in the year 1837, and afterward, that he was not married to Betsy Taylor. The circuit court admitted this evidence over the objections of the appellant. On appeal, in respect to this character of evidence, the court said: 'This objection arises from a misapprehension of the rule. Such declarations are not held to be admissible or inadmissible according to the necessity of the particular case; but they are admitted as primary evidence on such subjects by the established rule of law, which, though said to have had its origin in necessity, is universal in its application. Nor do such declarations stand upon the footing of secondary evidence, to be excluded where a witness can be had who speaks upon the subject from his own knowledge. "Hearsay evidence" is of course inadmissible, if the person making the declaration is alive and can be called. But the declarations of a deceased mother, as to the time of the birth of her son, are admissible, though the father ⁵⁴³ is living and not called.' The ruling in this case was followed in *Jones v. Jones*, 36 Md. 447, 11 Am. Rep. 505, and *Barnum v. Barnum*, 42 Md. 251. In *Jewell's Lessee v. Jewell*, 42 U. S. 219, 11 L. ed. 108, it was held that the declarations of a deceased member of the family that the parents were never married were admissible in evidence, and that an advertisement in a commercial paper, at the place of residence of the parties, inserted immediately after the separation, was a part of the *res gestae* and admissible in evidence to rebut the evidence of marriage. The *Jewell* case was followed in *Fulkerston v. Holmes*, 117 U. S. 389, 6 Sup. Ct. Rep. 780, 29 L. ed. 915. In view of the foregoing authorities the court of appeals said: "The declarations of Imboden, both written and oral,

made after the alleged marriage, that he was single and unmarried, were admissible to rebut the testimony offered by appellant to prove the marriage."

In *Greenawalt v. McEnelley*, 85 Pa. 352, evidence as to the admission of the deceased husband of the marriage was admitted, and also evidence to the contrary. On this point the court charged the jury as follows: "Coming, then, to the question of admissions of the parties, they may be looked upon either as in corroboration or negation of the allegation made by Mrs. Gilson as to the fact of the marriage. It is testified by a number of witnesses that Benjamin Guffey at various times made admissions to different witnesses that he was married to this lady; and there are also in evidence admissions of a contrary character, or rather denials by him of the fact that he was married. The admission of Benjamin Guffey of the fact of his marriage would be against his interest, and if once established to have been repeatedly made, under circumstances evincing their truth, and not mere casual or jocular expressions, they would be of great weight. Denials, however, by him, of his marriage are declarations in his own favor, and are entitled to little weight to contradict his admissions in opposition to his interest.⁵⁴⁴ Therefore, under these suggestions, you will look at the question of his admissions, which, as we have stated, are against his interest, and are entitled to great weight, and also take into consideration his denials of the fact of his marriage, which, as we have stated, are declarations in his own favor, and are entitled to little weight in opposition to admissions against his interest." This declaration of law was approved by the supreme court. It is evident from the whole case that the court regarded the denials of the deceased of his marriage as competent, but submitted their weight to the jury for their consideration.

We are cited to numerous cases by counsel for the plaintiffs to establish the general proposition that declarations against interest are admissible, but declarations in support of interest are not admissible, because self-serving. As to this general proposition, there can be no doubt, under the decisions of this court, but the question here is one of pedigree, which we have seen by numerous decisions, is taken out of this general rule. We are cited by counsel to *Hill v. Hill's Admr.*, 33 Pa. 511, in which the court excluded declarations of the decedent to disprove his marriage with the plaintiff, but a reading

of that case will indicate that the court based its ruling upon the ground that there had been no attempt to prove the marriage by reputation, and the testimony was not, therefore, competent to meet anything which had been proved by the plaintiff. There is no discussion whatever of the principle of law involved on this point, but any way it is clear that the supreme court of Pennsylvania did not regard that case as in conflict with its subsequent decision in *Greenawalt v. McEnelley*, 85 Pa. 352, nor do we regard the decisions in *Hoffman v. Hoffman's Exr.*, 126 Mo. 486; 29 S. W. 603, and *Wood v. Carpenter*, 166 Mo. 465, 66 S. W. 172, as applicable to the question now under consideration.

In our opinion the evidence as to the denials of ⁵⁴⁵ Ambrose G. Topper to his having been married to plaintiff Anna was competent evidence. We think the decision of the St. Louis court of appeals on this question, in *Imboden v. St. Louis Trust Co.*, 111 Mo. App. 220, 86 S. W. 263, correctly declares the law.

2. But it is insisted that the judgment of the circuit court is not supported by the evidence.

In *Cargile v. Wood*, 63 Mo. 501, the law in regard to proof of marriage at common law when questions of the legitimacy of children and the devolution of property right are involved, was fully considered by this court. In that case *Wagner, J.*, speaking for this court, said: "Where parties have cohabited together and held themselves out as man and wife, and there are circumstances from which a present contract may be inferred, the law, out of charity and in favor of innocence and good morals, will presume matrimony. The law in general presumes against vice and immorality, and on this ground holds acknowledgment, cohabitation and reputation presumptive evidence of marriage. Mere cohabitation is not usually considered sufficient."

Bishop lays down the doctrine that "cohabitation, and the reputation of being husband and wife, are usually considered together in questions concerning the proof of marriage; the one being, in a certain sense, the shadow of the other. Some of the authorities favor the idea that reputation of itself may be received as sufficient proof *prima facie*, but it must be uniform and general; if there is a conflict in the reputation, it will not establish the marriage. On the other hand, its sufficiency in any case has been denied, unless there be accom-

panying proof of cohabitation": Bishop on Marriage and Divorce, 5th ed., sec. 438.

"Cohabitation and reputation are at best only presumptive proofs, and when one of these foundations is withdrawn, what remains is too weak to build a presumption ⁵⁴⁶ on. There is good sense in the Scotch law, by which cohabitation alone is considered insufficient, and which requires in addition 'habit and repute,' because, it is said, the parties may eat, live and sleep together as mistress and keeper, without any intention of entering into marriage."

It is well established in this state that a marriage without observing the statutory regulations, if made according to the common law, is a valid marriage, and that, by the common law, if the contract be made *verba de praesenti*, it is sufficient evidence of a marriage, or if it be made *per verba de futuro cum copula*, the cohabitation is presumed to be on the faith of the marriage promise. That is, however, merely a rule of evidence, and it is always competent, in such cases, to show by proof that the facts are otherwise. Under our law marriage is a civil contract, by which a man and a woman agree to take each other for husband and wife during their joint lives, unless it is annulled by law, and to discharge toward each other the duties imposed by law upon such relation. Each must be capable of assenting and must, in fact, consent to form this new relation. When the consent to marry is manifested by words *de praesenti*, a present assumption of the marriage status is necessary: *State v. Bittick*, 103 Mo. 183, 23 Am. St. Rep. 869, 15 S. W. 325, 11 L. R. A. 587; *State v. Cooper*, 103 Mo. 266, 15 S. W. 327; *Dyer v. Brannock*, 66 Mo. 391, 27 Am. Rep. 359; *Cartwright v. McGowan*, 121 Ill. 388, 2 Am. St. Rep. 105, 12 N. E. 737.

In *McKenna v. McKenna*, 180 Ill. 577, 54 N. E. 641, the question of the sufficiency of a common-law marriage was the point in decision. In that case the action was for separate maintenance by Julia McKenna against James McKenna, on their claim of an alleged common-law marriage contract. The plaintiff testified that the defendant came to her room, and she told him he must leave the room, and he said he would not; she said he could not stay there and he said he would; she said he could not stay there and he said, "Well, we are much ⁵⁴⁷ as man and wife now; I take you as man and wife before God and man," and he lifted his hands, and she said if he

was to stay in that manner, certainly she would let him stay, and he stayed all night. Speaking of this, the supreme court said: "Here there was no assent on her part. . . . The words here spoken are not equivalent to a promise on her part to become his wife. She merely 'let him stay.' The words are no stronger than those used in *Hantz v. Sealy*, 6 Binn. 405. In that case the plaintiff and the defendant had long lived in adulterous intercourse, although they considered themselves lawfully married. In fact, they had entered into a marriage contract, which was void, because the defendant had a former wife living from whom he had been separated by consent, but not legally. After a legal divorce was procured they were advised by their lawyer to celebrate a new marriage. The defendant said, 'I take you [the plaintiff] for my wife,' and the plaintiff, being told if she would say the same thing the marriage would be complete, answered, 'To be sure; he is my husband good enough.' The court held that these words of the woman did not constitute a present contract, but alluded to the past contract, which she always asserted to be a legal marriage. Nor do the facts as established by the evidence bring the case within the rule declared in *Elzas v. Elzas*, 171 Ill. 635, 49 N. E. 717. There the common-law marriage was sustained, but the man accepted the woman as his wife and she then and there accepted him as her husband."

Now, when we compare the plaintiff's evidence as to what occurred when she claims the marriage between her and Ambrose G. Topper was entered into, it will be seen that there was no more a mutual agreement between the parties in the present tense than in either of the above-mentioned cases. She says that on the road home between Aurora and Verona, "He said that she was his wife under obligations, and wanted to hold ⁶⁴⁸ marriage relations with her, and at first she objected, but he persisted she was his wife. She wanted to have a ceremony before they held marriage relations, and he said it was not necessary; that marriage was simply a contract between a man and a woman and that she was just as much his wife as she would be if the ceremony was said if they should hold marriage relations, and he insisted, and then she agreed to hold marriage relations with him, and from that time on he acknowledged her as his wife." It will be seen that as in *McKenna v. McKenna*, 180 Ill. 577,

54 N. E. 641, she does not testify to any promise on her part to become his wife, but simply to have marriage relations with him upon his assertion that she was his wife. There was abundant evidence on her part that she still regarded a ceremony as necessary, and that because of his refusal to obtain a license and have a marriage performed, a difficulty arose between him and the son of the plaintiff, Ernest Stringer, in which the latter shot and killed Ambrose G. Topper. Now the proof as to the assumption of the marriage status was that the alleged marriage was kept secret. According to plaintiff Anna's testimony, it was entered into on the Fourth of July, 1901, but they never openly began to live together until the 9th of December, 1901. On the question of the reputation that the plaintiff Anna and Ambrose G. Topper were married, we think the evidence strongly preponderates that they were not regarded in their neighborhood as lawfully married. The ladies in that neighborhood refused to visit her, and there was so much adverse criticism of their conduct that one of the neighbors remonstrated with Topper and insisted that he have a marriage ceremony performed. Clearly, the reputation in this case was wholly insufficient under the rule laid down by Bishop and approved by this court in *Cargile v. Wood*, 63 Mo. 501, to wit, that "if there is a conflict in the repute, it will not establish the marriage." The learned trial court had all these facts before it to determine whether there was a valid common-law marriage ⁵⁴⁹ between the plaintiff Anna and the deceased Topper, and he finds there was none. In determining whether he erred in so finding, it must be borne in mind that he had the witnesses before him and could observe their manner of testifying and had exceptional opportunity to weigh their evidence in the light of the requirements of the law as to the essentials of a valid common-law marriage. It must be remembered that the only testimony to the contract itself was that of the plaintiff Anna and the court, as a trier of the facts, may have discredited her evidence, at least, in part, or he may have reached the conclusion from her own statement of what occurred on the night of the Fourth of July, 1901, that there was no mutual agreement in the present tense between her and the deceased to be man and wife, or that the cohabitation between them was upon the faith of any such agreement. Certainly there was no such assumption of the marriage status after the

night for over four months that would indicate that these parties regarded themselves as man and wife from and after that night. There was no such open and continued cohabitation and holding themselves out to the world as man and wife as usually characterize the marriage relation. When the whole evidence in the case is considered together, the age of the parties, the fact that there was no legal impediment to a lawful marriage, if they so desired, and the ease with which a license could have been obtained, and the ceremony performed, and the insistence on the part of the plaintiff Anna that a ceremony should be performed, we do not think we would be justified in holding that the circuit court was not authorized to find, as a matter of fact, that the deceased, Ambrose G. Topper, never entered into a marriage contract with the plaintiff Anna, notwithstanding the cohabitation, which unquestionably was maintained by them for the two months during which she lived in his house.

⁵⁵⁰ For these reasons the judgment of the circuit court is affirmed.

. Burgess, P. J., and Fox, J., concur.

Declarations of a Person Since Deceased as to relationship, descent, birth or marriage are admissible in evidence when such matters are in controversy, and such declarations concern his family affairs: *Shorten v. Judd*, 56 Kan. 43, 54 Am. St. Rep. 537. The term "pedigree" embraces not only descent and relationship, but also facts of birth, marriage, and death, and the times when these events happened: *Washington v. Bank for Savings*, 171 N. Y. 166, 89 Am. St. Rep. 800.

Common-law Marriages are recognized as valid in most of the states of the Union: *Supreme Tent etc. v. McAllister*, 132 Mich. 69, 102 Am. St. Rep. 382; *Hilton v. Roylance*, 25 Utah, 129, 95 Am. St. Rep. 821; *McCausland's Estate*, 213 Pa. 189, 110 Am. St. Rep. 540; *Chamberlain v. Chamberlain*, 68 N. J. Eq. 736, 111 Am. St. Rep. 658.

KANSAS CITY INTERURBAN RAILWAY COMPANY v. DAVIS.

[197 Mo. 669, 95 S. W. 881.]

EMINENT DOMAIN—Exercise by Railroads.—The power given to railroad companies to condemn private property for use is to be exercised within strict limits. The law does not authorize the incorporating of a company with a roving commission, to go to any point in the state at will and condemn lands in spots. (p. 792.)

EMINENT DOMAIN—Exercise by Railroads—Meanders.—Under a charter authorizing a railroad company to build from one certain point to another, the company is not compelled to condemn land and build in a straight line between such points, but it must condemn and build with only reasonable meanders and reasonably approximating the length of line named in the charter, and it has no authority under such a charter to condemn land and build a line of road from one point named therein to a much more distant point than the other point named in the charter. (p. 792.)

EMINENT DOMAIN—Exercise of by Railroads—Maps.—A statute requiring a railroad company to file a profile map of the route intended to be adopted in the county for the purpose of the exercise of the right of eminent domain, is not satisfied with a map of a part or section of such route. (p. 792.)

EMINENT DOMAIN—Exercise by Railroads—Abandonment of Route.—A railroad corporation has no right to willfully abandon any portion of its chartered route, and if, in proceedings to condemn land for its road, it clearly appears that its intention is to construct only a part of the road called for by its charter, it will not be permitted to condemn the property. (p. 793.)

EMINENT DOMAIN—Exercise of Right by Railroad.—If a railroad corporation claiming the power to take private property for its use invokes the aid of a court, the court, before it will lend such aid, will require the corporation to show, without equivocation, that it is seeking to exercise such extraordinary power within the strict boundaries of the law. (p. 793.)

EMINENT DOMAIN—Parties.—If all nonagreeing land owners of a county whose land is sought to be taken are not made parties defendant in condemnation proceedings for a railroad right of way, the petition therein is fatally defective, and when such fact is made to appear the petition should be dismissed. (p. 795.)

EMINENT DOMAIN—Parties—Appeal.—If all parties to condemnation proceedings for a railway right of way try the case on the theory that one of the issues is that all nonagreeing land owners affected by such proceedings have not been joined as defendants, the point that such issue was not raised by demurrer or answer cannot be raised on appeal. (p. 796.)

J. F. Mister and W. Adams, for the appellant.

Moore & Handy, for the respondent.

674 VALLIANT, J. The plaintiff railroad company is seeking by this proceeding to condemn a right of way for

road through certain land of defendants in Jackson county. On filing the petition commissioners were appointed to assess the defendants' damages, and in due time they made their report assessing the value of the property taken at eight hundred dollars and the damages to the remaining property at two hundred and fifty dollars; exceptions to the report were filed by defendants, which, coming on to be heard, upon the pleadings and evidence, were by the court overruled, and a judgment of condemnation accordingly was entered, from which judgment the defendants have taken this appeal.

There are two points of chief importance presented for our consideration: the first is the insistence that the plaintiff has no corporate franchise to build a railroad between the termini stated in the petition; the second, that the owners of all the lands within the county to be taken for the plaintiff's right of way, with whom the plaintiff has been unable to agree on the compensation to be paid, are not made parties defendant to the suit.

1. In the petition the plaintiff states that it is a corporation "organized under the laws of Missouri ⁶⁷⁵ with full power and authority to construct, maintain and operate a standard gauge railroad for public use in the conveyance of persons and property in the state of Missouri from a point commencing at or about Forty-eighth street and Main street in Kansas City, Jackson county, Missouri, to a point in Swope Park, in said Jackson county, Missouri, in section 11, township 48, range 33, across and over the tract of land hereinafter mentioned; that the general direction of said line of railroad built and to be built by your petitioner from said beginning is easterly and southerly."

The petition then goes on to state that the plaintiff had made and filed in the office of the county clerk a profile map of the route proposed and intended to be used in the construction and operation of "said railway," etc. Then follows a statement that the defendants are the owners of a certain tract of land through which it is proposed to construct the road and a description of the land. After which it is stated that the general course of the proposed road is northeasterly through this land and that it is "an extension of the petitioner's line of railway from said beginning point above mentioned."

On the trial the plaintiff to prove its corporate authority to do what it was seeking to do introduced in evidence its charter, from which it appeared that it was organized as a railroad corporation under the laws of this state; that "Kansas City in Jackson county, Missouri, and Lee's Summit in Jackson county, Missouri, are the places from which and to which the road is to be constructed, maintained and operated," and that its length was to be twenty miles.

When this proof was made the defendants moved to dismiss the proceeding, for the reason, among others, of the discrepancy between the road proposed in the petition and that authorized by the charter. The motion was overruled and exception taken.

⁶⁷⁶ The power given to a railroad company to condemn private property for its own use is to be exercised within strict limits. The law does not authorize the incorporating of a company, with a roving commission to go to any points in the state at will and condemn land in spots. It is required of the parties seeking to be incorporated as a railroad company that they state in their articles of association the places from and to which the road is to be constructed, and beyond the course between the points named (except as the law authorizes branches) the corporation has no right to go. Under a charter to build a road from St. Louis to Kansas City the corporation would have no authority to build a road from St. Louis to Springfield, nor would a company which is chartered to build a railroad from Kansas City to Lee's Summit be authorized to build one from Kansas City to Swope Park. The plaintiff's charter calls for a line approximating twenty miles in length from a point in Kansas City to Lee's Summit. That does not mean, of course, a straight line of exactly twenty miles in length, but it does mean a line with only reasonable meanders and reasonably approximating the length named in the charter. And the law contemplates that the company, when it exercises the power of eminent domain, intends in good faith to build the road its charter calls for. Section 1056 of the Revised Statutes of 1899 requires the company, before constructing any part of its road, to file a profile map in the office of the county clerk of the road intended to be adopted in that county. That requirement of the statute is for the information of all concerned, especially those whose lands are to be taken, and the law is not satisfied

with a profile map of a part or a section of the route in the county.

A railroad corporation has no right to willfully abandon any portion of its chartered route; the right conferred carries the obligation to perform. Section 1161 of the Revised Statutes of 1899 declares that if the company ⁶⁷⁷ does not begin the work of construction within two years and finish it within ten years, it shall forfeit its corporate existence and its powers shall cease; then follows a proviso that if the company has in the meantime built a portion of its road it may retain and operate that portion. That proviso comes only as a modification of the forfeiture prescribed in the main body of the section; it is not intended to authorize a partial abandonment of the charter obligation, but it operates only when the condition of forfeiture has occurred and when without it all corporate rights would cease and the property become forfeited. It is not an authority to proceed to construct, but a permission to hold that which has already been constructed and which but for the proviso would be forfeited.

When a corporation, claiming the power to take private property for its own use invokes the aid of a court to carry out its purpose, the court will require it to show without equivocation that it is exercising the extraordinary power within the strict boundaries of the law. The court will not lend its aid to assist the corporation in such case until the corporation makes an unequivocal showing that it is doing exactly what the law authorizes it to do.

If this corporation had come into court saying in its petition, "We have a charter which authorizes us to build a railroad from a point in Kansas City to Lee's Summit in Jackson county, covering a line of about twenty miles in length as near as we can estimate it, but we have concluded to abandon that line, and in lieu thereof we purpose to build only a road from a point in Kansas City to a point in Swope Park in Jackson county and we need the defendant's property for our right of way," would anyone contend that on that showing the court would entertain the petition? Now, what is the difference in legal effect between a case stated in such a petition as that would be, and the case made by the evidence under the petition we have before us? Here the ⁶⁷⁸ plaintiff comes and says in its petition that it has a charter that authorizes it to build a railroad from a certain point in Kansas City to a

certain point in Swope Park; so far as the petition shows, that is all that plaintiff has a right to do, and it is all that it purposes to do. Yet when it comes to the proof the plaintiff shows a charter that authorizes it to build a road only from Kansas City to Lee's Summit. Taking the statements in the petition in the light of the charter introduced in evidence, they mean that the plaintiff intends to use this charter for the sole purpose of building a road to Swope Park and abandon the rest; and so far as the rights of these defendants are affected, if we allow their property to be taken under this proceeding, the effect is the same as if the plaintiff had come into court avowing a purpose to abandon the road its charter calls for.

A charter to build a road from Kansas City to Lee's Summit is certainly not the same thing as a charter to build a road from Kansas City to Swope Park; yet if the plaintiff in this case had, at the trial, introduced in evidence a charter authorizing it to build a road from Kansas City to Swope Park, it would have been proof of the averments in the petition of the plaintiff's corporate power; how, then, can it be said that a charter to build a road to Lee's Summit is proof of the same averments?

If plaintiff relies on the fact that Swope Park is on the line of its charter route from Kansas City to Lee's Summit then the burden of proving that fact rested on the plaintiff. Opposing counsel in their briefs are not agreed as to whether it is or is not, and we are unable to decide from the evidence.

Even if it appeared in evidence that Swope Park was on the line between Kansas City and Lee's Summit, that would not justify this proceeding because the whole record shows only a purpose to build a road ⁶⁷⁹ to Swope Park and negatives the purpose of building the road called for in the charter.

Plaintiff in its brief says that it was the duty of the defendants, who are the appellants, to have brought up the profile map that was in evidence, and that since they did not do so, the presumption must be indulged that the map proves what the plaintiff offered it in evidence to prove.

Section 1056 requires the railroad company to file a profile map of its route intended or already adopted through the county and that it shall be based on actual surveys. The petition states that "a profile map of the route proposed as

intended to be used in the construction and operation of said railway, which profile map shows the actual survey, location and distances of the roadbed of said railroad," etc., following the language of the statute, has been filed. That averment must be understood to mean just what it says, that the profile map shows the "said railroad," that is, the railroad previously described in that petition, a railroad from Kansas City to Swope Park. And if that is true, and if that map shows the location of the whole road in the county as the statute requires, and as the petition says it does, then it also is evidence of a purpose to abandon the road to Lee's Summit. Mr. Winner, a witness for plaintiff and its right of way agent, was asked on cross-examination if there had been any survey to Lee's Summit, to which he answered: "There has been what we call a preliminary survey, but no location. We have got to make a located map before we can condemn, and to do that we have to make sometimes three or four preliminary surveys." There was therefore no location, no profile map as the statute requires, of the road called for in the charter.

We construe this petition to mean that the plaintiff's purpose is to build a railroad from the point named in Kansas City to a point in Swope Park only, ⁶⁸⁰ and that under the charter introduced in evidence it has no authority to do so.

2. In *Kansas City I. R. R. Co. v. Nelson*, 193 Mo. 297, 91 S. W. 36, there was a demurrer to the petition on the ground (among others) that it appeared on the face of the petition that there were other lands in Jackson county to be taken, yet the owners thereof were not made parties defendant. The judgment of the circuit court sustaining the demurrer was reversed because (on this point) we held that although it appeared that those other land owners were not made parties defendant, yet it did not appear but that they had all agreed with the company as to the amount of compensation to be paid.

In the case at bar it did appear at the trial that there were other persons whose lands in the county were to be taken whose names were known and with whom the plaintiff had not been able to agree, who were not made parties defendant. Plaintiff now says that the defendants tendered no such issue in their answer, and were not entitled to interpose that objection.

In the answer filed by defendants they did say: "Defendants also aver that the petition does not aver that the owners of all such parcels of land as lie within the county have been made parties defendant." That is really in the nature of a demurrer, and as such it falls within the judgment of this court in the Nelson case, above cited. But although it is defective as a plea, in that it fails to state that no agreement could be made with those other parties, yet it is at least an attempted pleading of a material fact, and although defective, yet the defect was not brought to the attention of the court, but it was treated as a good plea and evidence on it without objection was received. In the cross-examination of Mr. Winner the plaintiff's right of way agent, he stated that there were other parties whose lands in the county were to be taken with whom he had not been able to agree, and was then ^Qasked: "Q. You did not make them parties to this one suit here? A. No, sir, we don't have to make any party except the party we are condemning to each suit." Proceedings of this kind as to the pleadings and in some other features are not within the Code of Civil Procedure; they are proceedings peculiar and are prescribed by the statute which, although it calls for a petition and prescribes its requisites, does not call especially for an answer. Both parties tried this case on the theory that that was one of the issues in it, one of the objections to the validity of the proceeding on which the defendants were insisting, and it is too late now to say that there was no such issue in the case.

Section 1264 of the Revised Statutes of 1899, which prescribes the course to be pursued when the corporation seeking to condemn cannot agree with the land owners, requires that a petition shall be filed and prescribes what the petition shall contain, and it says: "To which petition the owners of all such parcels as lie within the county or circuit shall be made parties defendant, by name, if the names are known, and by the description of the unknown owners of the lands therein described, if their names are unknown." That is such a plain and unequivocal requirement of the statute that there is no call for judicial interpretation. The question has never been presented to this court before. The statute in its present form was enacted in 1866: Laws 1865-66, p. 47.

In *Quincy etc. R. R. Co. v. Kellogg*, 54 Mo. 334, and *Missouri Pac. R. R. Co. v. Carter*, 85 Mo. 448, it was held that under this statute nonresidents could not be joined with residents in the same petition, but those two decisions on that point were overruled in *Union Depot Co. v. Frederick*, 117 Mo. 138, 21 S. W. 1118, 1130, 26 S. W. 350.

In the brief for the plaintiff it is argued that the language of the statute above quoted is qualified by the terms of section 1267 of the same article. The whole of that section is contained in these words: "Any number ^{ess} of owners, residents in the same county or circuit, may be joined in one petition, and the damages to each shall be separately assessed by the same commissioners." The argument is that the term "shall be" in section 1264 is to be cut down to "may be," to harmonize with section 1267. These two sections are parts of the same original act of 1866. If the purpose of the lawmakers in enacting section 1267 was to qualify the term "shall be" in the previous section they were not driven to writing another section to accomplish that purpose, because the previous section had not passed out of their keeping, and they could have made the change by simply erasing one word and substituting another. The argument is that the words "shall be" in 1264 are to be read "may be" to harmonize with 1267. But to do so we would have to cut out of 1264 another sentence which also means "shall be." The closing sentence in that section is: "It shall not be necessary to make any persons parties defendant in respect to their ownership, unless they are either in actual possession of the premises to be affected, claiming title, or have a title to the premises appearing of record upon the proper records of the county." Why say it shall not be necessary to make persons parties defendant unless, etc., if the making of them parties was already not necessary but was a matter left to the will and pleasure of the plaintiff? The word "necessary" in that connection shows that the lawmakers intended "shall be" to mean an imperative command.

In reading section 1267 in connection with the sections that preceded it, the only legislative purpose that it seems to have is that it expressly says that all the assessments in one county or circuit are to be made by the same commissioners; that is the only new feature that seems to be in-

roduced by that section. Section 1264 requires all the non-agreeing land owners in the county or circuit whose rights are to be affected to be made parties defendant, then section 1266 directs ^{ess} the appointment of commissioners, and requires the damages allowed each land owner to be stated separately. We think the fair interpretation of that section means that one set of commissioners is to do the whole work, but to the legislative mind it may have occurred that a case might arise where there would be a large number of parties defendant along the line from one end of the county or circuit to the other, and the court might be puzzled to know if it was intended in section 1266 to give the whole matter into the hands of one set of commissioners or to appoint more than one set, and therefore section 1267 was inserted to make the point clear. But whatever else may have been the purpose of section 1267, we are satisfied that it does not cut down the meaning of the terms "shall be" and "necessary" in section 1264. It is no part of our duty to find a reason for the law as given us by the General Assembly; it is sufficient for us to understand what the law is as given and to apply it to the case in hand.

We hold that the petition in this case is fatally defective because it does not include as parties defendant other non-agreeing land owners in the county whose lands are to be taken for the right of way of plaintiff railroad.

The judgment is reversed and the cause remanded, with directions to dismiss the proceeding.

Brace, C. J., Gantt, Burgess, Lamm and Graves, JJ., concur.

Fox, J., concurs in paragraph 1 and in the result, but expresses no opinion as to paragraph 2.

Statutes Conferring the Right of Eminent Domain must be construed strictly: *Chestatee Pyrites Co. v. Cavenders Creek Gold Min. Co.*, 119 Ga. 354, 100 Am. St. Rep. 174.

The Power of Eminent Domain conferred upon railroad companies gives them a discretion in selecting their location: *Kansas City etc. Ry. Co. v. Northwestern etc. Co.*, 161 Mo. 288, 84 Am. St. Rep. 717; *Postal Tel. etc. Co. v. Oregon Short Line etc. Co.*, 23 Utah, 474, 90 Am. St. Rep. 705.

CASES
IN THE
SUPREME COURT
OF
MONTANA.

WESTERN PLUMBING COMPANY v. FRIED.

[33 Mont. 7, 81 Pac. 394.]

MECHANIC'S LIEN.—A verification to a claim of lien "that the matters and things therein stated are true, to the best of his knowledge, information and belief," is fatally defective. (p. 800.)

MECHANIC'S LIEN.—If There is No Affidavit attached to a claim of lien, there is no lien. (p. 800.)

MECHANIC'S LIEN—Personal Judgment.—A Party Seeking to Foreclose a Mechanic's Lien, Though He Fails to Establish It, may have a personal judgment in the same action against the person liable for the materials furnished or work and labor done. (pp. 800, 801.)

L. P. Forestell, for the respondent.

O. M. Hall, for the appellant.

HOLLOWAY, J. This action was brought by the Western Plumbing Company, a corporation, to enforce a mechanic's lien. The allegations of the complaint were denied in the answer, and upon the issues thus framed the cause was tried. Upon the trial plaintiff offered in evidence the lien which was verified as follows: "John Maus, being first duly sworn, on oath says that he is the president of the Western Plumbing Company, a corporation, and as such makes this affidavit; that he has read the foregoing claim of lien, knows the contents thereof, and that the matters and things therein stated are true, to the best of ^o his knowledge, information and belief." This was objected to on the ground that the lien, not being verified in the manner required by law, was invalid and of no effect. This objection was sustained, and thereupon counsel for the defendant moved the court to dismiss the plaintiff's action, for the reason that, it being an

action to foreclose a lien, and there being no proper lien in the case, no personal judgment could be entered against the defendant. This motion was likewise sustained, the action dismissed, and a judgment of dismissal entered. From this judgment this appeal is prosecuted.

The only errors assigned are, first, the order of the court sustaining the objection to the introduction of the lien, and second, the order of the court sustaining defendant's motion to dismiss plaintiff's action. Each of these questions has been determined by this court.

1. Section 2131 of the Code of Civil Procedure as amended by an act of the seventh legislative assembly, approved March 7, 1901 (Sess. Laws 1901, p. 162), provides, among other things: "Every person wishing to avail himself of the benefits of this chapter must file with the county clerk of the county in which the property or premises mentioned in the preceding section is situated, and within ninety days after the material or machinery aforesaid has been furnished, or the work or labor performed, a just and true account of the amount due, after allowing all credits, and containing a correct description of the property to be charged with such lien, verified by affidavit."

In *Benepe-Owenhouse Co. v. Scheidegger*, 32 Mont. 424, 80 Pac. 1024, this court held that a complaint verified in substantially the same manner as this lien is not an affidavit. The reason for the rule announced in that case is equally applicable in this: *Boisot on Mechanics' Liens*, sec. 452.

The statute provides that the lien is made up of, first, the account; second, the description of the property; and, third, the affidavit. The account is required to be a just and true one, showing the amount due the claimant after allowing all ¹⁰ credits, and there must be a correct description of the property to be charged with the lien. This account and description is required to be verified by affidavit, and the affidavit is made an essential part of the lien—as much so as the account or the description of the property. Therefore, if there was no affidavit attached to the account and description, there was in fact no lien, and the court properly excluded the pretended one offered in evidence.

2. May a party seeking to foreclose a mechanic's lien, although he fails to establish his lien, nevertheless have a personal judgment in the same action against the person liable

for the materials furnished or work or labor done? This question was answered in the affirmative in *Goodrich Lumber Co. v. Davie*, 13 Mont. 76, 32 Pac. 282, and in *Aldritt v. Panton*, 17 Mont. 187, 42 Pac. 767, and those decisions are conclusive of the question here. In this respect the court erred, and for this error the judgment is reversed, and the cause remanded for further proceedings.

Brantley, C. J., and Milburn, J., concur.

Under a Mechanic's Lien Law requiring that claims for liens shall set forth the dates when the materials were furnished, an affidavit merely alleging that the claim contains a full and true statement of the materials furnished, and omitting to certify that the statement or claim is true, in so far as it sets forth the times when the materials were furnished, is insufficient: *Orr etc. Hardware Co. v. Needham Co.*, 169 Ill. 100, 61 Am. St. Rep. 151.

MOORE v. SKYLES.

[33 Mont. 135, 82 Pac. 799.]

AGENCY—Special Agent, Who is.—One intrusted with a postal order and directed to see if it is all right, and, if so, to cash it, is a special agent. (p. 802.)

AGENCY.—All Persons Dealing With an Agent are Bound to Ascertain the Scope of His Authority; and if they do not, they deal with him at their peril. (p. 802.)

A POSTAL ORDER Having Thereon More Than One Indorsement is made invalid by section 4037 of the Revised Statutes of the United States. (p. 803.)

AGENCY—Sale of Property, When does not Bind Principal.—One intrusted with a postal order to ascertain whether it is all right, and, if so, to collect it, has no authority to sell it, and if he does so, receiving and retaining the purchase price, and the order subsequently coming to the principal is collected by him, he is under no liability to such purchaser. (p. 803.)

B. J. McIntire and W. H. Poorman, for the appellant.

F. L. Gray, for the respondent.

136 **HOLLOWAY, J.** This action was commenced in a justice of the peace court by the plaintiff to recover the sum of thirty-one dollars. Judgment was rendered in favor of plaintiff, and defendant appealed to the district court, where the plaintiff again prevailed, and the defendant appeals to

this court from the judgment and from an order denying his motion for a new trial.

The facts disclosed by the record are: That on October 13, 1903, the postoffice at Kendall, Montana, issued to Alex. Wilson a postal money order for thirty-one dollars, payable at Kalispell, Montana. This money order was indorsed by Wilson and transferred to this defendant, Skyles. Upon December 1, 1903, Skyles sent the order by one J. J. Kelley to the postoffice at Kalispell, with instructions to see if it was all right, and, if so, to get it cashed. Kelley took the order to the postoffice at Kalispell, where payment was refused for the reason that the order was then payable to Skyles and Skyles had not indorsed it. Kelley then sold the order to this plaintiff, indorsed it with his own name, and received for it the full sum of thirty-one dollars. Plaintiff then presented the order for payment, which was again ¹³⁷ refused for the reason advanced to Kelley. Moore then sent the order back to the defendant at Whitefish, Montana, for his indorsement; but, as the defendant had not received anything whatever from Kelley for the order, he indorsed it, sent it to the postoffice department, and himself received payment in full. Moore then brought this suit for damages in the sum of thirty-one dollars, the face value of the order. These facts were brought out by the testimony of plaintiff's witnesses, and this is the substance of all the evidence introduced. The defendant did not offer any testimony, but moved for a nonsuit, which was denied. The jury returned a verdict in favor of the plaintiff, and judgment was rendered thereon.

From these facts it appears that Kelley was a special agent of Skyles, within the definition given in section 3072 of the Civil Code, which reads as follows: "Sec. 3072. An agent for a particular act or transaction is called a special agent. All others are general agents": See, also, *Butler v. Maples*, 9 Wall. 766, 19 L. ed. 822. All persons dealing with an agent are bound to ascertain the scope of the agent's authority, and if they do not they deal with him at their peril: *Bank of Deer Lodge v. Hope Min. Co.*, 3 Mont. 146, 35 Am. Rep. 458; *First Nat. Bank v. Hall*, 8 Mont. 341, 20 Pac. 638; *Dodge v. Birkenfeld*, 20 Mont. 115, 49 Pac. 590; *Helena Nat. Bank v. Rocky Mt. Tel. Co.*, 20 Mont. 379, 63 Am. St. Rep. 628, 51 Pac. 829.

When this order was presented to Moore he was apprised by the order itself, first, that it was originally payable to Wilson; second, that Wilson had transferred the same to Skyles by indorsement; third, that no further indorsement of it could be made without rendering the order invalid under section 4037 of the Revised Statutes of the United States (U. S. Comp. Stats. 1901, p. 2747); and, fourth, that Skyles had not attempted to transfer it. There was not anything to indicate that Kelley had or could obtain any interest in the order, save only his possession of it; and, so far as this record shows, Kelley assumed to transfer title in his own name and by his own indorsement, and did not assume to act as the ¹³⁸ agent of Skyles or in any other capacity than as the owner of the order. As Skyles was the owner, and Kelley had no authority to part with it to Moore, Moore did not receive any better title than Kelley had. If Moore was dealing with Kelley as the owner of the order, he obtained no title, for Kelley had none, and this was apparent from the order itself. If he was acting upon the assumption that Kelley was the agent of Skyles, he was charged with ascertaining the scope of the agent's authority; and not having done so, so far as here disclosed, he dealt with Kelley at his peril, and having parted with his money to an agent not authorized to transfer the order to him, he is remediless, as against the principal who was the owner.

As the evidence wholly fails to support the verdict, the judgment and order are reversed, and the cause remanded for a new trial.

Brantley, C. J., and Milburn, J., concur.

A Special Agency Exists when there is a delegation to do a single act: Great Western Min. Co. v. Woodmas etc. Co., 12 Colo. 46, 13 Am. St. Rep. 204. A special agent is one authorized to act only in a specific transaction: Union Stockyard etc. Co. v. Mallory, 157 Ill. 554, 48 Am. St. Rep. 341.

A Person Dealing with an Agent is bound to inquire as to the extent of his authority: Jackson Paper Mfg. Co. v. Commercial Nat. Bank, 199 Ill. 151, 93 Am. St. Rep. 113; Cornish v. Woolverton, 32 Mont. 456, 108 Am. St. Rep. 598. One dealing with a special agent is bound, at his peril, to know the extent of the authority delegated: Cleveland v. Pearl, 63 Vt. 127, 25 Am. St. Rep. 748.

STATE v. CUDAHY PACKING COMPANY.

[33 Mont. 179, 82 Pac. 833.]

CONSTITUTIONAL LAW.—The Constitution of the United States is the Supreme Law of the Land, and state courts and legislatures are bound by it as well as by the interpretations put upon its provisions by the federal court of last resort. (p. 807.)

CONSTITUTIONAL LAW—Trusts—Exceptions of Classes of Persons from Statutes Making Unlawful and Criminal.—A statute purporting to prohibit the formation of trusts for the purpose of fixing the price or regulating the production of articles of commerce, but exempting from its provisions all persons engaged in agriculture or horticulture, is, because of such exception, in conflict with the fourteenth amendment to the constitution of the United States, and therefore void. (p. 809.)

CONSTITUTIONAL LAW—Unconstitutional Part, When may not be Eliminated or Disregarded.—If a statute prohibits and penalizes trusts or combinations to fix the price or regulate the production of articles of commerce, but excepts from its provisions all persons engaged in agriculture or horticulture, such exception, though unconstitutional, cannot be eliminated by the court, and the statute construed and enforced as if it contained no exception. (pp. 812, 813.)

STATUTES, Construction of, to Render Constitutional.—The intention of the legislature must be inferred from the plain meaning of the words used by it, and a different construction will not be placed on such words, even for the purpose of making them carry out a provision of the constitution of the state, nor to prevent their conflicting with the constitution of the United States. (p. 813.)

Albert J. Galen, attorney general, and E. M. Hall, assistant attorney general, for the appellant.

M. S. Gunn, for the respondents.

¹⁸¹ **BRANTLY, C. J.** The respondents were charged by information, filed by the attorney general in the district court of Lewis and Clark county, with the crime of conspiracy, under section 321 of the Penal Code. The charge in substance is that the respondents did on or about December 1, 1904, unlawfully agree and combine together to fix and control the price of certain articles of commerce consumed by the people of the state of Montana, and to destroy competition by restricting trade therein, to wit, meats of all kinds and meat products, and did then and there fix the price and offer for sale, and sell, said articles to the people of said county contrary to the force and effect of the statute, etc. The respondents demurred to the information on the ground that the facts stated do not constitute a public offense. After

argument the court allowed the demurrer, and gave judgment accordingly. Thereupon the state appealed.

The question submitted for decision is whether the legislation contained in chapter 8, title 7, of part 1 of the Penal Code, of which said section 321 is a part, is obnoxious to that portion of the fourteenth amendment to the constitution of the United States which declares that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws." The legislation referred to deals with the subject of criminal conspiracy, denouncing the acts constituting the crime and providing for its punishment. The portions thereof involved here are sections 321 and 325, as follows:

"Sec. 321. Every person, corporation, stock company, or association of persons in this state who, directly or indirectly, combine or form what is known as a trust, or make any contract with any person or persons, corporations or stock companies, ¹⁸² foreign or domestic, through their stockholders, directors, officers, or in any manner whatever, for the purpose of fixing the price or regulating the production of any article of commerce, or of the product of the soil for consumption by the people, or to create or carry out any restriction in trade, to limit productions, or increase or reduce the price of merchandise or commodities, or to prevent competition in merchandise or commodities, or to fix a standard or figure whereby the price of any article of merchandise, commerce or produce, intended for sale, use or consumption, will be in any way controlled, or to create a monopoly in the manufacture, sale or transportation of any such article, or to enter into an obligation by which they shall bind others or themselves not to manufacture, sell, or transport any such article below a common standard or figure, or by which they agree to keep such article or transportation at a fixed or graduated figure, or by which they settle the price of such articles, so as to preclude unrestricted competition, is punishable by imprisonment in the state prison not exceeding five years or by a fine not exceeding ten thousand dollars, or both. Every corporation violating the provisions of this section forfeits to the state all its property and franchises, and in case of a foreign corporation it is prohibited from carrying on business in the state."

"Sec. 325. The provisions of this chapter do not apply to any arrangement, agreement or combination between laborers

made with the object of lessening the number of hours of labor or increasing wages, nor to persons engaged in horticulture or agriculture, with a view of enhancing the price of their products."

These provisions are the result of an effort on the part of the legislature to carry out the mandate of the constitution of this state, which declares: "No incorporation, stock company, person or association of persons in the state of Montana, shall directly, or indirectly, combine or form what is known as a trust, or make any contract with any person or persons, corporations, or stock company, foreign or domestic, through their stockholders, trustees, or in any manner whatever, for the purpose of fixing the ¹⁸³ price, or regulating the production of any article of commerce, or of the product of the soil, for consumption by the people. The legislative assembly shall pass laws for the enforcement thereof by adequate penalties to the extent, if necessary for that purpose, of the forfeiture of their property and franchises, and in case of foreign corporations prohibiting them from carrying on business in the state": Const., art. 15, sec. 20.

The contention made by respondents in the district court and here is that the exception contained in section 325, by which the provisions of section 321 are declared not to apply to persons engaged in horticulture and agriculture, renders the provision of section 321 unconstitutional. The language of the last clause of this section is vague and indefinite; but, reading the whole section together, this clause should be construed to read as follows: "Nor to any arrangement, agreement or combination made by persons engaged in horticulture or agriculture, with a view of enhancing the price of their products." The obvious purpose of the legislature was to except from the operation of section 321 devices which might be resorted to by horticulturists and agriculturists to enhance the value of their products and destroy competition in trade therein when they came to put them upon the market.

The attorney general does not seriously controvert the proposition that the legislation as it stands is open to the constitutional objection urged against it, but he insists that since the provisions of the constitution of the state are mandatory, and since the legislature has declared in section 321 generally against every species and character of combination denounced therein, section 325 can be held inoperative, leav-

ing section 321 to stand in full force. In this connection he suggests, also, that neither the provisions of section 321 nor those of the constitution by any intendment can include labor organizations; and that, so far as section 325 refers to this character of combinations, it is simply nugatory, and a disregard of it will not extend or affect the provisions of section 321.

It is clear that if this section of the state constitution does not apply to combinations of laborers for the purposes stated, no ¹⁸⁴ exception was necessary to exempt them, for section 321, *supra*, is no more specific in its terms than is the section of the constitution; and, if the phrases "articles of commerce" and "products of the soil" in the former do not apply to or include them, neither do they, nor the terms "trade," "merchandise," and "commodities," as used in the latter, include them. But an inquiry into the question thus suggested is not now pertinent. Nor is it necessary to inquire into the question, also suggested, whether this exception does in itself render the legislation obnoxious to the provision of the federal constitution invoked by respondents. Nor, again, is it necessary to inquire whether the legislation is, by reason of any exception stated in it, obnoxious to any provision of our state constitution.

The constitution of the United States is, within the scope of its provisions, the supreme law of the land, and state courts and legislatures are bound by it as well as by the interpretation put upon its provisions by the federal court of last resort. In the cases of *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. Rep. 431, 46 L. ed. 679, the court had before it the identical question presented in this case. In these cases the supreme court of the United States considered the validity of the trust statute of Illinois of 1893. That act in terms prohibited combinations of capital, skill, or acts by two or more persons, firms, corporations, or associations of persons, or any of them, for any or all of the following purposes: To restrict trade; to limit production, or to fix the price of merchandise or of commodities; to prevent competition in manufacture, transportation, sale, or purchase of any product of industry; to fix or control prices, or to establish any agency for that purpose; or to make or enter into any contract or agreement by which the parties should bind themselves not to sell, dispose of, or transport any article of trade below a

common standard figure or card or list price, or any contract or agreement to keep the price of any such article or its transportation at such fixed price, in order to prevent free and unrestricted competition. Severe penalties were provided for the violation of any of its provisions. The ninth section of the act provided: "The provisions of this act ¹⁸⁵ shall not apply to agricultural products or livestock while in the hands of the producer or raiser." The tenth section declared that any purchaser of any article or commodity from any person, firm or corporation, or association of persons doing business in the state contrary to any of the provisions of the act should not be liable for the price of such article, and might plead the act as a defense to any suit for the price.

The Union Sewer Pipe Company brought its action in the circuit court of the United States for the northern district of Illinois against the plaintiffs in error to recover the price of certain sewer pipe sold by it to them. After alleging that the corporation was a combination in the form of a trust, and was engaged in conducting its business in Illinois in violation of the statute, they relied, among other defenses, upon the provisions of section 10 of the statute to defeat the company's claim. The circuit court held the act to be in violation of the above provision of the federal constitution. Upon error to the supreme court, that court, after a full discussion of its former decisions defining the meaning of the portion of the amendment in question, declared that the act was rendered void by this exception from its operation of persons engaged in agriculture and raising of livestock. The court states its conclusion thus: "We conclude this part of the discussion by saying that to declare that some of the class engaged in domestic trade or commerce shall be deemed criminals, if they violate the regulations prescribed by the state, for the purpose of protecting the public against illegal combinations formed to destroy competition and to control prices, and that others of the same class shall not be bound to regard those regulations, but may combine their capital, skill or acts to destroy competition and to control prices for their special benefit, is so manifestly a denial of the equal protection of the laws that further or extended argument to establish that position would seem to be unnecessary."

The court, in discussing the meaning of this provision of the constitution, cites with approval the case of *Barbier v. Con-*

nolly, 113 U. S. 27, 5 Sup. Ct. Rep. 357, 28 L. ed. 923, in which Mr. Justice Field uses this language: "The fourteenth amendment ¹⁸⁶ in declaring that no state 'shall deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses."

The court also cites with approval the case of Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. Rep. 1064, 30 L. ed. 220, in which it was said that "the equal protection of the laws is a pledge of the protection of equal laws," herein declaring, in substance, that not only must the law as enacted furnish equal protection to all, but also that the legislature, in enacting any law, must so adjust its provisions that it will operate equally upon the individuals constituting the class of citizens whose conduct it is intended to control. In the Illinois act the exception applies to agriculturists and livestock raisers. The exception in our statute applies to those engaged in agriculture and horticulture; but this slight difference does not affect the point at issue.

Though there might be differences of opinion as to the proper interpretation of the fourteenth amendment, if it were a new question, these decisions of the court of last resort are binding upon this court, and, under the mandate of the constitution of the United States, are the supreme law of the land. Accepting ¹⁸⁷ them as such, we must conclude that the legislation is void, unless section 325 can be eliminated, leaving section 321 in operation.

In the cases of *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. Rep. 431, 46 L. ed. 679, the supreme court of the United States also considered the question whether or not the act under consideration could be held operative by eliminating the ninth section thereof, which makes the exception of the class of persons engaged in agriculture and stock-raising. The court stated the rule to be that, "if different sections of a statute are independent of each other, that which is unconstitutional may be disregarded, and valid sections may stand and be enforced. But if an obnoxious section is of such import that the other sections without it would cause results not contemplated or desired by the legislature, then the entire statute must be held inoperative." The court then proceeds to discuss the other provisions of the act, and concludes that, to eliminate the ninth section and sustain the other provisions, would make the act apply to agriculturists and livestock raisers—a result not contemplated by the legislature, since by the terms of the rest of it, all persons engaged in domestic trade were included. This is a recognition of the soundness of the proposition that the courts may not by process of interpolation or elimination make statutory provisions apply or extend to subjects not falling clearly within their terms; for by so doing they would to this extent usurp the functions of the lawmaking department of the government. Mr. Justice Harlan, in the opinion, says: "If the latter section be eliminated as unconstitutional, then the act, if it stands, will apply to agriculturists and livestock dealers. Those classes would in that way be reached and fined, when, evidently, the legislature intended that they should not be regarded as offending against the law even if they did combine their capital, skill, or acts in respect of their products or stock in hand."

In *United States v. Reese*, 92 U. S. 214, 23 L. ed. 563, the court had before it the statute of Congress enacted May 31, 1870 (16 Stats. 140, c. 114), for the purpose of carrying into effect the provisions of the fifteenth amendment of the constitution ¹⁸⁸ of the United States, declaring that the right of citizens of the United States to vote shall not be denied or abridged on account of race, color or previous condition of servitude, and that Congress shall have power to enforce this article by appropriate legislation. The third and fourth sections of the act went beyond the purview of the amendment,

and denounced as a crime any act by which a voter was deprived of his right to vote, whether on account of race, color or previous condition of servitude or for other cause. It was held that the act was not legislation appropriate to carry the amendment into effect, because it was broader in its terms than the amendment authorized, and was therefore unconstitutional; and, further, that the court could not reject the part which was invalid and retain the part which fell within the power of Congress, because the act must be taken as a whole. The court, speaking through the chief justice, said: "The language is plain. There is no room for construction, unless it be as to the effect of the constitution. The question, then, to be determined, is, whether we can introduce words of limitation into a penal statute, so as to make it specific, when, as expressed, it is general only. It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government."

So in *Sprague v. Thompson*, 118 U. S. 90, 6 Sup. Ct. Rep. 988, 30 L. ed. 115, the argument was made that certain unauthorized exceptions made by a statute of the state of Georgia could be eliminated and the rest be allowed to stand. The supreme court of Georgia had so held, but the court said: "But the insuperable difficulty with the application of that principle of construction to the present instance is that, by rejecting the exceptions intended by the legislature of Georgia, the statute is made to enact what confessedly the legislature never meant. It confers upon the statute a positive operation beyond the legislative intent, and beyond what anyone can say it would have enacted in ¹⁸⁹ view of the illegality of the exceptions." The following cases are in point, and illustrate the application of the rule: *Pollock v. Farmers' Loan etc. Co.*, 158 U. S. 601, 15 Sup. Ct. Rep. 912, 39 L. ed. 1108; *Poindexter v. Greenhow*, 114 U. S. 270, 5 Sup. Ct. Rep. 903, 29 L. ed. 185; *Johnson v. State*, 59 N. J. L. 535, 37 Atl. 949, 39 Atl. 646, 38 L. R. A. 373; *Ames v. People*, 25 Colo. 508, 55 Pac. 725; *State v. Sheriff*, 48 Minn. 236, 31 Am. St. Rep. 650, 51 N. W. 112; *Kellyville Coal Co. v. Harrier*, 207 Ill. 624, 99 Am. St. Rep. 240, 69 N. E. 927; *Union County Nat. Bank v. Ozan Lumber Co. (C. C.)*, 127 Fed. 206; *In re Wong Hane*, 108 Cal.

680, 49 Am. St. Rep. 138, 41 Pac. 693. See, also, Cooley's Constitutional Limitations, 7th ed., 246 et seq.

Applying it to the statute now under consideration, the query is presented: Are sections 321 and 325 so independent of each other that the latter may be eliminated and the former be allowed to stand? To this query, we think the answer must be in the negative. The legislature in passing the law was attempting to make effective the provision of the constitution. This provision applies to every species of combination to control prices of products of the soil or manufacture consumed by the people of this state, or to create a monopoly in such products. The mandate to the legislature is, that it shall enforce the provision by appropriate legislation. The legislation is, therefore, the scheme adopted for that purpose. It is not supposable that it would have been enacted without the limitation contained in section 325. It must therefore be taken as a whole, and stand as it is, or both provisions must fall together. As it stands, agriculturists and horticulturists, though engaged in domestic trade, are not subject to any penalty. If the exception be eliminated and section 321 be allowed to stand, they will fall within the reach of the criminal courts and be punishable as criminals—not by intention of the law-making power as expressed in the enactment, but by virtue of arbitrary legislation by the court.

But the attorney general insists that this court has already committed itself to the view he contends for by the decision in ¹⁹⁰ *Northwestern Mutual Life Ins. Co. v. Lewis and Clark County*, 28 Mont. 484, 98 Am. St. Rep. 572, 72 Pac. 982. With this argument we do not agree. We think that case clearly distinguishable from this in two important particulars: This case involves the construction of a statute highly penal. To such statutes the strict rule is to be applied—not so strict as to defeat the plain intent of the legislature, but so strict as to give the words of the statute the sense in which they are obviously used: *United States v. Reese*, 92 U. S. 214, 23 L. ed. 563. If, applying this rule, the legislative intent cannot be given effect, the particular law must fail. In other words, it must stand as enacted or must be declared void as a whole: *Wynehamer v. People*, 13 N. Y. 378. Again, the court had under consideration section 681 of the Civil Code, which imposed a tax upon the excess of premiums collected by insur-

ance companies doing business in this state. This section also contains an exemption of the personal property of such companies. It was held that the exemption clause was so far independent of the other provisions of that section that it could be eliminated without affecting the rest of the section or extending its application. From this point of view the case is not applicable.

It is also said that the legislation under consideration was enacted under a mandatory constitutional provision prohibiting combinations in the form of trusts in this state, whereas in Illinois there was no such provision; and for this reason the cases of *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. Rep. 431, 46 L. ed. 679, are distinguishable from the case at bar. This argument proceeds upon the assumption that the legislature intended to enact a constitutional law, but having failed to do so, this court may give effect to this intention by holding section 325 void and allowing 321 to stand. This is but another way of putting the question which we have already considered and decided.

The intention of any legislation must be inferred in the first place from the plain meaning of the words used. If this intention can be so arrived at, the courts may not go further and apply other means of interpretation. It is only where there is a doubt as to the intention that other rules may be applied. ¹⁹¹ This statute is clear and certain as to its intention, and that intention, as expressed, is to except from the operation of section 321 persons engaged in agriculture and horticulture.

We can see no sound distinction between a case where Congress has gone beyond the limit of power conferred upon it by the constitution of the United States, as was the case in *United States v. Reese*, 92 U. S. 214, 23 L. ed. 563, and a case like the present, where the legislature has stopped short of the plain mandate of the state constitution, and made exceptions which are unauthorized; nor between a case where the legislature is undertaking to give effect to the mandate of a constitution and within limitations prescribed thereby, and a case where the legislature acts without constitutional restriction in an endeavor to give effect to the will of the people.

The result is that sections 321 and 325 are so dependent upon each other that both must fall. Nothing said herein,

however, must be construed as affecting the constitutionality of the other provisions of the chapter of the code of which these sections are a part.

The judgment of the district court is correct and is affirmed.

Milburn, J., and Holloway, J., concur.

A Statute denying to employers the right of setoff or of counterclaim in actions brought by their employes to recover for wages, but exempting from its provisions the business of farmers or farm laborers and employes, is unconstitutional in discriminating against employers who are not farmers; and the provisions respecting them cannot be disregarded for the purpose of sustaining the statute: Kellyville Coal Co. v. Harrier, 207 Ill. 624, 99 Am. St. Rep. 240.

CLEMMONS v. GILLETTE.

[33 Mont. 321, 83 Pac. 879.]

PUBLIC LANDS—Title of the State in Unsurveyed Lands.—The grant of the sixteenth section of lands to the state for school purposes, though for some purposes a grant in praesenti, conveying the fee, does not, until the official survey is made and the plat approved, vest title in the state, nor give it any power to lease such land. (pp. 816, 817.)

PUBLIC LANDS.—The Inclosure of Public Lands, without color of title, made or acquired in good faith, or an asserted right thereto, by or under claim made in good faith with a view to entry thereof at the proper land office under the laws of the United States, is unlawful. (p. 817.)

PUBLIC LANDS—Injunction to Protect a Person Inclosing and Possessing.—One who incloses and takes full possession of unsurveyed public land, with a view to its entry under the laws of the United States, is a trespasser and misdemeanant whose possession will not be protected by a recovery of damages nor by injunction against another person intending to tear down the fences and enter thereon for the purpose of depasturing sheep. (pp. 818, 819.)

James Donovan, for the respondent.

Walsh & Newman, for the appellants.

324 BRANTLY, C. J. This cause is before this court on appeal from an order of the district court of Lewis and Clark county, refusing to dissolve an injunction pendente lite. The writ was issued upon the verified complaint alone, which states three causes of action, namely, for a trespass alleged to have been committed by the defendants in the summer of

1903; for a like trespass committed in the winter of 1903 and 1904; and for an injunction to restrain further trespasses, which it is alleged are threatened, until the rights of the parties may be finally adjudged.

The plaintiff in his third cause of action alleges, in substance, that on or about January 1, 1903, he secured from the state of Montana, through the officers of its land department, a lease of section 16, township 16 north, of range 3 west, in Lewis and Clark county; that he paid to the state the annual rental therefor, and went into the actual and peaceable possession thereof; that he is now in possession and is, and has been, entitled to such possession since the date mentioned; that within the past thirty days, the plaintiff being in the actual and peaceable possession as aforesaid, the defendants have cut the wire fence erected by plaintiff inclosing said land, have torn down the gates leading to the same, and have removed the lower wire of the fence for the purpose of driving their sheep thereon, and are about to take possession of the land for the season of 1905, and to depasture the same with their sheep; that the defendants, as plaintiff is informed and believes, are insolvent and unable to respond in damages; that the plaintiff has arranged to graze on the said land, for the year 1905, registered cattle and standard bred horses; that he has no other place where he can graze the said cattle and horses; that they cannot be turned out upon the open range without coming in contact with ordinary range stock; that if he is compelled by the action of defendants to turn them upon the open range, it will impair their value and usefulness for breeding purposes for the season of 1905; and that, if the defendants are allowed to continue their ³²⁵ trespasses in breaking down the inclosure aforesaid, the land of the plaintiff will be depastured and the plaintiff will be compelled to allow his said stock to run at large upon the common range, at a loss to him of from four thousand dollars to five thousand dollars.

The complaint was filed and the injunction issued on June 20, 1905. On July 22, 1905, the court heard the motion of defendants for a dissolution of the writ. It was based upon the ground, among others, that the plaintiff had no interest in the lands and premises described in the complaint. The defendants filed a demurrer to the complaint. The motion was heard upon the complaint, affidavits and documentary

evidence, the allegations of the complaint being admitted, except that the defendants are insolvent. This is controverted. After consideration of the evidence submitted, the motion was denied. The evidence showed that the lands in controversy are a part of the unsurveyed public domain; that on or about January 1, 1903, the plaintiff, having obtained an alleged lease of them from the register of the state land office, at once entered into possession and erected a four-wire fence, inclosing the lands for the purpose of pasturing the stock mentioned in the complaint; that his lease was renewed for the year 1904, but not for the year 1905, because such renewal, though requested by plaintiff, was refused; and that plaintiff has no other right to the possession than such as he obtained by virtue of his inclosure made under the alleged lease from the state of Montana for the years 1903 and 1904.

The question presented for determination therefore is: Whether a person, by inclosing portions of the public domain, thereby acquires such a right therein as will enable him to protect his possession against repeated trespasses thereon by other persons having an equal right to the use and enjoyment thereof. Incidentally, also, arises the question whether the state acquires such a right, under its grant from the United States government of lands in aid of common schools, as to enable it, prior to the official survey by the United States, and the approval of the plat by the commissioner of the land office of the United States, to lease the lands so granted, and thus give a ³²⁶ right to a citizen of the state to the use and enjoyment thereof, to the exclusion of other citizens.

The question of the right of the state to make sales or valid leases of lands granted to it for school purposes by the United States, prior to the official survey thereof, is referred to as incidental, because the respondent does not, in this court, rely, except incidentally, upon a lease from the state for the protection of his alleged right to the exclusive use of the lands in controversy. He relies mainly upon his actual, peaceable possession of the land as a part of the public domain. He concedes that it is unsurveyed, and that, until it is surveyed, the state has no title which it may convey; and this concession we think properly made. For it seems to be the rule, applicable to such grants, that, though they operate for some purposes as grants in praesenti, conveying the

fee, yet, until the official survey is made and the plat has been approved by the federal authorities, the grant is not effective to vest title to any specific portion of the land described by the designation of section numbers only: *Middleton v. Low*, 30 Cal. 596; *Medley v. Robertson*, 55 Cal. 396; *Linn v. Scott*, 3 Tex. 67; *United States v. Montana L. & M. Co.*, 196 U. S. 573, 25 Sup. Ct. Rep. 367, 49 L. ed. 604. Even a partial survey of the particular section is not sufficient to identify it: *United States v. Birdseye*, 137 Fed. 516. The reason of the rule is that, until the subject of the grant is identified, there is no particular portion of the great body of lands in which it is included to which the state may assert title, or over which it can exercise exclusive right. The concession logically carries with it the further concession that, for the same reason, the state may not carve out of the subject of the grant a less estate than the fee and convey that. In other words, if it cannot, for the reasons stated, convey the fee, it may not for the same reason grant a lease.

So far as we are aware, the state has never by any legislation assumed, or attempted to assume, control of unsurveyed school lands. So we are relieved of the necessity of discussing further any right of the plaintiff founded upon a lease from the state; ³²⁷ for, though the respondent contends that even if the state cannot convey title, yet, since he went into possession and erected his inclosure under a lease which the state assumed to execute, he is in possession under color of title, it is apparent that this lease could have no efficiency whatever as a protection for his unlawful occupation.

We therefore pass to the question presented for decision, to wit: May one citizen unlawfully inclose a portion of the public domain and protect his possession, thus acquired and held, against the trespasses of another citizen who also has right of entry thereon, by invoking the injunctive power of a court of equity? That the inclosure of the plaintiff is violative of the statute of the United States prohibiting the fencing of public land is clear. Congress has declared unlawful all inclosures of any public lands, in any state or territory, made or maintained by any person, party, association or corporation, without color of title, made or acquired in good faith, or an asserted right thereto, by or under claim made in good faith with a view to entry thereof at the proper land office under the laws of the United States: Act of February

25, 1885, c. 149; U. S. Comp. Stats. 1901, p. 1524. The violation of this prohibition is made a misdemeanor, for which severe penalties are exacted.

It is practically admitted that the plaintiff has no foundation for his claim to the land in controversy other than his inclosure; nor is it asserted or proved that he expects or intends to acquire title to the land within it from the United States. Indeed, we think it may be assumed that he cannot do so, for the area inclosed cannot be acquired by a single citizen under any provision of the laws of the United States. So he stands before a court of conscience, asserting that he is a trespasser and misdemeanant, without right of possession or color of title, and without hope of acquiring any, and demands that it use its power to aid him in maintaining his unlawful course, and that, too, against a citizen who has the same right of entry that he has himself. No case has been called to our attention in which a ³²⁸ court has used its power for this purpose; and it seems to us that every principle of justice is against it.

The action was not brought for damages for the destruction of the fence or other improvements, but for the depasturing of the land and the consequential injury wrought by plaintiff's being compelled to allow his standard bred stock to run at large upon the common range. The purpose for which the injunction is sought is to prevent further injury of the same kind. The United States government has for many years encouraged its citizens in this western country to use the public domain to pasture their flocks and herds. So long has this condition of affairs prevailed, that it may be said that the government has granted to each citizen a license to go upon and use these pastures: *Buford v. Houtz*, 133 U. S. 320, 10 Sup. Ct. Rep. 305, 33 L. ed. 618. No citizen, then, has a right to take away or destroy or limit this privilege, and if he does so—as plaintiff has done in this case—he should not be heard by a court of equity to allege his wrong as a reason why a court of equity should protect him.

The cases cited by plaintiff are not in point. In *Monroe v. Cannon*, 24 Mont. 316, 81 Am. St. Rep. 439, 61 Pac. 863, this court considered the rights of citizens under the fencing law of this state. The question decided was whether, under

the statute (Pol. Code, sec. 3258), one citizen is at liberty to drive his stock upon the land of another and depasture it, though it is not inclosed by a legal fence, as provided by section 3250. It was held that when one person knowingly and willfully appropriates another's land in this way, though it be not fenced at all, he is liable for the damages sustained by the owner. It will be noted that the plaintiff in that case was admittedly the owner of the land in controversy, and that the defendant, knowing this fact, caused his sheep to be herded thereon and depastured it. And so with the other cases cited; none of them recognize the right of one person to sue and recover for damages for injury by others to the lands claimed by him, where such claim is not founded upon some color of title under the laws of the United States, or a settlement with bona fide intention to acquire title.

329 Plaintiff contends that, since he is in the actual, peaceable possession, and the federal government makes no complaint, he is, as against the defendants, the owner of the fee, or, at least, entitled to maintain his possession. He says that the courts will not sanction the enforcement of individual rights by violence, or look with favor upon a citizen who assumes to take the law into his own hands, and, by mere might or power, do what he should invoke the law to do for him; for this course would encourage violence and crime. This is conceded. What we here say has no application to actions at law for injuries to property belonging to the plaintiff; nor to summary actions to recover possession of real estate, the actual, peaceable possession of which is taken or detained from the plaintiff by force accompanied by circumstances of terror, authorized by statute to prevent breaches of the peace. In such cases the title to land is not involved. We think, however, different principles should apply where the plaintiff seeks to recover for damage to land to which he shows he has no other right but a tortious possession. The proprietary title to the public lands is in the United States, and it alone can maintain an action for injury to them. If plaintiff could maintain this action for depasturing this land, he could maintain one for the cutting of timber thereon, or removal of mineral therefrom, upon the strength of his inclosure alone. That he can maintain an action for either of the latter injuries, no one will claim. If the action may not

be maintained for the depasturing of the land, then it must follow that the plaintiff cannot have incidental relief by way of injunction.

The order is reversed.

Holloway, J., concurs.

MILBURN, J. I concur in the above opinion. Nothing therein contained should be considered as implying at all that the state of Montana has not some property interest in sections 16 and 36 of the unsurveyed government lands. I do not think that the opinion is intended to convey an idea that the ³³⁰ state has no interest, but I think it would be better to say so in plain language.

In 1895, at the time the codes were passed, it appears to me certain that the code commissioners, as well as the legislature, understood that the state had some interest in these sections when unsurveyed, for they made provision in section 3489 of the Political Code (section 2339, same code, as submitted by the commissioners), for the benefit of persons desiring to purchase such lands, who had "made improvements thereon prior to March 6, 1891, if the land was surveyed at that time, or if unsurveyed, then prior to the survey." Such legislation certainly was an inducement, if not an invitation, to people to settle upon unsurveyed school lands; and it is hard to suppose that the commissioners and the legislature would intentionally invite or induce a citizen to violate any law of the United States. This section was repealed in 1899, and is now only worth mentioning for what it is worth as going to show that this question of the state having some interest in unsurveyed school lands has not always been understood to be entirely settled in favor of the United States and against the people of this state.

A Settlement on the Public Lands confers no rights as against the government or its grantees: Wells v. Pennington County, 2 S. Dak. 1, 39 Am. St. Rep. 758. See, too, Witterbrock v. Wheadon, 128 Cal. 150, 79 Am. St. Rep. 32. A mere possessor of public land who has planted a crop thereon cannot maintain trespass against a purchaser who enters and removes it: Floyd v. Ricks, 14 Ark. 286, 58 Am. Dec. 374.

The Right to Pasture Cattle on uninclosed land is discussed in the note to Monroe v. Cannon, 81 Am. St. Rep. 446.

HARRINGTON v. BUTTE AND BOSTON MINING CO.

[33 Mont. 330, 83 Pac. 467.]

WITNESSES—Testifying Against a Deceased Adversary.—If at the second trial of an action one of the parties offers himself as a witness and is excluded as incompetent because of the death of his adversary, the ruling of the court is not made erroneous by the subsequent offering and receiving in evidence of the testimony of such adversary as given by him at the former trial, where the presentation of such evidence was not disclosed to the court when its ruling was made, and the party so rejected was not offered as a witness after such testimony was received. (p. 823.)

WITNESSES—Testifying Against a Deceased Adversary as to Transactions with Third Persons.—That the transaction sought to be testified to by a party to the action was with a third person does not exempt such party from the rule declaring that parties or assignees of parties to an action or persons in whose behalf it is prosecuted against an executor or administrator, upon a claim or demand against the estate of a deceased person, cannot be witnesses as to any matter of fact occurring before the death of such deceased person. (p. 823.)

NEGOTIABLE INSTRUMENTS, Purchase of With Notice of Facts Sufficient to Put a Prudent Man on Inquiry.—One purchasing a check for value and having no notice of the fact that it was obtained without consideration, cannot be charged with such notice though the facts and circumstances attending the purchase were such as to put a reasonably prudent man on inquiry, and such inquiry was not made, unless it further appears, to the satisfaction of the jury, that the purchase was not made in good faith. (p. 824.)

NEGOTIABLE INSTRUMENTS.—Bad Faith is Necessary to Destroy the Title of the Indorsee of a negotiable instrument in due course, though it was purchased under circumstances which would excite suspicion in the mind of a prudent man or put him on inquiry: (p. 824.)

NEGOTIABLE INSTRUMENTS.—Suspicious Circumstances Attending the Purchase of a negotiable instrument are admissible against the indorsee, but are not sufficient to overthrow his title unless the jury are able to find him chargeable with bad faith. The question of good or bad faith cannot be withdrawn from the jury, and any instruction having that result is prejudicially erroneous. (pp. 825, 826.)

C. M. Parr, for the respondents.

Maury & Hogevoil and J. E. Healey, for the appellant.

332 HOLLOWAY, J. This is the third time this case has been before this court on appeal: Harrington v. Butte & Boston Min. Co., 19 Mont. 411, 48 Pac. 758, 27 Mont. 1, 69 Pac. 102. The action is based upon a check for two thousand five hundred dollars issued by the Butte and Boston Mining Company to John A. Leggat, by Leggat indorsed generally and

transferred to one Wearth, and by Wearth indorsed generally and transferred to this plaintiff, Harrington. The check was presented by Harrington to the First National Bank of Butte, ³³³ upon which institution it was drawn, payment refused, and this action resulted.

The defense pleaded is a want of consideration for the transfer of the check from Leggat to Wearth, and for the transfer from Wearth to Harrington. The cause was tried to the court sitting with a jury. A verdict for defendants was returned and judgment entered thereon, from which judgment and an order denying his motion for a new trial the plaintiff appealed.

The record discloses that the check was received by Wearth from Leggat in settlement of a gambling debt, and that at the time he indorsed it Leggat was intoxicated, rendering his signature somewhat unnatural. Before the trial which resulted in the judgment from which this appeal is taken, Leggat died and his administrator was substituted.

Among others, the court gave to the jury instructions numbered 5 and 10, as follows:

"No. 5. In this case you are further instructed that although you may believe from the evidence that the plaintiff actually paid for the check as testified to, and that he had no knowledge of the fact that the check was obtained from Leggat by Wearth without any consideration, still if you find from the evidence that the facts and circumstances surrounding the purchase of the check by plaintiff from Wearth, if you find he did purchase it, would have put a reasonable, prudent man upon inquiry, and if the plaintiff failed to make such inquiry, such failure is equivalent to actual notice and he cannot recover."

"No. 10. If there is anything in a negotiable instrument to cast suspicion upon its character, the holder thereof, whether a holder for value, will be considered to have taken it under circumstances which render him guilty of bad faith, provided you may take into consideration all of the circumstances under which the plaintiff came into the possession of the check in question in determining whether or not he purchased it in good faith for value, and without notice of any fraud."

Upon the trial the plaintiff was introduced as a witness in his own behalf, and by him it was sought to show his transaction ³³⁴ with Wearth by which he came into possession of the

check. Objection was made that the testimony was incompetent under the provisions of section 3162 of the Code of Civil Procedure, as amended by an act of the fifth legislative assembly, approved February 19, 1897 (Session Laws 1897, p. 245). This objection was sustained and exception taken. Later in the course of the trial it developed that at a former trial of this cause Leggat had testified that his testimony had been preserved, and upon this trial proof of the testimony which he had given upon such former trial was introduced on behalf of the defendants.

It is claimed that the trial court erred in excluding the testimony of the plaintiff, for the reason that Leggat's testimony, taken at a former trial, had been preserved. But it is sufficient to say that this fact did not appear to the trial court at the time Harrington was introduced as a witness, and that after it did appear, the plaintiff did not renew his offer; so that, if there is the exception to the rule as claimed by the appellant, he did not bring himself within it.

It is also said that the rule is not so extensive in its operations as to preclude the plaintiff from testifying to transactions had with a third person, even if proof of such transactions tends to establish the plaintiff's claim against the estate of the deceased person. But in this, we think, counsel for appellant is in error. The language of section 3162 above, as amended, is: "The following persons cannot be witnesses: . . . 3. Parties or assignees of parties to an action or proceeding or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator, upon a claim or demand against the estate of a deceased person, as to any matter of fact occurring before the death of such deceased person."

The principal question is presented by a consideration of instructions Nos. 5 and 10 above. The doctrine announced in No. 5 is, that even though Harrington paid value for the check and had no actual knowledge of the fact that Wearth obtained it from Leggat without consideration, still, if the facts and circumstances attending the purchase of the check by Harrington ³³⁵ from Wearth were such as to put a reasonably prudent man upon inquiry, and if Harrington failed to make such inquiry, such failure on his part was equivalent to actual notice by him of the want of consideration for the transfer by Leggat to Wearth, and he could not recover. This

never has been the law of this state and is not now, and with the exception of a few states, it has not been the rule in this country for nearly three-quarters of a century. At an early date in the last century the rule announced in No. 5 above did prevail in England (*Gill v. Cubitt*, 3 Barn. & C. 466), and to some considerable extent in this country, but was repudiated by the English courts in 1836 (*Goodman v. Harvey*, 4 Adol. & E. 870), and by most of the courts of this country about the same time, and, with few exceptions, has not been given countenance by the courts of this country since. The overwhelming weight of authority is against it. But, in addition to this fact, that rule is entirely inconsistent with the provisions of our Civil Code upon the subject. When, in an action upon a negotiable bill or note, the defense of want of consideration in its making or transfer is interposed, it becomes a question whether the holder is an indorsee in due course, and, if he is, there are no defenses, except payment to him, which can be successfully maintained against his claim: Civ. Code, sec. 4035.

Who, then, is an indorsee in due course? Section 4034 of the same code answers this inquiry as follows: "An indorsee in due course is one who, in good faith, in the ordinary course of business, and for value, before its apparent maturity or presumptive dishonor, and without knowledge of its actual dishonor, acquires a negotiable instrument duly indorsed to him, or indorsed generally, or payable to the bearer."

It appears from this record (1) that the check was indorsed by Wearth generally and transferred to Harrington; (2) that the instrument is a negotiable instrument; (3) that Harrington received it before its presumptive dishonor and without knowledge of its actual dishonor; (4) that he received it in the ordinary course of business; and ³³⁶ (5), for the sake of this argument, we may say that Harrington paid value for it, although this is a disputed question of fact.

In order, then, for Harrington to put himself beyond the pale of the defense pleaded, as an indorsee in due course, it was only necessary for him to show good faith; so that, instead of suspicious circumstances sufficient to put a reasonably prudent man upon inquiry being the test of plaintiff's right to recover, the test provided by our code is good faith. If the suspicious circumstances are of sufficient cogency, they may warrant the conclusion of the jury that the holder acted

in bad faith in procuring the paper; but the test, nevertheless, is good faith. If Harrington acted in good faith in his transaction with Wearth—assuming the other five premises announced above—then the defense interposed is not available against him.

The rule is thus stated in 7 Cyclopaedia, 944: "The principle is now well established that neither a suspicion or defect of title, knowledge of circumstances which would excite such suspicion in the mind of a prudent man or put him on inquiry, nor even gross negligence on the part of the taker will affect his right unless the circumstances or suspicions are so cogent and obvious that to remain passive would amount to bad faith. In other words, the question is now one of good or bad faith, and not of diligence or negligence, except so far as the want of caution is material as bearing on the question of good faith, and suspicions or knowledge of facts which fall short of bad faith do not amount to notice." The authorities cited in support of the text are far too numerous to be reproduced here. The same doctrine is announced and authorities at great length cited, in 1 Daniel on Negotiable Instruments, fifth edition, sections 770-775.

It has been well said by the supreme court of Texas: "The ordinary rule of constructive notice which applies to the purchaser of property is not applicable in the case of negotiable instruments. As promotive of their circulation, a liberal view is taken, which makes the bona fides of the transaction the decisive ³³⁷ test of the holder's right. He is entitled to recover upon it if he has come by it honestly": *Wilson v. Denton*, 82 Tex. 531, 27 Am. St. Rep. 908, 18 S. W. 620.

Instruction No. 10 above is erroneous, for two reasons: 1. It is a flagrant invasion of the province of the jury for the court to say that particular evidence proves a particular fact, as this instruction does; 2. It is wrong in saying that suspicious circumstances alone will defeat recovery. The last half of the instruction, if standing alone, would correctly state the law; but, taken in connection with the first portion, the jury could draw but one conclusion, namely: if there were any suspicious circumstances attending the purchase of the check by Harrington, he was guilty of bad faith, and, as a result, could not recover. While evidence of suspicious circumstances or gross negligence on the part of Harrington—if any there was—was admissible upon the question of his good or bad faith, it re-

mains for the jury to say whether such evidence in fact proves bad faith.

As this case must go back for a new trial, attention is directed to Instruction No. 3 as given, which also submits to the jury the same erroneous theory of the law as instruction No. 5, but is further defective in submitting to the jury certain premises, but failing to inform the jury what conclusions might properly be drawn from the premises announced.

Because of these errors, the judgment and the order are reversed and the cause is remanded for a new trial.

Milburn, J., concurs.

Brantly, C. J., being disqualified, takes no part in the foregoing decision.

The Purchaser of Negotiable Paper, for value and before maturity is not bound at his peril to be on the watch for facts which might put a cautious man on his guard: *Second Nat. Bank v. Weston*, 161 N. Y. 520, 76 Am. St. Rep. 283; *Manhattan Sav. Inst. v. New York Nat. Ex. Bank*, 170 N. Y. 58, 88 Am. St. Rep. 640. It has been affirmed that even negligence on his part will not deprive him of his character as a bona fide holder: *Merritt v. Boyden*, 191 Ill. 136, 85 Am. St. Rep. 246; *Central State Bank v. Spurlin*, 111 Iowa, 187, 82 Am. St. Rep. 511. Compare, however, *Shirk v. Neible*, 156 Ind. 66, 83 Am. St. Rep. 150.

IN RE CARLETON.

[33 Mont. 431, 84 Pac. 788.]

ATTORNEYS AT LAW—Disbarment for Acting for Both Parties.—If a pregnant unmarried woman applies to an attorney stating the name of the man chargeable with her condition and her wish to compel such proceedings as will result in the legitimacy of her child when born, and the attorney advises that a marriage be brought about, to be followed by subsequent proceedings for its annulment, and thereupon brings about the marriage, with an agreement for its annulment and for the payment of certain sums to the woman, and thereafter, as attorney for the husband, commences suit for such annulment, obtaining from the wife a paper designating an attorney to appear in the suit for her, and the suit is prosecuted to judgment in favor of the husband, without informing the court of the agreement or the facts preceding the marriage, such attorney is guilty of acting for both parties and of professional misconduct. (p. 831.)

ATTORNEYS AT LAW—Preparing False Affidavit.—It is professional misconduct on the part of an attorney to prepare and

forward to his client for verification an affidavit showing the disqualification of the judge, he having no reason to believe such disqualification to exist and his real object being to procure a continuance of the cause. (p. 832.)

ATTORNEYS AT LAW—Procuring an Allowance for Attorneys' Fees Notwithstanding an Agreement for a Division of Alimony.—If an attorney representing a woman suing for divorce, and having an agreement with her to divide with him any alimony which may be awarded her, obtains an allowance for attorneys' fees and an award for alimony without disclosing such agreement, he is guilty of professional conduct. (p. 833.)

William T. Pigott, for the accused.

Frank W. Mettler, for the complainant.

433 MILBURN, J. On the twenty-seventh day of November, 1905, certain members of the Helena Bar Association represented to this court in writing that Evans A. Carleton, an attorney and counselor at law, licensed to practice his profession, had been guilty of certain acts involving moral turpitude, and asking that he be required to show cause why he should not be removed or suspended as an attorney and counselor at law and member of the bar of this state.

The accusations of which we are called upon to take notice and referred to in the communication of the gentlemen aforesaid are supported by the several oaths of Lola Ellen Heardt and Martha Smith. Mr. Carleton, after certain preliminary motions were disposed of, was ordered on the fifth day of December, 1905, to appear and show cause why he should not be disbarred or suspended as suggested. Mr. F. W. Mettler appeared as attorney for the accusers, and Mr. William T. Pigott as attorney for Mr. Carleton.

The accusations, stated as briefly as may be, are set forth in the brief of counsel for the accusers as follows:

"1. Acting as attorney for both parties in the same matter at the same time in the case of Smith v. Smith.

434 "2. Deceiving the court and also his client, Mrs. Smith, in securing and using the designation of attorney in the same case.

"3. Deceiving the court in the matter of the collusive agreement between the Smiths.

"4. Attempting to procure from his client, Mrs. Heardt, for an improper and unwarranted purpose, a false affidavit of disqualification against Judge Clements in the case of Heardt v. Heardt.

"5. Deceiving the court in the matter of the contract for attorney's fees with his client, Mrs. Heardt, in the same case."

We shall consider the first, second and third points together. It appears that the plaintiff, Mrs. Smith, before an alleged marriage between her and the defendant, James Smith, was named Martha Lee, being a young woman about eighteen years of age, that while enceinte she called upon Mr. Carleton, as a lawyer, for advice, stating that Smith was responsible for her condition. She desired that some arrangement be made by which the child, when born, would be born without the stigma of bastardy. The outcome of her consultation was that Mr. Carleton requested the defendant, James Smith, to call upon him at his office. He did so, and in the presence of the young woman and her mother he was prevailed upon to agree to a marriage ceremony, which was immediately gone through with, the understanding being, with full knowledge of counsel, that the parties were not to live together as man and wife, or in any wise enter into any marriage relation such as is contemplated in law in the case of a marriage. Five days thereafter, in Mr. Carleton's office and acting under his advice, the young man and woman entered into a written agreement, signed by each, wherein it was stated that they were both desirous of having said marriage declared null and void, the man agreeing to pay one hundred dollars to the woman, and also to pay for her use, at the law office of Mr. Carleton, the sum of twenty-five dollars on or before the first day of each and every month thereafter, beginning on the first day of October, 1905, until the full sum of seven hundred and fifty dollars should be paid, including the one hundred dollars before mentioned. The man agreed, upon the due performance of the ⁴³⁵ terms and agreements, not to visit or annoy the woman, and the woman agreed, in consideration of the premises set out in the contract, that she would save the man "free and blameless and without any liability whatsoever for or on account of said marriage now subsisting between said parties."

The suit to annul the marriage was soon thereafter brought, Mr. Carleton appearing for the plaintiff, Mr. Smith. Mr. Carleton presented to Mrs. Smith a document purporting to be a designation of an attorney to represent her in the annulment proceedings, leaving the place for the name of the attorney blank, which paper she signed and executed. There-

after the name of Theodore Shed, now deceased, and then a member of our bar, was inserted by Mr. Carleton. It does not appear that Mr. Carleton, when the matter came on for hearing, informed the district court of any of the facts as to this agreement between the Smiths with relation to the marriage ceremony, but it does appear that he did not inform the court as to the agreement in writing to have the pretended marriage annulled.

Mr. Carleton in his answer admits that in August, 1905, he acted as attorney and counsel "during a short period of time" for said Martha; says that "after he had ceased to act as such attorney and counsel, and after such relations between said Martha and himself had ended, he acted as attorney for said James Smith in a suit brought for the purpose of obtaining a dissolution or annulment of the marriage, . . . and avers that when he acted as attorney for said James he was not the attorney or counsel of or for said Martha," but "that said Martha was represented by an attorney and counselor of the bar of this court, to wit, one Theodore Shed"; that the said marriage was brought about for the sole reason that said Martha was at the time of the celebration thereof heavy with child by the said James, and that the said Martha desired the ceremony performed for the sole purpose "of giving to her unborn child by said James a name and to make it legitimate," and so expressed to the accused her wish and desire at the time she engaged his services as adviser, said James and ⁴³⁶ said Martha stating at the time to the accused that "neither would live with the other and that both desired to be separated and live apart, the one from the other." He admits the making of the paper designated as an appointment of counsel, and stated that "the said Martha Smith, of her own free will and accord, did sign and execute a 'certain paper purporting to be the appointment of an attorney in the proposed case of Smith v. Smith,' and avers that said paper writing so signed by her was a designation and appointment of an attorney to appear for her in said case, and that the attorney so appointed did appear in said case and acted therein as the attorney for said Martha Smith." He avers that the same proceedings were had and the same results secured that would have been secured if the accused, instead of another attorney, had represented said Martha in that suit. He admits drafting the agreement hereinbefore

referred to, and that the said Smith signed and executed the same.

As to the fourth and fifth specifications, in the case of *Heardt v. Heardt*, it appears that she had brought a suit for divorce from her husband, making charges of cruelty and other things, and that she was unable to prove the charges in her complaint, and had frequently stated to her counsel that "the hand of every man was against her," and that Mr. Carleton prepared an affidavit of bias and prejudice under what is called the Fair Trial Law, and sent it to her by mail, saying that if she felt warranted in signing the same, it would, upon filing, operate to procure a continuance on account of the time required to procure another district judge to try the suit, and thus, at the end of twelve months, which meanwhile would run, she would be able to substantiate the charges of a supplemental complaint to the effect that her husband was guilty of desertion. This affidavit she failed to sign, but sent the same to the Honorable J. M. Clements, district judge.

It appears, also, that Mr. Carleton, on August 31, 1904, had entered into a contract in writing with Mrs. Heardt whereby he was to receive one-half of all moneys "received of Frank B. ⁴³⁷ Heardt in the litigation between the said Lola Ellen Heardt and her husband, Frank B. Heardt, whether the same are received as alimony or otherwise." On January 10, 1905, this agreement was modified to the effect that he was to receive one-fourth instead of one-half. On August 6th an order was issued out of the district court, directing Frank B. Heardt to appear and show cause why the plaintiff should not receive sixty dollars a month alimony, fifty dollars suit money, and one hundred and fifty dollars attorney's fees. Hearing was continued until August 16th. On hearing, the motion for alimony was denied. On rehearing, on September 28th, the court made an order that the defendant Heardt pay fifty dollars attorney's fees, and fifty dollars a month temporary alimony. It appears conclusively that counsel did not inform the court of this agreement whereby he was to receive in addition to the attorney's fee allowed by the court, a further compensation, to wit, the amount agreed upon between him and the plaintiff as per agreement heretofore mentioned. All of these charges as to the Heardt matter are admitted by the accused.

Practically all the points set out in the accusation as to his conduct in his relation to the Smiths and in reference to the Heardts are admitted by Carleton in his answer. A judgment might have been rendered by this court upon the answer, without taking testimony; but, it having been deemed wiser to examine the witnesses offered by the accusers, as well as to give Mr. Carleton an opportunity to make further statements in his behalf regarding his conduct, the hearing was ordered. Practically, there was not anything of importance disclosed in the evidence adduced which is not admitted in the answer.

As to the Smith matter, Mr. Carleton is of the opinion that he was not acting for both parties in the same matter at the same time. He denies that he deceived the court or his client, Mrs. Smith, in securing and using the designation of attorney in the same case; or that he deceived the court as to the matter of the agreement between the Smiths, whereby they undertook to have the alleged marriage set aside. He also denies, in the Heardt matter, that he attempted to procure any false affidavit of disqualification ⁴³⁸ against Judge Clements, or that he deceived the court in the matter of the contract for attorney's fees.

We do not think there is any escape, under the admissions of the accused, from holding that he did act as attorney for both parties in the Smith case. When Mrs. Smith first appeared in his office and asked for advice, it appears that he outlined to her the very course of action which was pursued. He at every step therein was actively engaged in attempting to bring about the result desired, to wit, a marriage, pretended to be for the purpose of wedlock under the laws of the state, and which, as there is some evidence to show, the man Smith was induced to consent to by threats then and there made that he would be punished for some crime not explained to him, Mr. Carleton, at the same time, intending to bring an action for annulment of the alleged marriage. All of which conduct was, at least, against good morals.

So far as any designation of attorney—an instrument to be used for the purpose of procuring the services of some unselected attorney—is concerned, that appears to be merely a part of the same plan which he had instituted; but it does not appear that in this he deceived Mrs. Smith or Mr. Smith. It may easily be supposed that each, being under his in-

fluence, signed any paper that he prepared without any question and with full acquiescence in his acts and suggestions. We believe it to be unprofessional and contrary to the principles of professional fair dealing expected at the hands of all counsel by the court, to bring an action of the kind which was brought for the annulment of such a marriage entered into under such circumstances, and especially without letting the chancellor know the full facts in the case as to how the alleged marriage was brought about, and all the circumstances pertaining thereto. Counsel should tell the court the truth, and all the truth, under the official oath of the profession.

As to the Heardt matter, Mr. Carleton must have known that the so-called Fair Trial Law was not intended—whatever intentions the legislature may have had in enacting it—to aid unfortunate ⁴³⁹ married women to delay their divorce suits until some then nonexistent cause of action may accrue, knowing, as Mr. Carleton must have known, that a client, especially an ignorant one, such as this woman appeared on the witness-stand to be, is apt to sign and verify any paper prepared by intelligent counsel; and he was derelict in sending such affidavit to the woman to be sworn to by her. It was his good fortune, as well as hers, that she did not make oath to it; for it does not appear for a moment that Judge Clements was disqualified by reason of bias and prejudice, or that either the accused or Mrs. Heardt thought so.

As to the contract for attorney's fees to be awarded by the court and additional compensation to be obtained by dividing with the woman the alimony to be paid by the husband, it seems that the accused relies upon what he considers somewhat of a custom among attorneys. Such custom was not proven, and if it had been, it should not operate for his benefit. There seems to be a notion among some lawyers that the property of the husband in a divorce case belongs to the judge of the court, and that he may give so much thereof as he may see fit to the wife, and that the husband may not complain. The fact is that the money to be paid out belongs to the husband, and is only taken from him by the court by force because of the necessities of the wife, and not because of any need of the attorney. A man may have his property taken only by due process of law, and when, say five hundred

dollars, is allowed to a wife because she believes that she is in need and so swears, and because it is the husband's duty to take care of her pendente lite, certainly it amounts to almost a crime, if not quite so, to procure that sum from the husband, he and the court being deceived by the testimony of the wife and argument of counsel into the belief that she needs it for her own support, when in fact she intends to give one-half or one-fourth to the counsel to supplement the fee which the court said was right and proper to be paid by the husband to him. No self-respecting court, if he knew the facts, would make an order for five hundred dollars for the needs of the wife if in fact she needed only half that ⁴⁴⁰ amount, the other half to go to the attorney in the case, in addition to a just fee fixed by the court.

There is not any occasion to hunt through the books for authorities to support this court in its conclusion that the conduct of Mr. Carleton in connection with the Smith and Heardt matters, so far as we have heretofore found, was reprehensible and in violation of his duty as a member of the bar of this court, in that he was guilty of deceit and malpractice involving moral turpitude (subsection 5, section 402, Code of Civil Procedure, amended by Session Laws, 1903, page 51). He has been guilty of such unprofessional conduct that we cannot overlook it. He is to be commended, however, for not having testified falsely in his own behalf on the witness-stand, and further, for the reason that he has admitted in his answer the truth of the charges which we have found to be substantiated.

Without further comment, which would be unnecessary, the judgment of the court is, in the light of the findings and our conclusion above, that Mr. Evans A. Carleton, now a member of the bar of this court, be suspended as attorney and counselor for a period of three months from this date. At the expiration of this time said Carleton may resume the practice of law as heretofore.

Brantly, C. J., and Holloway, J., concur.

Grounds for the Disbarment of Attorneys are considered in the note to *In re Philbrook*, 45 Am. St. Rep. 71-86. An attorney may be disbarred whenever he ceases to have a good moral character: *People v. Smith*, 200 Ill. 442, 93 Am. St. Rep. 206.

Am. St. Rep., Vol. 114—53

IN RE THRESHER.

[33 Mont. 441, 84 Pac. 786.]

ATTORNEYS AT LAW—Disbarment of for Criminal Acts in Advance of Prosecution and Conviction Thereof.—If a crime alleged to have been committed by an attorney at law falls clearly without the sphere of official duty, it is discretionary with the court to hear and determine it on the merits prior to a criminal prosecution and conviction, and it will refuse to entertain the accusation in the absence of urgent reasons why it should do so; but if the misconduct charged as the ground for removal falls within the sphere of official duty, it is of no moment that it amounts to an offense against the criminal laws, nor whether criminal proceedings have been instituted and prosecuted to a conclusion. (p. 837.)

ATTORNEYS AT LAW.—A Proceeding for the Disbarment of an Attorney is in No Sense a Criminal Prosecution, though the alleged causes therefor are criminal acts. Its purpose is to ascertain whether the accused is worthy of confidence and possessed of that good moral character which is a condition precedent to the privilege of practicing law and of continuing in the practice thereof. (p. 837.)

ATTORNEYS AT LAW—Disbarment of for Forgery and Misappropriation of Money.—If an attorney intrusted by a client with a check payable to a justice of the peace and intended to provide funds to perfect an appeal forges the name of the justice on such check and thereby draws the amount specified in the check, and appropriates the money to his own use, proceedings for his disbarment will be sustained though no criminal prosecution has been instituted against him. (p. 838.)

ATTORNEY AT LAW—Disbarment of for Withdrawing His Client's Deposit in Court and Misappropriating It to His Own Use.—An attorney who, without the authority or knowledge of his client, obtains an order of court permitting the withdrawal of a deposit and appropriates it to his own use, should be disbarred though no criminal prosecution against him has been sustained or even commenced. (p. 839.)

Jesse B. Roote, for complainant.

442 BRANTLY, C. J. This proceeding was instituted in this court by one G. R. Nickey, under subdivision 5 of section 402 of the Code of Civil Procedure, as amended by the act of 1903 (Sess. Laws 1903, p. 51), to obtain a judgment of disbarment against B. S. Thresher, a member of the bar of Montana.

The amended accusation, duly verified by persons cognizant of the facts stated therein, sets forth, in four separate counts against the accused, acts of deceit and malpractice, and crimes involving moral turpitude, of which it is alleged the accused has been guilty in connection with his office as an at-

torney. The accused having failed to appear at the time set for answer, the matter was set for hearing of the evidence on the merits on January 24, 1906. On that day the accused caused to be filed written objections to the first and second counts, and denials of the third and fourth, but was not present in person nor represented by counsel; nor did he signify any purpose or wish to contest the charges or express any desire for delay in order that he might prepare his defense. Indeed, from affidavits filed at the time, it appears that the accused was attending to his ordinary duties in the courts of Silver Bow county, and seemed indifferent as to whether or not the court proceeded to the hearing ⁴⁴³ or as to what the result might be. The court considered and overruled the objections to the first and second counts, and thereupon proceeded to hear the evidence, as if denials had been interposed to all of them. No evidence was introduced in support of the first count and it was, by permission of the court, withdrawn.

The evidence in support of the second count, which charges the forging of an undertaking on attachment in an action in the district court of Silver Bow county, is not so clear and definite as to justify a finding thereon against the accused. For this reason notice of it will be omitted and the merits of the controversy will be determined by a consideration of the evidence in support of third and fourth counts only.

The third count alleges, in substance, that on February 29, 1904, an action was begun before George F. Danzer, one of the justices of the peace in and for Meaderville township, Silver Bow county, by one W. J. Christie against G. R. Nickey, the accuser, and others, to recover judgment for thirty-eight dollars and fifty cents for services performed by plaintiff for defendants; that upon a trial the plaintiff had verdict and judgment for thirty-five dollars and costs, taxed at twelve dollars and fifty cents; that B. S. Thresher was attorney for defendants; that on March 25th, G. R. Nickey instructed him to take an appeal to the district court; that he delivered to him, the said Thresher, a check, drawn by himself on the First National Bank of Butte, for the sum of forty-nine dollars and sixty cents, payable to said justice of the peace or his order, the amount called for thereby to be deposited with the said justice in lieu of an undertaking on appeal; that said Thresher, as his attorney, accepted the check and promised to

deliver it to the justice for the purpose aforesaid and take the appeal, but that, instead of delivering it to the justice, as he undertook to do, on March 26th, the following day, he forged the indorsement of said justice thereon and thereby fraudulently procured the amount of money called for and appropriated it to his own use.

In substance, the fourth count alleges that on June 3, 1897, an action was commenced in the district court of Silver Bow ⁴⁴⁴ county by one Ruth A. Burton, plaintiff, against one Henry Kipp, defendant; that during the pendency of said action and prior to May 14, 1904, there had been deposited in the district court by Ruth A. Burton the sum of four hundred dollars in cash as a tender to the defendant in the action; that the court on May 14, 1904, made an order directing the treasurer of Silver Bow county, with whom the money had been deposited by the clerk of the court as required by law, to pay over to the clerk the said sum of four hundred dollars, and further, that the clerk pay the same to Ruth A. Burton or to either of her attorneys, J. J. McHatton or B. S. Thresher; that on the same day B. S. Thresher received the said amount from the clerk, and thereupon, disregarding his duties in the premises and intending to cheat and defraud said Ruth A. Burton, appropriated said amount to his own use; that, though repeated demand has been made upon him by Ruth A. Burton, he has failed and neglected to pay her the said sum or any part thereof; and that, notwithstanding the fact that he had so drawn the money from the hands of the clerk under the order of the court, he stated falsely to the agent of Ruth A. Burton that the money was still in the hands of the treasurer of Silver Bow county, well knowing at the time that he had received the said sum as aforesaid and appropriated it to his own use.

Under the view we entertain of this case, it is not important to consider whether criminal proceedings have been instituted and prosecuted against the accused resulting in his conviction of the crimes charged. Subdivision 5 of the section under which the charges are preferred is broad enough to include crimes and misdemeanors of all kinds involving moral turpitude, whether within this jurisdiction or not, and whether within or without the sphere of official duty. If the charge sets forth such a crime, this court has exclusive jurisdiction to hear the evidence and determine the truth of

it. Where the crime falls clearly without the sphere of official duty, it is discretionary with the court to hear and determine it upon the merits prior to a criminal prosecution and conviction in the local court; and it will refuse to entertain the accusation in the absence of urgent reasons why ⁴⁴⁵ it should do so: *In re Wellcome*, 23 Mont. 140, 58 Pac. 45; 23 Mont. 213, 58 Pac. 47. It is but just and fair to the accused that it should refrain from investigating and passing judgment upon such a charge, to the end that his rights may not be prejudiced. But where the conduct charged as the ground for removal falls within the sphere of official duty, as does that charged in this case, it is of no moment that it amounts to an offense against the criminal laws, nor whether criminal proceedings have been instituted and prosecuted to a conclusion.

This proceeding is in no sense a criminal prosecution; nor is it in aid of a criminal investigation. Its purpose is to ascertain whether the accused is worthy of confidence and possessed of that good moral character which is a condition precedent to the privilege of practicing law and of continuing in the practice thereof: *In re Wellcome*, 23 Mont. 213, 58 Pac. 47; *In re Weed*, 26 Mont. 241, 67 Pac. 308. "The end to be attained is not punishment, but protection": *Case of Austin*, 5 Rawle, 191, 28 Am. Dec. 657. And the determination of the fitness of the person under consideration to continue in the practice being exclusively a matter for this court, it will not await the action of the criminal court and be controlled by the result of a prosecution, even though the finding of this court may be in effect that the accused is guilty of a crime.

The evidence submitted in this case leads to but one conclusion, namely, that the charges contained in the third and fourth counts are true. It appears, as charged in the third count, that Nickey, one of the defendants in the case of *Christie v. Nickey et al.*, was dissatisfied with the result of the trial and desired to take an appeal to the district court. He was about to leave the county of Silver Bow to be gone for several weeks, and, in order that his rights might be preserved, he put into the hands of the accused, who had been and still was his attorney in that case, the check mentioned in the charge, intending the sum of money payable thereon to the justice to be used, to the amount of the judgment and

costs (forty-seven dollars and fifty cents), as a deposit in lieu of an undertaking on appeal. The balance was presumably intended to ⁴⁴⁶ pay for the transcript. He had a right to make the deposit: Code Civ. Proc., sec. 1763. He had a right to intrust the matter to his attorney. The latter, however, instead of meriting this confidence, forged or caused to be forged the indorsement of the justice, obtained the money and appropriated it to his own use; and not only that, but failed to secure the appeal, thus further betraying the trust reposed in him. Whether these acts be designated as malpractice or a crime, in the absence of explanation the conclusion must be that the accused is unworthy of confidence. So in regard to the evidence under the fourth count. Ruth A. Burton, at the time she employed the accused about May 14, 1904, had been engaged in litigation over some property in the city of Butte. The action had been brought by her to determine an adverse claim to it by one Kipp under a purchase by him at an execution sale. Upon the filing of her complaint she paid into court four hundred and ninety dollars, the sum paid for the property by Kipp with interest. This was deposited by the clerk with the county treasurer, as his duty under the law required. The result of the litigation was adverse to the plaintiff (*Burton v. Kipp*, 30 Mont. 275, 76 Pac. 563). J. J. McHatton had up to this time been her attorney. Upon his telling her, as he did, that nothing more could be done for her, she consulted the accused, who represented to her that the case was not yet hopeless and undertook to prosecute it further, with the agreement that he was to be paid if he was successful, but that he should have nothing in the event of failure. Mrs. Burton was to pay court fees and other expenses. Questioned by Mrs. Burton as to what should be done with the deposit, he told her that it should be allowed to remain where it was, in order to keep her tender good until the end of the litigation. What was being done in the case does not appear; but immediately after his employment, he, as her attorney, and without her knowledge, obtained an order of the court permitting the deposit to be withdrawn and received it from the clerk, less the amount deducted by the treasurer for taxes while it was in his hands. The amount received was four hundred and fourteen dollars and ninety cents. Further, ⁴⁴⁷ under pretense that he was conducting the litigation in her behalf, he induced Mrs. Burton to pay him at various times in small amounts a total of

sixty-five dollars, by representing to her that these amounts were necessary to pay court fees and other expenses. Finally, after some months, through the intervention of friends, she was able to purchase the claim of Kipp and clear up the title. During the negotiations the question came up again as to the disposition of the deposit, Mrs. Burton desiring Kipp to take it as part payment of the amount agreed upon with him as necessary to effect the settlement of the controversy. At this time, though Thresher had already withdrawn and misappropriated it, he asserted again and again that it was still in the hands of the county treasurer and could be withdrawn at any time.

It thus appears that the accused is wholly destitute of that degree of honesty and integrity which every member of the bar should possess, and which should characterize all of his dealings with those who repose trust and confidence in him.

The judgment of the court is, that B. S. Thresher be removed from his office as attorney and counselor at law, and that his name be stricken from the roll.

Holloway, J., concurs.

MILBURN, J. I concur in the decision and order of the court, but not being fully satisfied that we may find an attorney guilty of felonious conduct in the absence of any attempt to try and convict him on the charge of felony in the district court, I withhold my concurrence in what is said in the opinion as to the accused being guilty of felony. Independently of actual violation of the criminal laws of the state, there is enough proof to show conclusively that Mr. Thresher has been guilty of conduct involving moral turpitude in connection with his office as attorney and counselor, and he should be disbarred.

**THE DISBARMENT OF ATTORNEYS FOR CRIMINAL ACTS IN
ADVANCE OF THEIR CONVICTION THEREFOR.**

- I. General Powers of Courts to Disbar, 839.
- II. Crimes Committed in a Professional Capacity, 840.
- III. Crimes Committed in a Nonprofessional Capacity.
 - a. The General Rule, 840.
 - b. Exceptions to General Rule, 841.

I. General Power of Courts to Disbar.

At the common law, courts exercised the right to disbar attorneys. This power is inherent in the court, being the means by which

courts protect themselves from abuse at the hands of their officers, and the public from injury at the hands of individuals recommended by the courts as worthy of trust and confidence. This power of the court is not the creature of statute. While it would seem that legislatures might, by statutory rules, withdraw this power from the courts, or regulate its exercise by them (*In re Eaton*, 4 N. Dak. 514, 62 N. W. 597; *Ex parte Smith*, 28 Ind. 47; *Kane v. Haywood*, 66 N. C. 1), statutes bearing on the matter are not construed as restrictive of the courts' powers, either as to causes for disbarment or the procedure to be followed in disbarment cases, unless expressly made so. Where statutes dealing with the subject are not restrictive, but in a way merely expressive of the court's power, they are intended not so much to create the power of the court as to enable lay-people who have suffered from the wrongful act of attorneys to see that the latter are properly dealt with: *In re Mills*, 1 Mich. 392; *State v. Laughlin*, 10 Mo. App. 1; *State v. Winton*, 11 Or. 456, 50 Am. Rep. 486, 5 Pac. 337.

II. Crimes Committed in a Professional Capacity.

Criminal conduct on the part of an attorney is cause for disbarment. As pointed out in the leading case, a distinction is made, however, between crimes committed in the performance of official duty and crimes committed by attorneys in their private capacity. If the accused is charged with a crime of the former sort, the court will always act upon the case. It considers, not the criminal aspect of the attorney's conduct, but the insight that it gives into his professional character. The purpose of the court is not to punish the accused, but to protect itself; and it will purge its rolls of the name of one who is shown not to be worthy of the honor and responsibility of being listed among its officers: *In re Burris*, 101 Cal. 624, 36 Pac. 101; *In re Treadwell*, 67 Cal. 353, 7 Pac. 724; *Ex parte Walls*, 64 Ind. 461; *Perry v. Slate*, 3 G. Greene (Iowa), 550; *State v. Caldwell*, 16 Mont. 119, 40 Pac. 176. For such an offense, an attorney might be disbarred even though criminal proceedings against him had resulted in an acquittal: *State v. Finlay*, 30 Fla. 302, 11 South. 500.

III. Crimes Committed in a Nonprofessional Capacity.

a. **The General Rule.**—When the charge against an attorney involves a crime of the second kind, the practice of the English courts has universally been to await conviction by a criminal court before taking up disbarment proceedings. This rule has been generally followed in the United States. The reasons for the rule are generally those assigned in the leading case: the desire of the court not to prejudice the accused in his criminal trial, and to keep itself free to act fairly, if the matter reaches it on appeal from the trial court. In addition, the higher court has the right to insist that

the one making the charge shall first show his good faith, and his confidence in the truth of his charges, by resorting first to another forum and to bring the matter to its attention in such shape that, because of the fact that the judgment of the criminal court may be taken as conclusive evidence of the guilt of the accused, the matter may occupy but a limited portion of the court's valuable time: In re Wyatt, 102 Cal. 264, 36 Pac. 586; Anonymous, 7 N. J. L. 162. Generally, a final judgment in the criminal action will be awaited; disbarment proceedings will not be taken up pending an appeal from the judgment of the trial court: People v. Treadwell, 66 Cal. 400, 5 Pac. 686.

b. **Exceptions to the General Rule.**—There are exceptions to this general rule. Though the court will not hear charges against an attorney based upon criminal conduct in his private life when these charges are presented by an individual, the matter might be treated differently if the charges are presented by a public or quasi public body like a bar association: In re Wyatt, 102 Cal. 264, 36 Pac. 586. In case of extreme delay on the part of the authorities in instituting criminal action, or in case of an acquittal by a criminal court, action looking toward disbarment might be taken: In re Tipton (Idaho), 42 Pac. 504. Special circumstances connected with the crime itself might warrant a departure from the general rule. It seems that the circumstances of the case, and not any iron rule on the subject, must determine whether and when it is proper to dispense with a preliminary conviction: Ex parte Wall, 107 U. S. 265, 2 Sup. Ct. Rep. 569, 27 L. ed. 552.

We have heretofore, in our note to In re Philbrook, 45 Am. St. Rep. 79, expressed the view that neither the general law upon the subject nor the peculiar provisions of the code of California relied upon in some of the cases restricted the court in disbarment proceedings to those cases in which the accused had already been convicted as the result of a criminal prosecution. Further reflection upon the subject and some notorious cases which have become known to the community have but strengthened our conviction that the courts, in proceedings for disbarment, are too much inclined merely to regard their own dignity, and have not given sufficient attention to the consideration that the welfare of the public is of prime importance, and that the courts should be very reluctant to allow one the apparent recommendation to the public confidence implied from his being entitled to practice before them, to continue in that practice, and thereby invite and secure opportunities for the further betrayal of the trusts which, as incident to his profession, must, in the ordinary discharge of its duties, be committed to his care.

Upon the general subjects involved in this note, we quote the following expression of the supreme court of Kansas in Re Smith, 85 Pac. 584: "If there is authority in the legislature to restrict the

discretion of the courts as to what shall constitute causes for disbarment, or to limit the inherent power which they have exercised from time immemorial, it should not be deemed to have done so, unless its purpose is clearly expressed. It is generally held that the enumeration of the grounds for disbarment in the statute is not to be taken as a limitation on the general power of the court, but that attorneys may be removed for common-law causes as well as when the exercise of the privileges and functions of their high office is inimical to the due administration of justice: *Farlin v. Sook*, 30 Kan. 401, 46 Am. Rep. 100, 1 Pac. 123; *In re Norris*, 60 Kan. 649, 57 Pac. 528; *Boston Bar Assn. v. Greenhood*, 168 Mass. 169, 46 N. E. 568; *In the Matter of Mills*, 1 Mich. 392; *Laughlin's Case*, 10 Mo. App. 1; *State v. Harber*, 129 Mo. 271, 31 S. W. 889; *State v. Gebhardt*, 87 Mo. App. 542; *In re Boone* (C. C.), 83 Fed. 944, 4 Cyc. 905, 906. The nature of the office, the trust relation which exists between attorney and client, as well as between court and attorney, and the statutory rule prescribing the qualifications of attorneys, uniformly require that an attorney shall be a person of good moral character. If that qualification is a condition precedent to a license or privilege to enter upon the practice of the law, it would seem to be equally essential during the continuance of the practice and the exercise of the privilege. So it is held that an attorney will be removed not only for malpractice and dishonesty in his profession, but also for gross misconduct not connected with his professional duties, which show him to be unfit for the office and unworthy of the privileges which his license and the law confer upon him: *Ex parte Wall*, 107 U. S. 265, 2 Sup. Ct. Rep. 569, 27 L. ed. 552; *In re Burr*, Fed. Cas. No. 2186, 2 Cranch C. C. 379, Wheel. C. C. 503; *In re O——*, 73 Wis. 602, 42 N. W. 221; *Delano's Case*, 58 N. H. 5, 42 Am. Rep. 555; *O'Connell, Petitioner*, 174 Mass. 253, 53 N. E. 1001, 54 N. E. 558; *Doremenon's Case*, 1 Mart. (O. S.) 129; *In re Percy*, 36 N. Y. 651; *Sanborn v. Kimball*, 64 Ma. 140; *In re Welcome*, 23 Mont. 450, 59 Pac. 445; *In re Weed*, 28 Mont. 507, 68 Pac. 1115; *Cohen v. Wright*, 22 Cal. 293; *State v. McClaugherty*, 33 W. Va. 250, 10 S. E. 407; *Jones' Case*, 2 Pa. Dist. Dec. 539; *State v. Byrkeet*, 4 Ohio S. & C. P. Dec. 89; 4 Cyc. 910; 3 Am. & Eng. Ency. of Law, 302. Respondent was charged with professional misconduct, and also with misconduct not directly connected with his professional duties, but all of the charges related to the administration of justice and seriously affected his professional and personal integrity. Although the charges involved moral turpitude, it is not necessary to a disbarment that there should be a conviction: *Ex parte Wall*, 107 U. S. 265, 2 Sup. Ct. Rep. 569, 27 L. ed. 552; *State v. Caldwell*, 16 Mont. 119, 40 Pac. 176; *State v. Winton*, 11 Or. 456, 50 Am. Rep. 486, 5 Pac. 337; *Perry v. State*, 3 G. Greene, 550; *Watson v. Citizens' Sav. Bank*, 5 S. C. 159; *In*

re Davies, 93 Pa. 116, 39 Am. Rep. 729; Gate's Case, 1 Pa. Co. Ct. Rep. 236. Even an acquittal upon a criminal charge does not prevent the disbarment of an attorney, where it clearly appears that the misconduct under investigation rendered him unfit to be intrusted with the powers and duties of his profession: People v. Mead, 29 Colo. 344, 68 Pac. 241.

"It is contended that the proceeding is barred by some statute of limitations, but respondent points out no particular limitations applicable to cases of this character. Staleness in a charge against an attorney might prevent its being considered, because an unreasonable delay in the presentation of a charge of misconduct might make it impossible for an attorney to procure witnesses or the testimony available at an earlier time to meet such charge; but the statute of limitations itself is no defense to such a proceeding: In re Elliott (Kan.), 84 Pac. 750; In re Lowenthal, 78 Cal. 427, 21 Pac. 7; Ex parte Tyler, 107 Cal. 78, 40 Pac. 33; In re Weed, 26 Mont. 507, 68 Pac. 1115; United States v. Parks (C. C.), 93 Fed. 414; 4 Cyc. 914, 915."

CASES
IN THE
SUPREME COURT
OF
OREGON.

TINSLEY v. LOMBARD.

[46 Or. 9, 78 Pac. 895.]

MORTGAGES—Foreclosure—Priorities—Right to Plead Limitations.—If a first mortgagee sues to foreclose his mortgage and makes a holder of a second mortgage a party to the action, and the latter does not contest the former's claim nor his right of priority, but files a cross-complaint for the foreclosure of his mortgage as a subsequent lien, there is no privity between the parties which enables the first mortgagee to plead the statute of limitations against the second mortgagee. (p. 845.)

LIMITATION OF ACTIONS—Right to Plead.—The right to interpose the statute of limitations is a privilege, personal to the debtor, that may be availed of by others only when they stand in the relation of privity of estate to the debtor. (pp. 845, 846.)

D. W. Sheahan, for the appellant.

J. A. Burleigh, for the respondent.

⁹ **WOLVERTON, J.** This is a suit by F. P. Tinsley against B. M. Lombard and others to foreclose a mortgage. The mortgagors suffered default, and only Lombard defended. J. C. McAllister and wife gave a mortgage to the Lombard Investment Company, providing, among other things, that the mortgagors should pay the taxes on the mortgaged premises, but if not so paid, then that the mortgagee might pay the same and add the amount thereof to the mortgage debt. Subsequently the mortgage and the obligations which it was given to secure were duly assigned and set over to the plaintiff. On the same day of the execution of plaintiff's mortgage, McAllister and wife gave two other mortgages to the¹⁰ Lombard Investment Company, covering the same premises, one of them, however, including a ten-acre lot additional

which mortgages and the obligations secured thereby have since come into the hands of the defendant Lombard by due assignment and transfer. The plaintiff instituted this suit to foreclose his mortgage, making Lombard a party defendant with others. Among other allegations of the complaint is the following: "That the defendants herein have, or claim to have, some right, title or interest in or to the said premises, the nature of which is to plaintiff unknown; but whatever the same may be, it is inferior in right, and subsequent in time, to the mortgage lien of this plaintiff upon said premises." Without denying or in any manner controverting any of the allegations of the complaint, Lombard interposed two further and separate answers, which he denominates "cross-complaints," setting up his mortgages, which he prays shall be declared liens upon the premises described in plaintiff's mortgage, second, subsequent, and subject to such mortgage, but a first lien upon the ten-acre lot not included therein; that defendant's said mortgages be foreclosed; and that the equities of the parties be adjusted, and the assets marshaled accordingly. Plaintiff demurred to these answers on the ground that defendant had not commenced his suits to foreclose within the time limited by the Code of Civil Procedure, which demurrers were sustained, and, defendant refusing to plead further, a decree was entered for plaintiff, foreclosing all right or interest of the defendant in the premises comprised in plaintiff's mortgage, from which he appeals. The case was submitted under the proviso of rule 16: 35 Or. 587, 600.

The question involved is whether the plaintiff is in a position to set up the statute of limitations as a bar to defendant's foreclosures. The defendant is not controverting any right that plaintiff is seeking to maintain, but is aiming only to have his ¹¹ mortgages foreclosed in the same suit with the plaintiff's, completely subordinating his alleged liens upon the premises described in plaintiff's mortgage, and his rights thereunder, to those of the plaintiff. So that, as to the right of priority of liens, whether for the principal sums or for interest, or for taxes paid, there is absolutely no dispute or contest. Such being the case, plaintiff cannot make use of the statute of limitations to cut off defendant's right of suit. The right to interpose the statute of limitations is a privilege, personal to the debtor, that may be availed of by others only when

they stand in the relation of privity of estate to the debtor, as a subsequent purchaser or encumbrancer of the legal title, or are in privity with the claim or demand, or have succeeded to or may be said to occupy the place of the debtor, as executor or administrator, and the like. And the pleader must show that it is a bar as between the parties to the debt. Certainly no person who is not injured by the enforcement of the demand can be heard to insist upon the plea: 2 Pingrey on Mortgages, sec. 1575; Wood on Limitations, 3d ed., sec. 41; Grattan v. Wiggins, 23 Cal. 16; Coste v. Brown, 23 Cal. 142; Cartwright v. Cartwright, 68 Ill. App. 74; Board v. Presbyterian Church, 19 Wash. 455, 53 Pac. 671; Ewell v. Daggs, 108 U. S. 143, 2 Sup. Ct. Rep. 408, 27 L. ed. 682; Sanger v. Nightingale, 122 U. S. 176, 7 Sup. Ct. Rep. 1109, 30 L. ed. 1105; Blair v. Silver Peak Mines (C. C.), 84 Fed. 737; Hanchett v. Blair, 100 Fed. 817, 41 C. C. A. 76.

Now, the plaintiff here sustains no such relation to the defendant appealing, nor is he in privity with the claims or demands that defendant is seeking to have declared liens upon the premises involved. But conceding, as defendant does, that plaintiff's lien is prior and superior in time and right to his, the plaintiff cannot, through the right of the debtor, bar the defendant's right of foreclosure in this suit. The decree of the circuit court will therefore be reversed, the demurrers overruled, and the cause remanded for such other and further proceedings as may seem proper.

On Who may Plead the Statute of Limitations, see the recent note to Hopkins v. Clyde, 104 Am. St. Rep. 742-770.

BURTON v. ANTHONY.

[46 Or. 47, 79 Pac. 185.]

INFANCY—Loan to Minor—Lien on Land to Protect.—A court of equity will not impose a lien on a minor's interest in land to secure the payment of money advanced at his request to redeem the premises from a sale thereof under a decree of foreclosure, although the minor has agreed that the lender should be subrogated to the rights of the mortgagee. Such redemption is not a necessary for which the minor is liable. (p. 850.)

MORTGAGES—Reinstatement of Canceled Lien.—If an agreement is entered into between a mortgagee who has foreclosed and bought in the property with another that the judgment of foreclosure is to be assigned to the latter in consideration of the payment of the sum due, but instead thereof the premises, by mistake, are redeemed from the sale, a court of equity will restore the lien of the judgment. (pp. 851, 852.)

R. I. Eaton and G. Noland, for the appellant.

⁴⁷ MOORE, J. This is a suit by L. C. Burton against Clara L. E. Anthony, Walter B. E. Anthony, her minor son, and H. H. Burton as his guardian, to establish and enforce an alleged lien. It is averred in the complaint that the defendant, Walter B. E. Anthony, is under the age of fourteen years, and that the defendant, H. H. Burton, is the duly appointed guardian of his estate; that on January 27, 1900, his mother, the defendant, Clara L. E. Anthony, being the owner of an undivided one-sixth of certain real property in Yamhill county, in consideration of love and affection and one dollar, executed to her son a quitclaim deed of all her interest in the premises, subject to a mortgage thereon executed by her and her late husband, E. H. Anthony, deceased; that this mortgage was foreclosed, the land sold to the mortgagee and the sale confirmed; that the premises were redeemed by Mrs. Anthony and her son, who were obliged to pay therefor the sum of one thousand and ten dollars and seventy-five cents, receiving from the sheriff of that county a certificate evidencing such fact; that, the redemptioners, having no means with which to pay the sum required, plaintiff, at their ⁴⁸ request, loaned to Walter the money necessary for that purpose, "in the expectation that he would be substituted in the place and stead of the creditor"; that Walter has no means with which to pay the sum so loaned, except his interest in such real property, and, unless plaintiff is decreed a lien thereon, or subrogated to the rights and remedies of

such creditor therein, he will lose the money so advanced. The defendant Walter, appearing by his guardian, filed an answer denying the material allegations of the complaint; and, a trial being had, and the evidence taken, the court, concluding that the complaint did not state facts sufficient to entitle plaintiff to the relief prayed for, dismissed the suit, and he appeals. The case was submitted on briefs under the proviso of rule 16: 35 Or. 587, 600.

⁴⁹ Though the sufficiency of the complaint is the only question presented by this appeal, it is deemed proper to state the substance of the testimony, showing the nature of the claim sought to be established. It appears from the transcript that the defendant, Clara L. E. Anthony, is plaintiff's sister, who, having no property and being a widow, is compelled to labor to support herself and her son; that, the land of the defendant, Walter B. E. Anthony, having been sold under the decree of foreclosure, he and his mother requested plaintiff to advance the money necessary to redeem the premises, assuring him that he should be subrogated to the rights of the judgment creditor; and that, to secure such sum, plaintiff was obliged to mortgage his undivided one-sixth interest in the same real property. As an affirmance of the decree herein may deprive plaintiff of his claim against his nephew, and also of his own interest in the real property, the merits of his demand are apparent, and it remains to be seen whether or not the complaint states facts sufficient to authorize a court of equity to impose a lien on a minor's interest in land to secure the payment of money advanced at his request to ⁵⁰ redeem the premises from a sale thereof under a decree of foreclosure.

1. It is argued by plaintiff's counsel that the redemption of the land was necessary to preserve it, thereby rendering the agreement of the minor to repay plaintiff the sum of money borrowed for that purpose a binding obligation, which the court should have enforced, but, not having done so, an error was committed in dismissing the suit. The rule is elementary that, if an infant is under a legal obligation to do an act, he may, by a fair and reasonable contract, bind himself to perform it: 16 Am. & Eng. Ency. of Law, 2d ed., 273. As an infant is bound to pay a debt contracted for necessities, his promise to repay a sum of money advanced by another for that purpose constitutes a binding obligation: *Randall*

v. Sweet, 1 Denio, 460. Thus, where the statute compels a putative father to indemnify a municipality against expense incurred in supporting his illegitimate child, and makes it necessary for him to enter into a bond with sureties for the performance of the obligation which is thus imposed, as the only means by which he can be discharged from arrest, the law thereby confers on him plenary power to make a binding obligation; and, having done so, his infancy will not constitute a defense to him or his sureties in an action based on a failure to comply with the terms of the undertaking: *McCall v. Parker*, 13 Met. (Mass.) 372, 46 Am. Dec. 735; *People v. Moores*, 4 Denio, 518, 47 Am. Dec. 272. So, too, an infant father of an illegitimate child, on a prosecution of bastardy, having given a promissory note with his father as surety, to the mother of such child, as a compromise settlement, it was held that his infancy did not constitute a defense in an action on the note: *Gavin v. Burton*, 8 Ind. 69. In deciding that case, Mr. Justice Perkins says: "So, as the law authorizes an infant father of a bastard child to settle with the mother, and secure to her compensation for keeping such child, it impliedly gives him power to execute instruments necessary in making such settlement." To the same effect is the case of *Stowers v. Hollis*, 83 Ky. 544. In *People v. Mullin*, 25 Wend. 698, the defendant, an infant, having been convicted of the crime of assault and battery, and imprisoned⁵¹ under the sentence which followed, offered to assign his property in compliance with the provisions of a statute of New York which permitted the discharge of prisoners who were found guilty of such misdemeanors; and it was held that, as an adult, was entitled to the benefit of the act, which by its terms applied to "every person," an assignment by a minor must be regarded as valid, notwithstanding his nonage.

In the cases to which attention has been called, indemnity from punishment by imprisonment of persons convicted of misdemeanors has been afforded by complying with the provisions of the statutes authorizing it. The discharge of a person when imprisoned, or his exemption from punishment when found guilty of petty offenses, by complying with the terms of a statute, must be regarded by the legislative department as of more importance to the state, which is thereby freed from the expense of his maintenance during the term of incarceration, than the retention of his property. These

acts, being general in their terms, are held to be applicable to all persons; and, as a corollary therefrom, the conclusion is deduced that ample power is thereby conferred on an infant to bind himself to pay an obligation which the law imposes as a condition precedent to securing his freedom from imprisonment, or exemption from punishment for the commission of minor crimes. This legal principle, which is clearly established in the cases mentioned, can have no application to the defendant, Walter B. E. Anthony. He could not have been arrested for a failure to pay the mortgage debt on his interest in the land, the redemption of which terminated the sale, discharged the lien of the mortgage which was merged in the decree, and restored to him his estate: B. & C. Comp., sec. 250. Though the redemption of the land conferred on him a pecuniary benefit, the furnishing of the money for that purpose at his request does not, by reason of his incapacity to enter into a valid contract, create a binding obligation, because it was not necessary to his sustenance. Thus, in *McCarty v. Carter*, 49 Ill. 53, 95 Am. Dec. 572, it was held that a contract made with a minor to furnish labor and materials for the improvement of his property was not binding on him, and the contractor could claim ⁵² no lien therefor against the property benefited thereby. In deciding that case Mr. Justice Lawrence says: "An infant is not bound by his contract, except in certain cases, to which the erection of a building for rent does not belong. A conveyance or mortgage by him of his real estate would not be binding upon him, and the legislature certainly never intended to allow him to encumber his property indirectly by a contract for its improvement, when he cannot do the same thing in a binding mode by an instrument executed expressly for the purpose. A minor who has nearly attained his majority may be as able in fact to protect his interests in a contract as a person who has passed that period. But the law must necessarily fix some precise age at which persons shall be held sui juris. It cannot measure the individual capacity in each case as it arises. It must hold the youth who has nearly reached his majority to be no more bound by his contract than a child of tender years, and neither in one case nor in the other can it permit a contractor to claim a lien against his property under the guise of a contract for improvement. This would expose minors to ruin at the hands of designing men. The mechanic

who erects a building must take, like all other persons, the responsibility of ascertaining that he is contracting with a person who has reached the requisite age." To the same effect, see *Mathes v. Dobschuetz*, 72 Ill. 438, and *Price v. Jennings*, 62 Ind. 111. The improvement of a minor's property by erecting buildings thereon in pursuance of his contract cannot be regarded as of less importance—the value being equal—than the saving of his estate by the redemption thereof at his request; and, as no lien can be created in the first instance, none can be imposed in the latter.

Plaintiff's counsel, in support of the principle for which they contend, rely upon the rule announced in *MacGreal v. Taylor*, 167 U. S. 688, 17 Sup. Ct. Rep. 961, 42 L. ed. 326. In that case an infant female, without being interrogated as to her age, or making any representation in relation thereto, borrowed a sum of money to pay off an encumbrance on her land and to improve the property, giving a trust deed thereon as security therefor. After attaining her majority she refused to pay the money borrowed, ⁵³ notifying the adverse party that she rescinded the contract and disaffirmed her deed; and it was held that, the money secured by her having been used in improving her property and in discharging liens thereon, the premises should be subjected to the benefits received. In that case Mr. Chief Justice Fuller and Mr. Justice Brown dissented. If that decision had been rendered by the entire court, the rule adopted would not be controlling in the case at bar until the defendant, Walter B. E. Anthony, became twenty-one years old. The complaint, therefore, does not state facts sufficient to constitute a cause of suit. The mortgage having been foreclosed, under which decree the premises were sold to the mortgagee and the sale confirmed, he may have preferred to retain his interest in the land, rather than to have accepted the amount of his bid therefor. He could not have been compelled to assign the judgment, nor could the assurance of Mrs. Anthony or of her son that plaintiff should be subrogated to the rights and remedies of the judgment creditor be of any force or effect, because it was impossible for them to fulfill their representations.

2. If an agreement was entered into between such creditor and plaintiff to the effect that the judgment was to be assigned to the latter in consideration of the payment of the sum due, but, instead thereof, the premises, by mistake, were redeemed

from the sale, a court of equity will, upon an averment and proof of such fact, restore the lien of the judgment. It may have been intended by the statement in the complaint that plaintiff advanced the money to his nephew "in the expectation that he would be substituted in the place and stead of the creditor," to allege that an agreement to that effect had been entered into between plaintiff and the mortgagee or his representative, and, if so, it may be desired to institute another suit, in which such fact can be averred in the complaint. With this possible object in view, the decree of the court below, dismissing the complaint, will be affirmed, but such dismissal shall be without prejudice, and it is so ordered.

The Contracts of Infants are discussed at length in the note to *Craig v. Van Bebber*, 18 Am. St. Rep. 573-724.

The Right to Subrogation is the subject of an extended note to *American Bonding Co. v. National etc. Bank*, 99 Am. St. Rep. 474-533.

HILDEBRAND v. UNITED ARTISANS.

[46 Or. 134, 79 Pac. 347.]

CORPORATIONS—Service of Process on Agent.—Under a statute providing for service of process on a resident agent of a corporation in certain cases, service on a nonresident fraternal benefit association to whom the statute applies may be valid if made on the secretary of the local assembly of such association, whose duty it is, among others, to notify the supreme secretary when the death of a member occurs, to collect members' assessments, and to make reports to the supreme assembly of the money received and of the membership. (p. 854.)

AGENCY is to be Ascertained by considering the business transacted for and the acts performed by one person for another, with his previous authorization or subsequent knowledge and approval. (p. 855.)

BENEFIT ASSOCIATIONS—Venue of Action on Certificate of Membership.—The venue of a cause of action on a certificate of membership of a fraternal benefit association is the county of the member's residence at the time of his death. (p. 856.)

CORPORATIONS—Service of Process—Return.—If an action is commenced against a corporation in the county where the cause of action arose, and not in the county where the corporation has its principal place of business and office, the return of the officer upon the process must show the reason for making the service in the manner pursued. (p. 856.)

CORPORATIONS—Service of Process on Agent—Return.—In an action against a corporation, the delivery of certified copies

of the summons and complaint to an inferior agent of the corporation outside the county of its principal office and place of business is a substituted service of process, and the return of the officer must show the facts necessary to confer jurisdiction and the reason for making the service in the manner pursued. (pp. 856, 857.)

CORPORATIONS—Service of Process on Agent.—To enable a court to render a valid personal judgment against a foreign corporation by the service of process on its agent, it must appear somewhere in the record that the corporation was engaged in business within the state. (p. 857.)

CORPORATIONS—Service of Process on Agent.—Under a statute requiring an action to be brought in the county of the defendant's residence and permitting an action against a corporation in the county in which the action accrued, if service can be had on an agent of the corporation in that county, the record must somewhere show that the cause of action arose in the county in which the action is brought. (p. 857.)

P. L. Willis, for the appellant.

G. M. Brown and J. T. Long, for the respondent.

¹³⁵ Per CURIAM. This is an action by a minor, instituted by his guardian in the circuit court for Douglas county, against a private corporation, having its principal place of business in Multnomah county, to recover upon a benefit certificate issued by it, stipulating to pay plaintiff the sum of nineteen hundred dollars in case of his father's death. The complaint alleges that the defendant was organized under the laws of this state, and is engaged therein in mutual life insurance on the assessment plan; that in conducting its business it instituted at Roseburg, Oregon, a lodge, known as "Umpqua Assembly, No. 105"; that in consideration of the payment by plaintiff's father of the fees and charges prescribed, and of his compliance with the defendant's rules and regulations, it "there executed and delivered" to him a contract of insurance, a copy of which is set out, whereby he became a member in good standing in that assembly, and entitled to all the rights, benefits and privileges of membership in the defendant corporation; that plaintiff's father, having fully complied with all the conditions required of him by it, died November 18, 1903; and that due proof of his death was made to the defendant within the time prescribed, but for more than sixty days thereafter it declined, and now refuses, to pay any part of the sum named in ¹³⁶ the certificate. A summons was issued, and the sheriff of Douglas county certifies, in his return indorsed thereon, that he served it in that county upon the within named defendant, the

United Artisans, by delivering a true copy thereof, prepared and certified to by him, and also a copy of the complaint prepared and certified to by one of plaintiff's attorneys to Minnie Jones, the secretary of Umpqua Assembly, No. 105, and agent of the defendant corporation; and that the reason he made the service upon her was because the president or other head of the corporation, secretary, cashier or managing agent thereof, did not reside or have an office in Douglas county. The defendant's attorney, appearing specially, moved to set aside the service of the process on the ground that the court did not have jurisdiction of the body of the defendant, supplementing the motion by his affidavit, and that of the defendant's managing agent, to the effect that such service was not made upon its agent. A counter-affidavit was filed by plaintiff's attorney, in which he sets out what purport to be the duties of a secretary of a subordinate assembly of the defendant corporation. Based on the showing thus made, the court refused to quash the service, and, for want of an answer or other pleading, rendered judgment against the defendant for the sum demanded, and it appeals.

1. The statute regulating the manner of securing jurisdiction of the person of a defendant is as follows: "The summons shall be served by delivery of a copy thereof, together with a copy of the complaint prepared and certified by the plaintiff, his agent or attorney, or by the county clerk, as follows: 1. If the action be against a private corporation, to the president or other head of the corporation, secretary, cashier or managing agent, or in case none of the officers of the corporation above named shall reside or have an office in the county where the cause of action arose, then to any clerk or agent of such corporation who may reside or be found in the county, or if no such officer be found, then by leaving a copy thereof at the residence or usual place of abode of such clerk or agent": B. & C. Comp., sec. 55. The affidavit of plaintiff's counsel states that Minnie Jones, as secretary of Umpqua Assembly, No. 105, of the United Artisans, ¹³⁷ was required to remit all moneys to the supreme assembly; to notify the supreme secretary when the death of a benefit member occurs, and to see that all blanks for proof of death are promptly filled out and returned to the supreme secretary; and semi-annually to make a report of all members in good standing, and of other items of interest. The affidavits

of defendant's counsel and of its managing agent fail to state any facts from which the conclusion can be deduced that Minnie Jones was not an agent of the defendant. They are simply to the effect that she was not its agent or representative, and are nothing more than mere expressions of opinion, not amounting to the specifications of probative facts from which her authority, or want thereof, is to be determined. The question of agency is to be ascertained by considering the business transacted for, and the acts performed by, one person for another, with his previous authorization or subsequent knowledge and approval. Upon the proof of these facts, the conclusion is reached whether or not the agency existed at the time relied upon. This deduction is based upon evidence of the facts adverted to, and cannot be made to depend upon the opinions of witnesses, for that would be delegating to them the duty devolving upon the court.

Where the regulations of an association having a benefit department require the secretary of each local division to certify to the health of every applicant for insurance, to keep a correct list of the members of the benefit department, and to place therein the name of any member of an insurance department joining his division by transfer from any other division, such secretary is an agent of the association: *Dixon v. Order Ry. Conductors (C. C.)*, 49 Fed. 910. In deciding that case, the court, referring to the duties which the secretary was directed to perform, says: "The list required to be kept by the local secretary could perform no office, except as an aid to the defendant in its transactions with its members. In these respects the local secretary is in no sense the agent of the assured. The acts required are for the benefit of the assurer, not the assured, and are done by the authority of the company, not of the member. The imposition of such duties upon local secretaries constitutes them agents of ¹³⁸ the corporation, within the definition of the statute, for the purpose of service of process." To the same effect is the case of *Southwestern Mut. Ben. Assn. v. Swensen*, 49 Kan. 449, 30 Pac. 405. We think the affidavit of plaintiff's counsel sufficiently shows that the duties required of a secretary of a subordinate assembly of the United Artisans made Minnie Jones an agent of the defendant corporation in Douglas county, so that a delivery of a certified copy of the summons and of the complaint to her was the service of process on it, and it

remains to be seen whether the record affirmatively shows that the cause of action arose in that county.

2. "Where statutes," says the text-writer, "provide that an insurance company may be sued within the county in which the cause of action, or some part of it, arose, it is generally held that an action on a policy of life insurance is maintainable in the county where the insured resided and died": 11 Ency. of Pl. & Pr. 384. The sum named in a certificate of a fraternal insurance association does not usually become payable until the death of the assured, upon the happening of which the persons designated in the certificate as the beneficiaries eo instanti acquire a vested interest therein: *Masonic Mut. Ben. Soc. v. Burkhart*, 110 Ind. 189, 10 N. E. 79, 11 N. E. 449; *Hoelt v. Supreme Lodge K. of H.*, 113 Cal. 91, 45 Pac. 185, 33 L. R. A. 174. The indemnity thus rendered payable by the happening of the condition is in the nature of personal property bequeathed by a testator; the policy representing the last will of the deceased, and the beneficiaries named therein personating the legatees. If the policy were payable to the decedent's estate, the sum specified would, on his death, become an asset thereof, and be subject to the law in relation to administration. In ordinary life insurance policies the cause of action necessarily arises when the right to the sum specified accrues by reason of the death of the assured, and the cause of action must arise in the county of which he, at the time of his death, was an inhabitant: *Brul v. Northwestern Mut. Relief Assn.*, 72 Wis. 430, 39 N. W. 529.

3. All actions, except such as have been localized by statute (*Bailey v. Malheur Irr. Co.*, 36 Or. 54, 57 Pac. 910), must be ¹³⁹ commenced in the county in which the defendant resides or may be found at the time it was instituted: *B. & C. Comp.*, sec. 44. This section has been impliedly amended so as to permit an action to be brought against a corporation in the county in which the cause of action arose: *B. & C. Comp.*, sec. 55. The residence of a corporation is deemed to be in the county in which it has its principal office or place of business, where it may at all times be sued. When the action is commenced in the county in which the cause of action arose, and not in the county where the corporation has its principal office and place of business, the return of the officer upon the process must show the reason for making the service in the manner pursued: *Holgate v. Oregon Pac. R. Co.*, 16 Or. 123, 17 Pac. 859. The delivery of certified copies of the summons

and complaint to an inferior agent of a corporation, outside the county of its principal office and place of business, is a substituted service of process, and the return of the officer must show the facts necessary to confer jurisdiction: *Caro v. Oregon etc. R. Co.*, 10 Or. 510; *Weaver v. Southern Or. Co.*, 30 Or. 348, 48 Pac. 167.

4. To enable the court to render a valid personal judgment against a foreign corporation by the service of process on an agent, it must appear somewhere in the record that the corporation was engaged in business in the state: *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. Rep. 354, 27 L. ed. 222; *Farrell v. Oregon Gold Co.*, 31 Or. 463, 49 Pac. 876. The rule as to venue adopted by this court is that, though a corporation, for the purpose of jurisdiction, may be engaged in business throughout the entire state, its residence, within the meaning of the statute (B. & C. Comp., sec. 44), is in the county where its principal office is located; and, while it may be sued in any other county than that of its domicile (B. & C. Comp., sec. 55), the right to maintain the suit depends upon the fact that the cause of action arose in the county in which the venue is laid. Such right is an exception ingrafted by implication on the general statute, and, to bring the notice home to a corporation which is to be imputed to it by the service of a process on an inferior agent, the record, by a parity of reasoning, and following the rule adopted in *Farrell v. Oregon Gold Co.*, ¹⁴⁰ 31 Or. 463, 49 Pac. 876, must somewhere show that the cause of action arose in the county in which the action was brought.

The complaint states that at Roseburg, Oregon, the defendant "there executed and delivered" to plaintiff's father a contract of insurance. The benefit certificate shows that it was signed by the officer of the defendant corporation at Portland, Oregon, April 12, 1901. Eight days thereafter it was countersigned by the master artisan and secretary of Umpqua Assembly, No. 105. Immediately below their approval, but over the signature of the plaintiff's father, is the following indorsement: "I hereby accept the certificate and the conditions therein named." A contract is completed at the place where the minds of the parties meet and assent to the terms of the agreement. It is fairly to be implied from the contract of insurance that it was entered into at Roseburg, in Douglas county; but it is nowhere disclosed by the record that plaintiff's father, at the time the certificate was issued, was an in-

habitant of that county. If this fact were manifest from an inspection of the record, it is possible that a continuation of his residence would be presumed until his death; but, in the absence of such showing, it does not affirmatively appear that the cause of action arose in Douglas county.

The judgment will, therefore, be reversed, and the cause remanded, with instructions to quash the service of the summons, and for such further proceedings as may be necessary, not inconsistent with this opinion.

The Mode of Serving Process on Foreign Corporations, including the officers or agents on whom service may be made, is considered in the monographic note to *Abbeville Elec. etc. Co. v. Western Elec. etc. Co.*, 85 Am. St. Rep. 926-938, and in the recent case of *In re Curtis*, 115 La. 918, 112 Am. St. Rep. 284.

SMITH v. BAYER.

[46 Or. 143, 79 Pac. 497.]

BILLS AND NOTES—Indorsement for Collection.—The indorsement of a negotiable note by the payee with the words "for collection," or the like, is not strictly a contract of indorsement, but rather the creation of a power, the indorsee being the mere agent of the indorser to receive and enforce payment for his use. The title to the note and the proceeds thereof remain in the payee, and he may maintain suitable actions and proceedings to enforce his right. (p. 861.)

BILLS AND NOTES—Indorsement for Collection—Right to Sue.—The indorsee of a negotiable note for collection may maintain an action thereon in his own name. (p. 861.)

BILLS AND NOTES—Indorsement for Collection.—Although an indorsee of a negotiable note for collection may maintain an action thereon in his own name, yet it is open, as against him, to all defenses which could have been made against it, if it had remained in the hands of the indorser. (p. 861.)

BILLS AND NOTES—Indorsement for Collection—Evidence to Vary.—Parol evidence in favor of an indorsee of a negotiable note for collection, that in fact he is an actual part owner of such note, is not admissible. The contract of indorsement cannot be contradicted or varied by parol. (p. 862.)

BILLS AND NOTES—Indorsement for Collection—Defenses.—In an action by an indorsee of a negotiable note for collection to collect it, payment by the maker to the indorser after the assignment of the note is good defense as against any claim of ownership by the indorsee, who is a mere agent for collection. (p. 862.)

TRIAL—Erroneous Instructions.—Confusing and misleading instructions injecting into a case an issue not proper to be tried therein are reversible error. (p. 862.)

R. R. Duniway, for the appellant.

M. W. Smith, in propria persona, for the respondent.

¹⁴³ BEAN, J. This is an action by Milton W. Smith against J. C. Bayer and Peter Hobkirk on a promissory note for two hundred and ninety dollars, executed and delivered by the defendants to the Concordia Loan and Trust ¹⁴⁴ Company of Kansas City, Missouri, on January 30, 1896, due on or before August 1st following. The complaint alleges the execution of the note, its indorsement to the plaintiff before maturity, the making of certain payments thereon by defendants, and prays judgment against them for the balance. The answer admits the genuineness of the note, denies that it was indorsed to the plaintiff before maturity or at all, and affirmatively alleges that it remained the property of the payee named therein until after maturity, when it was transferred to the Fidelity Trust Company, and that thereafter the defendants paid the note to the trust company and satisfied it in full. The reply denies the allegations of the answer, and affirmatively pleads that at all the times mentioned the plaintiff was, and now is, the owner in his own right of two-sevenths of the note, and since the twenty-first day of July, 1896, has been, and now is, the owner of the remaining five-sevenths for collection. Upon the trial plaintiff produced the note, with an indorsement thereon as follows:

"Pay to the order of Milton W. Smith for collection and return to Concordia Loan & Trust Co.

"A. D. RIDER, Treasurer.

"O. K. F. AMELUNG."

He testified that he received the note in due course of mail from the loan and trust company, inclosed in a letter which the witness produced, and which stated in substance that the note was remitted for collection; that he knew the signature to the letter, had seen the handwriting, and knew that it was the signature of the Concordia Loan and Trust Company, and the person signing it had authority to represent the company; that such person was and had been employed by the company for a good many years, doing business for it and exercising such authority; that witness knew that he had a right to make contracts in the name of and for the company; that he (witness) knew the indorsement on the note to be that of the payee; that Rider, who made it, was the treasurer of the com-

pany, and had done business for it as such for a good many years; that witness knew him personally, had seen him write, and knew that his signature to the indorsement was genuine; that ¹⁴⁵ the other name to the indorsement was simply an "O. K.," or ratification by some one; that Rider is the treasurer of the company, and has always done its business. The note was then admitted in evidence over defendants' objection on the ground that the indorsement did not transfer such title to the plaintiff as would support an action thereon in his own name, and because the genuineness of the indorsement had not been sufficiently proved. The witness was also permitted to testify, over defendants' objection and exception, that he was in fact the owner in his own right of two-sevenths of the note, and the court instructed the jury that any settlement made by the defendants with the payee or owner of the note after the indorsement thereof to the plaintiff would not be a defense against the plaintiff's two-sevenths interest therein, although it would be such defense against the other five-sevenths. The verdict and judgment were in favor of the plaintiff, and the defendants appeal.

The record bristles with assignments of error. Indeed, it would seem that almost every step in the progress of the trial was objected to by the defendants, and exceptions saved to the rulings of the court. The questions thus raised are embodied in the record and discussed more or less in the brief. They are, however, mostly technical and without merit. There was, in our opinion, sufficient proof of the genuineness of the indorsement on the promissory note offered in evidence to make a prima facie case in favor of the plaintiff. The plaintiff, testifying in his own behalf, said that he was familiar with the signature of the loan and trust company, knew that the man who signed the indorsement was an officer of the company and had been doing business for it for many years, and that his signature to the ¹⁴⁶ indorsement was genuine. The weight to be given to this testimony was, of course, for the jury.

The only points of real importance on this appeal are:

1. Whether the indorsement, being on its face "for collection and return" to the payee, vested plaintiff with such a title as will enable him to maintain an action thereon in his own name; and, if so,
2. Whether the court erred in admitting parol testimony tending to show that plaintiff was in fact the owner of

two-sevenths of the note, and in instructing the jury that, if such was the case, any settlement with the payee or assignee subsequent to the date of the indorsement to plaintiff would be no defense as against plaintiff's two-sevenths.

1. The indorsement of a promissory note by the payee with the words "for collection," or the like, is not strictly a contract of indorsement, but rather the creation of a power, the indorsee being the mere agent of the indorser to receive and enforce payment for his use. The title to the note and the proceeds thereof remain in the payee, and he may maintain suitable actions and proceedings to enforce his right: *White v. National Bank*, 102 U. S. 658, 26 L. ed. 250; *Commercial Bank of Pennsylvania v. Armstrong*, 148 U. S. 50, 13 Sup. Ct. Rep. 533, 37 L. ed. 363; *Sweeney v. Easter*, 68 U. S. (1 Wall.) 166, 17 L. ed. 681; *Williams v. Jones*, 77 Ala. 294; *People's Bank v. Jefferson County Sav. Bank*, 106 Ala. 524, 54 Am. St. Rep. 59, 17 South. 728; *Central R. R. v. First Nat. Bank*, 73 Ga. 383.

2. There is, in the absence of a statute, some conflict in the decisions as to whether such an indorsee can sue in his own name. The weight of authority seems to be in favor of his right to do so: 4 Am. & Eng. Ency. of Law, 2d ed., 274; *Freeman v. Exchange Bank*, 87 Ga. 45, 13 S. E. 160; *Roberts v. Parrish*, 17 Or. 583, 22 Pac. 136; *Falconio v. Larsen*, 31 Or. 137, 48 Pac. 703, 37 L. R. A. 254; *Selover on Bank Col.*, sec. 28.

3. It is now so provided by statute in this state: B. & C. Comp., sec. 4439; *Selover on Negotiable Instruments*, sec. 155; *Crawford on Negotiable Instruments*, sec. 67. We are therefore of the opinion that the present action was rightfully brought in the name of the plaintiff.

¹⁴⁷ 4. It was open, however, as against him, to all defenses which could have been made if the notes had remained in the hands of the indorser, and the action had been brought by it: *Wilson v. Tolson*, 79 Ga. 137, 3 S. E. 900; *Leary v. Blanchard*, 48 Me. 269. The indorsement did not pass the title, nor did it deprive the defendants of any defense they may otherwise have against the note. It merely created the plaintiff the agent of the payee for collection with the right to sue in his own name. The plain meaning of such an indorsement, as said by Mr. Justice Miller (*White v. National Bank*, 102 U. S. 658, 26 L. ed. 250), is that the maker of the note "is to pay it to the indorsee for the use of the indorser. The

indorsee is to receive it on account of the indorser. It does not purport to transfer the title of the paper or the ownership of the money when received. Both these remain, by the reasonable and almost necessary meaning of the language, in the indorser."

5. Such being the effect of the restrictive indorsement and the character of the title acquired by the plaintiff by reason thereof, it necessarily follows that the court was in error in admitting evidence to contradict the contract of indorsement by showing that the note was not transferred to the plaintiff for collection as shown on its face, but that he actually owned two-sevenths thereof in his own right, and in instructing the jury that a settlement made with the payee after the indorsement to plaintiff would be no defense against plaintiff's two-sevenths. The contract of indorsement is in writing. The terms thereof are plain and unambiguous, and parol evidence is not admissible to vary or contradict it: *White v. National Bank*, 102 U. S. 658, 26 L. ed. 250; *Leary v. Blanchard*, 48 Me. 269; *Howe v. Taylor*, 9 Or. 288.

6. The plaintiff's action is based on the indorsement, and not on any interest he may have in the note. He is made by the indorsement the mere agent of the payee for its collection. The defendants' obligation, notwithstanding the indorsement, is to the payee or subsequent owner of the note, and not to the plaintiff. If they settled and paid the note to the payee or assignee, such settlement is a complete defense to an action thereon by plaintiff as a mere agent for collection.

¹⁴⁸ 7. It may be suggested that, because the jury found a verdict in favor of plaintiff for the entire amount sued for, they must have found that the settlement alleged as a defense was never made, and therefore the error of the court in charging the jury in relation thereto was harmless. The ruling of the court upon this point and its instructions to the jury injected into the case an issue not proper to be tried, the result of which was to confuse and mislead the jury, and we do not think it can be said that the error was harmless.

From these views it follows that the judgment of the court below must be reversed, and a new trial ordered. Many of the other questions argued in the briefs will probably not arise on a retrial, and need not, therefore, be noticed at this time.

An Indorsement for Collection does not pass the title or the right to the proceeds of the property, but it makes the indorsee a collecting agent or trustee for the holder: *Moore v. Louisiana Nat. Bank*,

44 La. Ann. 99, 32 Am. St. Rep. 332; National etc. Bank v. Hubbell, 117 N. Y. 384, 15 Am. St. Rep. 515. See, too, Freeman's Nat. Bank v. National Tube Works Co., 151 Mass. 413, 21 Am. St. Rep. 461.

An Indorsement "For Collection" on negotiable paper is notice to the drawee, and indicates on its face that the indorser remains the owner, and that his successive indorsees are his agents only for the purpose of collecting the paper and remitting the proceeds: First Nat. Bank v. First Nat. Bank, 58 Ohio St. 207, 65 Am. St. Rep. 748.

An Indorsee of a Note may Maintain Suit thereon in his own name against the maker, although others are beneficially interested in the paper: Rosemond v. Graham, 54 Minn. 323, 40 Am. St. Rep. 336.

MANCHESTER ASSURANCE COMPANY v. OREGON RAILROAD COMPANY.

[46 Or. 162, 79 Pac. 60.]

EVIDENCE—Memorandum to Refresh Memory.—In Oregon, a witness may refresh his memory by a writing only when it was written by the witness himself, or under his direction, at the time when the fact occurred, or immediately thereafter, or at another time when the fact was fresh in his memory, and he knew that it was correctly stated in the writing. (p. 866.)

EVIDENCE—Memoranda are but secondary evidence, and are not admissible if the witness is able to testify as to the facts mentioned therein, or if he is enabled to testify from present recollection after having had his mind refreshed by the memoranda. (p. 866.)

EVIDENCE—Memoranda.—To enable a witness to testify in any event from memoranda, they must be the originals, unless they be lost, or their absence excused. (p. 866.)

EVIDENCE—Memoranda.—If original memoranda are produced, and it appears that they were made in the usual course of business, they may be introduced and received in evidence along with the testimony of the witness who made them and is enabled to say that the facts stated were correctly minuted at the time, and that he is unable to speak concerning such facts without the aid of the memoranda. (p. 867.)

EVIDENCE—Memoranda.—If original memoranda of locomotive engineers or inspectors are shown to be lost, other memoranda made from original slips by a clerk whose duty it was to make them, and shown by the evidence of such person to be correct, are admissible in evidence. (p. 869.)

RAILROADS—Fire Set by Engines—Evidence of Other Fires.—If it is sought to recover for injury from fire set by a passing railroad engine, and plaintiff does not identify the particular engine that caused the fire either in his pleadings or his proof, the jury are entitled to consider evidence as to other fires caused about that time by the engines of the defendant, and as to the scattering of sparks from such engines about the time in question. (p. 870.)

J. J. Balleray and J. McCourt, for the appellant.

Cotton, Carter & Raley and H. F. Connor, for the respondent.

¹⁶³ WOLVERTON, J. The plaintiffs seek to recover damages for loss by fire alleged to have been occasioned by the negligence of the defendant, its agents and employes. The verdict and judgment of the circuit court were for defendant, and plaintiffs appeal.

The defendant, to show that it had observed proper care and precaution in keeping its engines and smokestacks thereof in suitable repair to prevent the escape of sparks and fire, and the consequent injury to the property of others along the line of its railroad, called one Whitby as a witness, who testified that his occupation was that of a boilermaker; that he was, and had been, in the employ of the defendant; that he inspected locomotives at times, but that he could not testify from memory regarding any inspection of engine No. 400—the one supposed to have done the damage. A book was then placed in his hands, and ¹⁶⁴ his attention called to a page purporting to show the examination, condition and repair of the smokestack and ashpan of such engine at La Grande from time to time during the month of December, 1902. This book is ruled in columns headed, respectively: "Date of Examination"; "Condition of Smokestack and Netting"; "Repaired, State Nature of Repairs"; "Condition of Ashpan and Netting"; "Repairs, State Nature of Repairs"; "Signature of Inspector"; and "Occupation." Within the column headed "Condition of Smokestack and Netting" is written the word "Good" opposite the figure "2" in the column headed "Date of Examination." The word "Good" is also written under the heading "Condition of Ashpan and Netting," the name of C. W. Ellsworth under the heading "Signature of Inspector," and the word "Inspector" under that of "Occupation." The same thing appears as of dates December 3d and 5th. So of the 7th, 11th, 13th, 15th, 23d, 30th, and 31st, except that the name of J. A. Whitby appears under "Signature of Inspector," and "Boilermaker" under "Occupation." The witness then further testified that the signatures on the page were those of the witness, except the first three, and that the word "Boilermaker" was written by him, but that the word "Good," wherever appearing, was written by a clerk in the

division foreman's office; that it was entered from reports that the witness turned in in writing; that when he signed the page he knew the entries as indicated by the clerk opposite his signature to be correct.

On cross-examination the inquiry proceeded as follows:

"Q. Do you know those entries there to correctly report the examinations made on those dates? A. They do.

"Q. What do you recall about the inspections except from this memoranda? A. When the book is given to me to sign, we have the memoranda right there, and look them over when we sign the book, to make sure it is right when we sign it.

"Q. You make these memoranda on what—a book? A. Yes, sir; a shop-book. . . .

"Q. The book is still there, which you made the original entries in? A. I guess it is.

"Q. It is not here, is it? ¹⁶⁵ A. No, sir.

"Q. The clerk makes this, and you sign them? A. He keeps them, and copies them off these reports.

"Q. Who told you he copied it off? A. I frequently see him."

It is further shown that this book is signed by the inspector from the 1st to the 5th of every month following. The page alluded to had previously been offered and received in evidence without objection while Ellsworth, the inspector, signing as of dates December 2d, 3d, and 5th, was on the stand, and likewise the entire book had been offered and admitted, which shows the inspection of many other engines during the same month; but at this time there was an objection interposed both as to the memorandum, and to the witness using it, because it appears from the witness' statement that he did not make the entries, nor were they made under his supervision. Ellsworth, while a witness, testified that he made his reports sometimes on stubs, requisition stub-books—anything to get them on—during the month, which he sent into the office, but that he had them before him when he signed up the exhibit. The objection to the memorandum itself is manifestly without merit, as at this time it had already been admitted in evidence without objection; and, as to the objection to the witness using it, we are of the opinion that it is also without merit, for the reason that the exhibit was already a matter in evidence, and, being so, there existed no good reason why the

witness should not have been examined concerning it, nor why he should not have made such statements touching the real facts as he was enabled to with its aid. However, as this case must go back for a new trial on another point, we will state briefly the result of our investigation as to the admissibility and use of this memorandum for any purpose in the case.

1. Under the testimony of Whitby, the result of the inspections were first noted in a shop-book, and the memorandum in question was subsequently made up from these notations by the division foreman's clerk, and verified by the witness, who appended his signature in testimony thereof. The original entries are those made in the shop-book. Memoranda made up therefrom are but secondary evidence, and are not per se competent evidence of ¹⁰⁰ what was done; nor are they competent for use by the witness under any conditions unless they so refresh his memory that he would thereby be enabled to testify independently of them, or except the originals be lost, or their absence legally excused: *State v. Magers*, 36 Or. 38, 58 Pac. 892; *Haines v. Cadwell*, 40 Or. 229, 66 Pac. 910. By the old law a witness might have refreshed his memory from the memorandum or writing made by himself or under his direction, if made at or near the time, and while the fact or facts of which it speaks were fresh in his mind; and so he might have refreshed his memory from a memorandum or record made by another, if read by or to him when the matter was fresh in his memory, so that he was enabled to depose that the writing correctly represented his recollection at the time: 1 *Greenleaf on Evidence*, 16th ed., sec. 439b; *Abbott on Trial Brief*, 2d ed., 395; *Stephens on Evidence*, art. 136; 2 *Phillips on Evidence*, *916; *Commonwealth v. Ford*, 130 Mass. 64, 39 Am. Rep. 426. The statute has changed this rule, so that now a memorandum must have been made by the witness himself, or under his direction: *B. & C. Comp.*, sec. 848. This statute, in the light of the law as it formerly stood, was probably designed to apply more particularly, if not exclusively, to those memoranda where, after consultation by the witness, his memory is not so refreshed that he can speak from his own recollection independently of the writing, because, if wholly refreshed, so that he can speak without it, it is not always necessary that he produce it in court; but if reference is made to it while testifying, it is

proper for the opposite counsel to cross-examine concerning it, to determine whether he is using it as evidence aside from his recollection: *Friendly v. Lee*, 20 Or. 202, 25 Pac. 396; *State v. Magers*, 36 Or. 38, 58 Pac. 892; *Haines v. Cadwell*, 40 Or. 229, 66 Pac. 910; *Hill v. State*, 17 Wis. 675, 86 Am. Dec. 736; *Folsom v. Apple River L. Co.*, 41 Wis. 602.

2. The theory of the law deducible from the books seems to be that a memorandum is but secondary evidence of the facts of which it speaks, the primary evidence being the knowledge of the witness, if he is able to testify truly as to the facts mentioned, or if he is enabled to testify from present recollection ¹⁶⁷ after having had his mind quickened by the memorandum—that is to say, of his own knowledge, independent of the memorandum; and it is only when this primary proof is not available that resort may be had to the secondary, so that it becomes necessary to show that the witness cannot speak from knowledge of the facts, or from present recollection thereof, after having consulted the memorandum, before it can become of evidentiary value, either as auxiliary, or an aid to the mind in speaking from it: *Bradner on Evidence*, 2d ed., 472; *Abbott on Trial Evidence*, 2d ed., 395, 396; *Friendly v. Lee*, 20 Or. 202, 25 Pac. 396; *Howard v. McDonough*, 77 N. Y. 592; *Peck v. Valentine*, 94 N. Y. 569; *National Ulster County Bank v. Madden*, 114 N. Y. 280, 11 Am. St. Rep. 633, 21 N. E. 408; *Krom v. Levy*, 1 Hun (N. Y.), 171; *People v. McLaughlin*, 150 N. Y. 365, 44 N. E. 1017; *Acklen's Exr. v. Hickman*, 63 Ala. 494, 35 Am. Rep. 54; *Hayden v. Hoxie*, 27 Ill. App. 533. But to enable a witness to testify from the memorandum, under the conditions stated, it must be the original, unless it be lost, or its absence excused: *Davis v. Field*, 56 Vt. 426; *Caldwell v. Bowen*, 80 Mich. 382, 45 N. W. 185; *Harrison v. Middleton*, 11 Gratt. 527.

3. If the original be produced, and it appears that it was made in the usual course of business, it may be introduced and received in evidence along with the testimony of the witness who made it, and is enabled to say that the facts stated in it were correctly minuted at the time; but this is because he has forgotten, so that he is unable to speak concerning such facts without the aid of the memorandum: *Abbott on Trial Evidence*, 2d ed., 395; *National Ulster County Bank v. Madden*, 114 N. Y. 280, 21 N. E. 408, 11 Am. St. Rep. 633; *Peck v. Valentine*, 94 N. Y. 569; *Krom v. Levy*, 1 Hun (N. Y.),

171; *Merrill v. Ithaca etc. R. Co.*, 16 Wend. 586, 30 Am. Dec. 130; *Moots v. State*, 21 Ohio St. 653; *Burton v. Plummer*, 2 Ad. & E. *341; *Doe v. Perkins*, 3 Durn. & E. 749; *Tanner v. Taylor*, referred to by Mr. Justice Buller in the latter case. Memoranda made in the usual course of business, when made up from reports of subordinates, are admissible, under the rule, when accompanied by the ¹⁶⁸ testimony of such subordinates that they represent truly what had transpired, combined with that of the person minuting the transactions that they were also truly noted; but not so with merely private memoranda, not made in pursuance of any duty owed by the person making them: *Mayor v. Second Ave. R. Co.*, 102 N. Y. 572, 55 Am. Rep. 839, 7 N. E. 905. To the same purpose, see *Harwood v. Mulry*, 8 Gray, 250; *Miller v. Shay*, 145 Mass. 162, 1 Am. St. Rep. 449, 16 N. E. 468. So, the court in the case of *The Norma*, 68 Fed. 509, 15 C. C. A. 553, where entries were made in the usual way from memoranda furnished by foremen of the time of their workmen, the memoranda being lost, held that the proofs were sufficient as to certain items pertaining to the yacht, the foremen having been called in conjunction with the bookkeeper who made up the account; citing *Mayor v. Second Ave. R. Co.*, 102 N. Y. 572, 55 Am. Rep. 839, 7 N. E. 905. Another phase of the question was presented in *Peck v. Valentine*, 94 N. Y. 569, where the plaintiff, for the purpose of proving that defendant had not entered in his cash-book all the moneys received by him for the sales of lumber, called one Leggett, who testified that he kept on a loose piece of paper an account of moneys received by defendant, which he gave to the plaintiff. This the plaintiff supplemented by his own testimony that he received the memorandum from Leggett and had lost it, but that he had correctly copied the figures into a memorandum-book, and that the entries had not been altered; and it was held error to receive the book in evidence, because the memorandum of Leggett was not produced, and he was not called upon to verify its contents. Of a kindred nature is *Hematite Min. Co. v. East Tennessee etc. R. Co.*, 92 Ga. 268, 18 S. E. 24.

4. In the light of these rules and legal principles, we are of the opinion that the original memoranda of Ellsworth and Whitby, showing the dates of their inspections, should have been produced, if they were unable to testify to the facts thereby recorded without and independently of them. If

produced, however, it would have been competent to submit them to the jury, as well as for the witnesses to speak from them.

109 5. If, on the other hand, they have been lost, and the fact is satisfactorily shown, then the fact of the inspection could be proven by calling the inspectors in conjunction with the clerk in the division foreman's office who made up the present book in the usual course of business, and the book would then become competent evidence to go to the jury. Neither the inspector nor the clerk being able to testify as to the fact of the inspection and the result, with the attendant dates, from present recollection, the necessity for resort to the secondary evidence would thus be shown; otherwise the book could not be introduced. The book is not a memorandum made by the inspectors or under their direction, but it is a reproduction of the original memoranda made by them. It is a memorandum made by the clerk, however, and, when his testimony concerning it is conjoined with that of the inspectors, showing that inspections were made, and that their memoranda have been lost, or that their production is excusable, and they are able at the same time to verify this as being a correct transcript therefrom, there exists no good reason why the book should not go to the jury.

6. According to the bill of exceptions, the plaintiffs introduced evidence tending to prove that the fire occurred on the third day of December, 1902; that it started in a warehouse close to the railroad; that a passenger train passed, and that about fifteen minutes afterward the fire was discovered; that when first seen it was a "little fire—looked like a headlight of an engine at a short distance"; and that it started on the roof of a warehouse. This was about 6 o'clock in the morning. Plaintiffs also introduced other evidence tending to show that other trains were seen passing there on previous mornings, and shortly after the fire, and that the engines were frequently seen to throw out sparks sufficient at times to set fire to grass along the way; that the engine hauling the same passenger train was at other times seen to emit sparks, some of them of large size; that the passenger train in question was No. 6, but it was not known what engine was attached to it. Under this record, plaintiffs requested the following instruction: "You are the judges of all the facts in the case, and should the defendant offer proof to establish

the fact that the engines ¹⁷⁰ and the particular engine claimed to have caused the fire was equipped with the best modern appliances generally used, and that it was in good repair, and operated by careful and skilled mechanics, who were careful at the time, you will nevertheless take all the evidence into consideration, and determine from the whole evidence whether this is true or not; and, in doing this, you will take into consideration any evidence tending to show that other fires were caused by engines of the defendant at other times shortly prior or subsequent to the fire alleged in the complaint, or whether engines of the defendant, or this particular engine, scattered coals or sparks or cinders at the time of this particular fire, or shortly prior or subsequent thereto, in determining whether the defendant has been guilty of negligence or not."

This the court modified so as to confine its application to the particular engine which it is claimed caused the fire, and its action in that regard is assigned as error. The particular engine that did the damage not having been identified by plaintiffs' pleadings or proof, plaintiffs were entitled to the instruction requested: 2 Thompson on Negligence, 2371-2374; Koontz v. Oregon Ry. etc. Co., 20 Or. 3, 23 Pac. 820. The one given had the effect of saying to the jury at the last that, although evidence had been admitted tending to show that other engines than the one claimed by the defendant to have set the fire had shortly previous, and subsequent thereto, in passing in proximity to the place, scattered and communicated the fire, they need not consider such evidence, but only such of the kind as related to the particular engine in question, in arriving at their verdict in the case. This was error, for which the judgment of the circuit court will be reversed, and the cause remanded for such further proceedings as may seem proper.

A Witness may Refresh His Memory, as a rule, by anything written by him or under his direction at the time the fact occurred or soon thereafter: Card v. Foot, 56 Conn. 369, 7 Am. St. Rep. 311; McGowan v. McDonald, 111 Cal. 57, 52 Am. St. Rep. 149; Post v. Kenerson, 72 Vt. 341, 82 Am. St. Rep. 948.

KASTON v. PAXTON.

[46 Or. 308, 80 Pac. 209.]

MORTGAGES—Foreclosure—Execution Sales—Right to Subsequently Accruing Rents.—The right to rents collected by a purchaser of real estate at execution sale upon foreclosure of a mortgage, while he is in possession, does not pass to a purchaser of the equity of redemption, even after redemption, merely under the habendum clause in his deed, and without being specially mentioned and assigned. (p. 872.)

EQUITY Has No Jurisdiction of a Suit for an Accounting in the absence of an allegation that the account is long and complicated. (p. 872.)

O. F. Paxton, for the appellant.

G. G. Ames, for the respondent.

³⁰⁸ Per CURIAM. This is a suit for an accounting. The complaint states, in effect, that one P. O. Lundin was on June 29, 1894, and September 21, 1895, the owner of certain real property in Portland, which he mortgaged to the Alliance Trust Company, Limited, to secure the sums of three thousand dollars and one thousand dollars respectively, the debts maturing July 1, 1899 and 1900; that these mortgages were assigned to one Jennie Y. Wade, who, upon default in the payment of the sums due, secured a decree foreclosing the liens thereof, and executions having been issued thereon, the premises were sold thereunder to the defendant, who, on a confirmation of the sale, September 18, 1902, took possession of the land and collected the rents thereafter accruing, amounting to five hundred and twenty-eight dollars and twenty cents; that on August 19, 1903, Lundin and his wife sold and conveyed the premises to plaintiff, who, three days thereafter, redeemed the same from the sale thereof under the decree of foreclosure; and that the defendant, having been requested by plaintiff to pay to him the rents she had collected, refused to comply therewith. A demurrer to the complaint on the ground that it did not state ³¹⁰ facts sufficient to constitute a cause of suit having been overruled, and the defendant declining further to plead, a decree was rendered against her for the sum demanded, and she appeals.

1. It is contended by defendant's counsel that the rents received in the case at bar accrued prior to the conveyance of the premises to plaintiff, and the right thereto did not pass

by the deed executed to him, and that a suit in equity cannot be maintained for the recovery of the sums secured, for which reasons an error was committed in overruling the demurrer. Rent, in the legal sense, is a compensation paid for the use of demised premises, and is treated as a profit arising out of lands and tenements corporeal: Wood on Landlord and Tenant, sec. 448. The rents involved herein accrued before the land was conveyed to plaintiff, and, though the right to recover the sum received on account thereof might have been assigned by Lundin, as a chose in action (*West Shore Mills Co. v. Edwards*, 24 Or. 475, 33 Pac. 987), such right did not pass to plaintiff under the habendum clause of his deed: *Jolly v. Bryan*, 86 N. C. 457. There is no averment in the complaint that the right to the rent which accrued prior to the execution of the deed to plaintiff was assigned to him, and, as the compensation for the use of the premises was payable to Lundin, the owner of the reversion when the rent became due, the plaintiff does not show a prima facie right to recover the sum collected by the defendant: 18 Am. & Eng. Ency. of Law, 2d ed., 280; *Page v. Lashley*, 15 Ind. 152; *Van Driel v. Rosierz*, 26 Iowa, 575; *Damren v. American L. & P. Co.*, 91 Me. 334, 40 Atl. 63; *Burden v. Thayer*, 3 Met. 76, 37 Am. Dec. 117; *Hayden v. McMillan*, 4 Tex. Civ. App. 479, 23 S. W. 430. The complaint, therefore, did not state facts sufficient to entitle plaintiff to recover the rents which accrued prior to the execution of his deed.

2. If the complaint were sufficient in this respect, however, the remedy would be an action to recover the rents as money had and received to plaintiff's use, unless, possibly, by reason of the account being long and complicated, a resort to the other forum might be upheld (*Harris v. Reynolds*, 13 Cal. 514, 73 Am. Dec. 600), which is not alleged herein. As the complaint does not state any facts justifying a recourse to a court of equity, and ³¹¹ fails to aver an assignment of the rents, the decree must be reversed, the demurrer sustained, and the suit dismissed; and it is so ordered.

A Conveyance of Leased Premises carries with it the right to rents subsequently falling due: Eisley v. Spooner, 23 Neb. 470, 8 Am. St. Rep. 128. And where rent is payable at stated intervals, as quarterly, or yearly, it will not be apportioned, in the absence of an express reservation, and a purchaser of the property before the rent falls due is entitled to the whole thereof: *Whithed v. St. Anthony etc. Elevator Co.*, 9 N. Dak. 224, 81 Am. St. Rep. 562.

A Purchaser of Land at a Foreclosure Sale is substituted to the rights of the owner, and is entitled to receive from the tenant in possession the rents of the property sold: *Whithed v. St. Anthony etc. Elevator Co.*, 9 N. Dak. 224, 81 Am. St. Rep. 562.

STATE v. LAUTH.

[46 Or. 342, 80 Pac. 660.]

CRIMINAL LAW.—Insanity, to Excuse Crime, must be such as dethrones reason and renders the subject incapable of discerning between right and wrong, or of understanding or appreciating the extent, nature, consequences, or effect of his wrongful act. (p. 874.)

CRIMINAL LAW—Frenzy as Insanity—Sudden Brainstorm not Defense.—A paroxysm of jealousy, or sudden anger or frenzy of temper, provoked or superinduced by the intelligence that the accused had been abandoned by his mistress, he being otherwise in possession of his mental faculties, unimpaired by disease or unbalanced by heredity, will not relieve him of criminal responsibility for having killed her. (p. 875.)

TRIAL—Qualification of Jurors.—The trial court's conclusion as to the qualifications of a juror, when attacked after verdict for bias or prejudice rendering the juror unfit to sit in the case, will be set aside only upon a showing by clear and palpable proof that the court has abused his discretion. (p. 877.)

TRIAL—Qualifications of Jurors—Review of.—If the qualifications of a juror are attacked after verdict for bias or prejudice rendering him unfit to sit in the case, and affidavits and proofs are produced for and against, which are conflicting and contradictory, or of somewhat even balance, so that it requires a precise estimate to determine as to the greater weight or preponderance, the trial court's conclusions will not be disturbed, unless they may result in manifest injustice. (pp. 878, 879.)

TRIAL—Qualifications of Jurors—Setting Aside Verdict.—If a venireman on his voir dire falsely states his interest or position, or misstates or conceals a material, relevant fact, and is then accepted as a juror, he is guilty of prejudicial misconduct, and the verdict must be set aside. (pp. 879, 880.)

G. C. Brownell and G. B. Dimick, for the appellant.

H. Allen, district attorney, A. M. Crawford, attorney general, and C. Schuebel, for the state.

343 WOLVERTON, C. J. The defendant was convicted of murder in the first degree for killing one Leonora B. Jones, his mistress, and adjudged to pay the penalty imposed by statute. He interposed the plea of insanity at the trial, and, with a view to establishing the defense, called Charles R. Noblitt, who related that he was at the depot in Oregon

City the night before the killing; that he did not see the defendant there, but saw him a little while afterward. Thereupon one of the counsel for the defendant stated that he desired to show the actions of the woman when she got off the train, with reference to another man, and that her conduct there was afterward made known to the defendant, which ³⁴⁴ request the court denied, saying: "I do not think a man can set up, in a case of this kind, jealousy or anger or frenzy caused by jealousy—caused by the fact that a woman had abandoned him. I do not believe it is a good defense. If you can show this man was insane, it is a defense. But I do not think that the law recognizes that the abandonment of a man by his mistress is any legal provocation for taking her life. If you expect to offer any evidence tending to show that he was insane, the court will admit it."

Counsel then further stated that the woman came down on the train with certain parties, who were seen by two policemen, which fact was communicated to the defendant, and requested permission to show the subsequent acts of the defendant, answering which the court again ruled as follows: "I want to lay this down as the law: That a frenzy arising from jealousy or anger is not insanity. The difference between them, in law, is as wide as the poles. It is the duty of a man to control his passions, but he cannot control disease. I will admit anything that you can introduce to show the condition of this defendant's mind—anything that was communicated to him. As I say, what the fact might be would not be material, but what was communicated to him might be material, with a view of determining what kind of a mind he had."

Objections were saved to these rulings and form the basis of the first assignment of error.

1. Insanity, to excuse crime, must be such as dethrones reason and renders the subject incapable of discerning right from wrong, or of understanding or appreciating the extent, nature, consequences, or effect of his wrongful act: *State v. Murray*, 11 Or. 413, 5 Pac. 55; *State v. Zorn*, 22 Or. 591, 30 Pac. 317. It has been said that "a mere uncontrollable impulse of the mind, coexisting with the full possession of the reasoning powers, will not warrant an acquittal on the ground of insanity; the question for the jury being whether the prisoner, at the time he committed the act, knew the char-

acter and nature of the act, and that it was a wrongful one": *Regina v. Barton*, 3 Cox C. C. 275, headnote. This appears to be the rule in England. The rule as it obtains in this country is lucidly but concisely ³⁴⁵ stated by Mr. McClain (1 McClain on Criminal Law, sec. 157), as follows: "As indicated in the preceding paragraph, there are some cases which lend countenance to the idea that an irresistible impulse to the commission of the crime will be an excuse; but in many cases, and, indeed, by a great weight of authority, irresistible impulse or uncontrollable passion is held not to be a defense. Where the criminal has sufficient mental capacity to distinguish between right and wrong, mere passion or frenzy produced by anger, jealousy or other passions will not excuse. There may, indeed, be insane impulses which are so far uncontrollable that there is no criminal liability therefor, but they must be shown to be the result of a diseased mind, and not merely of passion or impulse, though it is said in one case that uncontrollable impulses, due to provocation and disappointment, exaggerated by a disordered mind, might be taken into account to relieve the degree of homicide. But what is called moral or emotional insanity is distinctly repudiated as an excuse in perhaps all the cases in which such defense has been directly considered." In further support thereof, see *State v. Hansen*, 25 Or. 391, 35 Pac. 976, 36 Pac. 296; *Goodwin v. State*, 96 Ind. 550; *McCarty v. Commonwealth*, 24 Ky. Law Rep. 1427, 71 S. W. 656. Thus it is obvious that a paroxysm of jealousy, or sudden anger or frenzy of temper, provoked or superinduced by the intelligence that the accused had been abandoned by his mistress, the object of his lustful affections—he being otherwise in possession of his mental faculties, unimpaired by disease or unbalanced by heredity—will not relieve him of criminal responsibility; and the trial court's rulings or observations were in accord with this understanding of the law. The rule was pithily stated, with something of epigrammatical emphasis, but there was no purpose manifest of attracting any particular attention to that phase of the case any more than to any other.

2. The court distinctly stated that any evidence tending to show insanity would be admitted, and, to that end, that it would allow the acts and conduct of the defendant to be proven, as well as any communications made to him relative

to the deportment of the woman. This gave ample scope for maintaining the defense interposed, and, when taken in connection with ³⁴⁶ the general charge that the jury had a right to take into consideration the condition of mind of the defendant at the time he committed the homicide, as bearing upon the degree of the offense of which he was guilty, it is manifest that there was no error of which he could complain.

The only other error assigned arises from the conduct of John Page, who sat on the jury. The following is his examination, and the answers elicited on his voir dire:

"Q. I will ask you if you have heard or read anything about this case? A. No, sir.

"Q. Did you read anything about it in the newspapers at the time it is alleged to have happened? A. No, sir; I believe not.

"Q. You knew there was such a case on the docket, did you? A. I did.

"Q. I will ask you if, on or about the sixth day of September, when this alleged offense is supposed to have happened, if you heard the matter discussed any? A. No, sir.

"Q. Then you know nothing about what purports to be the facts in this case? A. Not a thing.

"Q. I will ask you, if you were accepted as a juror in this case, you'd be willing to go into the jury-box and eliminate any impression, if you have one, as to the guilt or innocence of the defendant, and try the case solely upon the evidence, and the law as given you by the court? A. Yes, sir."

Being accepted by the defendant, the district attorney further examined him as follows:

"Q. Have you any conscientious scruples against the infliction of capital punishment for murder? A. Not at all.

"Q. Have you ever been a close friend of Mr. Brownell or Mr. Dimick? A. No, sir.

"Q. Are you acquainted with any of the witnesses in the case? A. Carll is the only one I know. I don't know any of them, only Carll.

"Q. Do you know any reason why you could not give both sides an absolutely fair and impartial trial? A. I could.

³⁴⁷ "Q. You could? A. Yes, sir.

"Q. Have you no opinion at all? A. None whatever."

After verdict the defendant moved to set it aside and for a new trial on the ground, as alleged, that the juror made

false answers to the questions thus propounded to him touching his qualifications to sit as a trior in the cause, and therefore he was not accorded a trial by a fair and impartial jury. To prove the falsity charged, the affidavits of Henry W. Trembath and G. B. Dimick, one of the counsel for the defendant, were produced. Trembath is a constable, and took charge of the defendant very soon after the tragedy, receiving him from the father of the deceased, who then had him in custody. He swears that, immediately after he received the defendant into his custody, the defendant informed him that his (defendant's) gun or pistol, which he then had in his pocket, contained only one loaded shell, and that he had shot four loads into the body of the deceased; that he (affiant) was subpoenaed as a witness, and testified before the coroner's jury relative to what the defendant had told him; that immediately after the inquest he met Page, the juror, in front of the courthouse, and there talked with him, and told him all about the shooting of the deceased, and also what the defendant had told him (affiant) in regard to the loaded and empty shells remaining in the pistol, and, in fact, all that he had testified to before the coroner's jury. Further, he swears that he related to him all the facts, as he (affiant) understood them, leading up to the homicide; that thereafter, about the last of September, 1904, affiant again met Page in the sheriff's office, and there talked with him about the shooting, wounding, and killing of the deceased by the defendant; that the affiant was in the courthouse when Page was drawn on the panel as a juror; that he was asked, while being examined touching his qualifications, if he was acquainted with any of the witnesses for the state (the names on the information being read to him at his request, that of affiant among the rest); and that he answered that Dr. Carll was the only one. The affiant further deposed that he had been acquainted with Page for a long time ³⁴⁸ prior to the date of the killing. Dimick deposes that on or about December 1, 1904, Page admitted to him, in the presence of Trembath, that he had talked with the latter about the case prior to the trial.

In refutation of this showing on the part of the defense, the state produced the affidavit of Page, and another from Trembath. Page avers that he has no recollection of ever having talked with Trembath or any other person about the shooting of deceased by defendant; that he had not at any

time expressed an opinion as to the guilt or innocence of the defendant to any person or persons; that he had no knowledge of the facts, or of what purported to be the facts, relative to the homicide, prior to hearing the evidence at the trial; that he never admitted to having talked with Trembath or any other person about the facts of the shooting in the presence of Dimick and Trembath, or any other person or persons; that he never knew Trembath by the name of Henry W., but was slightly acquainted with him by the name of Harry, by which latter he was commonly known; and that, when the name Henry W. Trembath was read to him from the information, he did not know that it referred to the same person as Harry Trembath. Trembath avers that he was in the office of Dimick at the time referred to by the latter in his affidavit, and that Page never stated at that or any time, in his presence, or in the presence of Dimick and himself, that he had ever talked with Trembath about the case, nor did he in any manner admit the same. This constitutes all the material proofs pro and con touching the alleged misconduct of the juror.

3. The exact function of the trial court as a trier of a juror's qualifications before trial, and the principle upon which its action in that regard may be revised, have been firmly settled in this state: *State v. Saunders*, 14 Or. 300, 12 Pac. 441; *State v. Armstrong*, 43 Or. 207, 73 Pac. 1022. As the trier of a juror's qualifications after verdict, when attacked for bias or prejudice rendering him unfit to sit in the cause, the function of the court is much the same as when it is sitting to make the inquiry before trial. It is held to the exercise of a sound legal discretion, and is amenable to revision only when it has abused that discretion. The reason commonly assigned for the ³⁴⁹ rule is that the trial court has the opportunity of seeing the juror, of hearing him give his testimony, and of noting his manner and demeanor while under examination; thus affording it advantages superior for determining the matters of inquiry to those accorded the appellate tribunal, which is furnished only with the dry facts upon paper. The rule is otherwise stated as requiring clear and palpable proofs to warrant a reversal of the trial court's determination.

4. It follows, therefore, that, where affidavits and proofs are produced for and against, which are conflicting and con-

tradictory, and of somewhat even balance, so that it requires a precise estimate to determine as to the greater weight or preponderance, the trial court's conclusions will not be disturbed, unless they result in manifest injustice: 17 Am. & Eng. Ency. of Law, 2d ed., 1209; Ray v. State, 15 Ga. 223; Brinkley v. State, 58 Ga. 296; Stewart v. State, 58 Ga. 577; Vann v. State, 83 Ga. 44, 9 S. E. 945; Long v. State, 95 Ind. 481; Hodges v. Bales, 102 Ind. 494, 1 N. E. 692; Epps v. State, 102 Ind. 539, 1 N. E. 491; De Hart v. Etnire, 121 Ind. 242, 23 N. E. 77; State v. Lee, 80 Iowa, 75, 20 Am. St. Rep. 401, 45 N. W. 545; Wightman v. Butler County, 83 Iowa, 691, 49 N. W. 1041; Hull v. Minneapolis St. Ry. Co., 64 Minn. 402, 67 N. W. 218; Svenson v. Chicago, G. W. R. Co., 68 Minn. 14, 70 N. E. 795; State v. Gonce, 87 Mo. 627; Kennedy v. Holladay, 105 Mo. 24, 16 S. W. 688; State v. Dusenberry, 112 Mo. 277, 20 S. W. 461; State v. Howard, 118 Mo. 127, 24 S. W. 41; State v. Taylor, 134 Mo. 109, 35 S. W. 92.

5. The rule, on principle, must necessarily be the same where the court is sitting to inquire touching alleged misconduct of a juror. Mr. Chief Justice Elliott, in *Pearcy v. Michigan Mut. L. Ins. Co.*, 111 Ind. 59, 60 Am. Rep. 673, 12 N. E. 98, 99, says, with great force and obvious justice, that "the examination of a juror on his voir dire has a two-fold purpose, namely, to ascertain whether a cause for challenge exists, and to ascertain whether it is wise and expedient to exercise the right of peremptory challenge given to parties by the law. It is often important that a party should know the relation sustained by a person called as a juror to his adversary, in order that he may ³⁵⁰ interpose a challenge for cause, or exercise his peremptory right to challenge. It is the duty of a juror to make full and truthful answers to such questions as are asked him, neither falsely stating any fact nor concealing any material matter, since full knowledge of all material and relevant matters is essential to a fair and just exercise of the right to challenge either peremptorily or for cause. A juror who falsely misrepresents his interest or situation, or conceals a material fact relevant to the controversy, is guilty of misconduct, and such misconduct is prejudicial to the party, for it impairs his right to challenge": *Johnson v. Tyler*, 1 Ind. App. 387, 27 N. E. 643. The accused has a constitutional right to a trial by a fair and impartial jury, and ought not, therefore, to be com-

pelled to submit to be tried by a juror who insinuates himself upon the panel by falsifying his oath. So we take it, without further inquiry or citation of authority, that if the juror Page, when asked on his voir dire if he had heard or read anything about the case, or if he had heard the matter discussed, or knew anything about what purported to be the facts in the case, or was acquainted with any of the witnesses, answered falsely, so as to deprive the defendant of his right of peremptory challenge, or of questioning him more rigidly relative to the real facts which might have influenced his mind and determined the court as to his competency as an impartial juror, then his acts amounted to misconduct manifestly prejudicial to the defendant, as they have deprived him of a clear legal right. We think, also, we may assume that the juror, by answering falsely, if such he did, had some ulterior motive to subserve. Whether it was to convict or to acquit the defendant is not apparent, but it does not matter—the result of his verdict was to convict—and who could say that he went into the box with a different purpose or wholly unbiased?

6. Did the juror, therefore, answer falsely? For such is the misconduct charged against him. The solution of this question depends almost entirely upon the affidavit of Trembath and the counter-affidavit of Page. Between these there is a sharp conflict in statement. The juror has a right to be heard upon his own affidavit, and the trial court may look back to the examination ³⁵¹ on his voir dire, and, considering the whole, determine the controversy. As to the controlling feature sworn to by Trembath—that he had talked with Page, and told him about the pistol and the shells, and the facts as he understood them—Page replies by saying that he has no recollection of either circumstance, or of having talked with anyone about the case prior to the trial. He might have denied by positive statement, which would have strengthened his defense, and, not having done so, it leaves an impression that he could not conscientiously so depose. It is hardly possible, however, that he should have forgotten within such a short space of time a matter which would naturally impress itself upon his mind, and it is a fair inference that he knew when he filed his affidavit whether Trembath had previously talked with him or not, and he is not to be excused on account of a short memory. When, therefore, he asserts that

he retains no recollection of Trembath's having talked with him, the statement is persuasive and cogent in repudiation of the charges made by Trembath. Page's statement on the *voir dire*, however, is positive that he had never heard anything about the case, and knew nothing of the facts; and this was very recently after the conversation should have taken place, according to the showing of Trembath. Further, there is a weakness in Trembath's statement. He does not aver that Page made any reply when being told of the alleged facts of the killing, either by way of expressing an opinion, or letting fall any observation about the matter. One would naturally suppose that he would have said something affecting his qualifications as a juror, of a nature pertinent to have been set out along with the other facts. All this, however, by way of a discussion of the relative probabilities of truth in these contradictory and conflicting affidavits. The incident of Trembath's alleged acquaintance with Page is of minor moment, and is satisfactorily explained by the latter. The affidavit of Mr. Dimick is admittedly disparaging to the juror's answers on his *voir dire*, but the latter denies the statement in positive terms, and Trembath, who was present at the time alluded to, corroborates the denial, so that, considering the whole testimony pro and con bearing on the dispute, there is ³⁵² something of an even balance. It falls far short of a clear and palpable showing that the juror has been guilty of misconduct as alleged, and the trial court, with more favorable opportunity to detect imposition and discover truth, having passed upon the proofs, we must take it, under the authorities, that it has rightly and justly decided the question involved. We cannot, therefore, interfere with its legal discretion in the premises. *State v. Cook*, 84 Mo. 40, and *State v. Gonce*, 87 Mo. 627, afford apt illustrations and discussions of the consideration and weight to be accorded to conflicting affidavits introduced for the establishment of a fact in dispute. A trial of fact by affidavit is not so felicitous in the discovery of truth as where the witness may be subjected to the search of a cross-examination for the verification of his statements, and the ascertainment of any motive present that may go to the impairment of his credibility. Accordingly, courts have enjoined the observance of caution in acting upon testimony adduced by that method, and usually agree that the case should be distinctly and clearly made, where it is sought

to have a verdict set aside, and a new trial awarded, for it is, in a manner, impeaching the regularity of a judicial proceeding: *Hughes v. People*, 116 Ill. 330, 6 N. E. 55; *Spies v. People*, 122 Ill. 1, 3 Am. St. Rep. 320, 12 N. E. 865, 17 N. E. 898; *Lamb v. State*, 41 Neb. 356, 59 N. W. 895; *Hill v. State*, 42 Neb. 503, 60 N. W. 916.

Finding no error, therefore, in the rulings of the circuit court, its judgment will be affirmed.

Insanity as a Defense to Crime is discussed in the note to *Knights v. State*, 76 Am. St. Rep. 83-97; *State v. Marler*, 36 Am. Dec. 402-410. And insane delusions as affecting criminal responsibility are discussed in the note to *People v. Hubert*, 63 Am. St. Rep. 100-108.

MCCRARY v. BIGGERS.

[46 Or. 465, 81 Pac. 356.]

HUSBAND AND WIFE—Contract Between, as to Estate by Curtesy.—A contract between husband and wife for the relinquishment by him of his curtesy estate or interest in her property is void as against public policy. (p. 884.)

HUSBAND AND WIFE—Estoppel to Claim Estate by Curtesy. If a husband agrees with his wife not to claim his estate by curtesy in her lands, and, as a result, she does not convey her lands by deed, but devises them by will, such contract is void, and the husband is not estopped from claiming an estate by curtesy in such lands, although he has allowed the persons to whom the land was devised to take possession of it. (p. 884.)

SPECIFIC PERFORMANCE of Contracts for the transfer of real property will not be enforced on the ground that one of the contracting parties has taken possession thereof, when the contract is itself void and incapable of being enforced. (p. 884.)

C. H. Finn, for the appellants.

Crawford & Crawford, for the respondents.

⁴⁶⁷ BEAN, J. On September 12, 1904, the defendant commenced an action at law against the plaintiffs to recover possession of certain real property in the city of La Grande, alleging that he was the owner of a life estate therein, and entitled to its immediate possession. The plaintiffs answered at law, and at the same time filed a complaint in equity in the nature of a cross-bill, in which they alleged facts which they insist make them the owners in equity of the defendants'

interest in the property, and estop him from asserting any claim thereto. A demurrer to the cross-bill was sustained, and, plaintiffs refusing further to plead, it was dismissed, and they appeal.

⁴⁰⁸ The facts as disclosed by the cross-bill are, briefly, that Mary Biggers, the wife of the defendant, died on June 30, 1903, seised and possessed of the property in dispute, leaving a will by which she devised the same to the plaintiff Hattie McCrary, and appointed the defendant as the executor thereof; and thereafter the will was regularly admitted to probate, and the plaintiffs, by the consent of the defendant, entered into possession of the property; that defendant, it is alleged, ought not to be permitted to claim or set up any interest in or right to the property, for, at the time the will was executed, the testator was suffering from a serious malady requiring a surgical operation; that she was informed by her physicians of the character of her disease, and of the probability of a fatal result of the operation; that she was desirous in case of her death that her property should go to her parents and her brother and sister, the plaintiff Hattie McCrary; that with the consent of her husband, the defendant, she could and would have transferred her property to her relatives by conveyances or other proper means, but was advised and induced by the defendant to believe that she could accomplish the same purpose by a last will and testament; that defendant represented to her that he was possessed of ample means in his own right, and did not need or desire any part of her property or the use thereof, and should not be considered at all in her will; that he advised and counseled her to omit from her will any provision for him in lieu of curtesy or otherwise, and represented to her that he would respect and carry into effect and operation any provisions of her will for the disposition of her property that she might make; that, relying upon such statements and representations and agreement of her husband, she made and executed her will, whereby she devised the real property in question to her sister; that after her death the defendant had the will probated, and was duly appointed executor thereof; that as such executor he put the plaintiffs in possession of the property, and thereby recognized their right to such possession.

From these facts it appears that Mrs. Biggers and the defendant, her husband, were seised in her right at the time of

her death of an estate of inheritance in the land in dispute, and ⁴⁶⁹ therefore the defendant is entitled to the possession of such land during his life as tenant by the curtesy, notwithstanding her will (B. & C. Comp., secs. 5544, 5547), unless he has become, in some manner known to the law, barred thereof. It is not alleged or contended that he ever executed any conveyance or instrument jointly with his wife or otherwise, which has such an effect. As we understand the plaintiff's position, it is that the defendant and his wife entered into an oral contract or agreement at the time the will was executed by which he agreed to relinquish or surrender his curtesy interest in her property, and that she made her will relying thereon. The gist of this contention is that by such contract or agreement the defendant clothed his wife with power and authority to dispose of her property free from his curtesy interest. Now, it has been held by this court that, when a husband or wife owns property in his or her own right, any inchoate right the other may have therein, such as tenant by the curtesy or by dower, cannot be the subject of a valid contract between them. It was so held in *House v. Fowle*, 20 Or. 163, 25 Pac. 376, and again in *Potter v. Potter*, 43 Or. 149, 72 Pac. 702. The contract, therefore, between the defendant and his wife for the relinquishment by him of his curtesy estate or interest in her property was void, and, of course, cannot be specifically enforced.

2. Nor, under the facts as stated is he estopped from asserting such interest. His wife did not change her position in any way to her injury by reason of his representations or agreement. She could not have barred his curtesy by any means in her power, and therefore any statements or representations he may have made to her and any instruments she may have made in reliance thereon, could not estop him from asserting his legal rights. And the fact that he permitted the plaintiffs to go into possession of the property is of no consequence. The court will not enforce specific performance of a contract for the transfer of real property on the ground that one of the contracting parties has taken possession thereof, when, as in this case, the contract is itself void and incapable of being enforced. The contract between the defendant and his wife for the relinquishment of the curtesy interest in her property was, as we have seen, void ⁴⁷⁰ as against public policy, and could not become valid by the plaintiffs' taking

possession of the property. Nor does the fact that the will was admitted to probate on petition of the defendant, and his appointment as executor, operate as an estoppel against him. He does not claim to hold under the will, but independently of it, and the will could and did not devise his interest in the property as tenant by the curtesy.

It follows from these views that the decree of the court below must be affirmed, and it is so ordered.

The Principal Case is cited in the note to *Collins v. Russell*, 112 Am. St. Rep. 592. If a husband and wife execute an agreement of separation, whereby each releases all claim to the property of the other, and all right of inheritance thereto, and the agreement is lived up to by both during her lifetime, he should not be heard to say, after her death, that the contract is unfair: *Estate of Edelman*, 148 Cal. 233, 113 Am. St. Rep. 231.

ABBOT v. OREGON RAILROAD COMPANY.

[46 Or. 549, 80 Pac. 1012.]

RAILROADS—Duty to Passengers at Stations.—A railroad company, engaged in carrying passengers for hire, must exercise reasonable care in keeping its platforms, approaches thereto, and station grounds, as far as passengers would naturally resort to them, properly lighted at night for a reasonable time next prior to the arrival or immediately following the departure of a train which its time cards specify will stop at night to take on or put off passengers. (p. 889.)

RAILROADS—Lighting of Stations and Approaches.—What constitutes a reasonable time in which railroad stations and their approaches must be kept lighted at night for the accommodation and safety of passengers, is determined by the circumstances of each particular case, and depends upon the size and importance of the station, and the number of persons who lawfully visit it at night for the purpose of transacting business with the railroad company. (p. 889.)

RAILROADS—Passengers at Stations.—A person who has completed his journey on a railroad train and alighted therefrom at a station provided for the accommodation of the general public is allowed a reasonable time in which to leave the premises, and one who lawfully intends to secure passage on the cars is permitted to occupy the waiting-room of a depot a reasonable time preceding the arrival of the train, which he intends to take, and during such time such persons sustain toward the railroad company a relation analogous to that of a passenger, to whom the company owes a duty commensurate with the degree of danger to which such persons may be exposed. (p. 890.)

RAILROADS—Depots—Duty to Persons Waiting for Trains.—If a railroad company permits a person to remain in its station or

in its cars while waiting for a train not due for some time, and which he intends to take, the company owes him the same protection and care that it owes any other passenger. (p. 892.)

RAILROADS—Depots—Duty as to Lighting.—The knowledge of a train dispatcher that a passenger arriving over another line of railroad, at night, intends to take a train on his line of road does not bind the company owning the last-named road to light its depot and its approaches until a reasonable time prior to the arrival of its train. (p. 892.)

RAILROADS—Duty to Light Stations—Reasonable Time—Question of Fact.—Whether a railway passenger depot was kept lighted a reasonable time prior to the arrival of a night passenger train is a question of fact to be determined by the jury. (p. 893.)

RAILROADS—Right of Passengers to Leave Cars.—A passenger by rail may, before reaching his destination, leave his car to transact his own private business, at any intermediate station where a stop is made for any reasonable time to receive or discharge passengers, and if, without his fault, he is injured in consequence of the carrier's negligence on any part of its premises set apart by it for the use of the public, or used with its consent, he may recover the damages sustained. (p. 894.)

RAILROADS—Right of Passenger to Leave Car for Exercise. A passenger by rail has a right, before reaching his destination, to leave his car to walk on a depot platform for exercise when the train is stopped a reasonable time in daylight, to receive or discharge passengers, and he has the same right, even at night, when the platform or walk is sufficiently lighted; and if, while so doing, he is injured without his fault, in consequence of the railroad company's negligence, he may recover damages for the injury sustained. (p. 901.)

RAILROADS—Right of Passenger to Leave Car for Exercise—Contributory Negligence.—A passenger, before reaching his destination, or while waiting for his train at night, has no right to leave a well-lighted car or a well-lighted depot, provided with necessary accommodations, and, for the mere purpose of exercise, go in the darkness upon a walk surrounding the depot, and recover damages for an injury sustained in consequence of the carrier's failure to maintain a railing or its omission to light such platform or walk. His own contributory negligence precludes his recovery. (p. 902.)

Snow & McCamant, W. W. Cotton and H. F. Connor for the appellants.

Bennett & Sinnot, for the respondent.

550 MOORE, J. This is an action by George Abbot against the Oregon Railroad and Navigation Company and the Columbia Southern Railway Company to recover damages for a personal injury alleged to have been sustained by plaintiff while a passenger of the defendant companies, and caused by their negligence in failing to maintain a railing at, and in omitting to keep a lamp burning on, a depot platform jointly used by them. The defendants, separately answering, denied the material allegations of the complaint, and for further de-

fenses averred that plaintiff, at the time he was injured, was not a passenger of either company, and that his hurt was caused by his own want of care. The allegations of new matter in the answer having been denied in the replies, the cause was tried, and judgment rendered against the defendants, or either of them, for the sum of twenty thousand dollars, and they severally appeal.

⁵⁵⁷ It is contended by defendants' counsel that the testimony introduced by plaintiff conclusively shows that the injury of which he complains was caused by his contributory negligence, and hence the court erred in overruling their motions for judgments of nonsuit, based on that ground. The legal principle insisted upon necessitates an examination of the bill of exceptions, which shows that the Oregon Railroad and Navigation Company is a corporation owning and operating a railroad from Portland east to Huntington, passing through the station of Biggs, situated on the south bank of the Columbia river. The Columbia Southern Railway Company is also a corporation owning and operating a railroad from Biggs south to Shaniko. The depot and tracks at Biggs are owned by the former company, but the cost of maintaining the station is borne, and the tracks and premises connected therewith are jointly used, by both in receiving and discharging passengers. The station building is placed east and ⁵⁵⁸ west between parallel tracks, the Oregon Railroad and Navigation Company using the lines of rails on the north side of the depot, and the other company those on the south. This building is surrounded by a plank platform sixteen feet wide on the north, twelve on the south, and fourteen on the east and west. The land on which the depot stands slopes to the south, so that the north edge of the platform is level with the tracks of the Oregon Railroad and Navigation Company, while the south edge is about five feet above the rails on that side, and the center of the west edge about six feet above the surface of the ground, which at that point is somewhat depressed. The Columbia Southern Railway Company, at the time of plaintiff's injury, was operating daily trains only, but the other company was running night passenger trains—No. 6, going east, passing through Biggs at 12:22 midnight, and No. 3, going west, at 3:30 A. M. These trains were not scheduled to stop at that station, which was closed at night, and no light maintained at the depot, the passengers being accommodated

by the day trains of both companies which stopped at that junction.

The plaintiff is fifty-nine years old, has traveled extensively by rail, is engaged in buying wool on commission, and had been at Biggs eleven times prior to his injury, passing in the daylight over a gang-plank extending from the depot platform to the cars of the Columbia Southern Railway Company. With other buyers, he was at Shaniko June 27, 1903, attending a sale of wool, which was not concluded until evening. As these dealers could save a day's time if they could reach Biggs and take the night passenger trains of the Oregon Railroad and Navigation Company, they employed the other company to carry them by special train to that junction, the train dispatcher of the former company having telegraphed that its night passenger train would stop at Biggs if the special train reached there in time. The train so chartered left Shaniko at 8:40 P. M., and reached the junction at 12:15 that night, the car in which the wool dealers rode being left on the south side of the depot, and near the west end thereof. A few minutes thereafter train No. 6 stopped at the north side of the depot, and the passengers from Shaniko, who were going east, were escorted by a trainman of the Columbia Southern Railway Company, having a lantern, from its car, over the gang-plank ⁵⁵⁹ and across the west end of the depot platform to the train of the other company. The plaintiff accompanied the departing passengers to their train, and immediately returned with the trainman to the car which he had left, intending to take passage for Portland when train No. 3 arrived. The car in which plaintiff was to wait was well lighted, and provided with a suitable toilet-room. He sat down and tried to slumber, but on the way from Shaniko the passengers had freely indulged in smoking, and he was unable to sleep. Being weary from the effects of his ride and fatigued from the strained position occasioned by sitting for several hours in an ordinary passenger-car he rose, left the coach, and again passed over the gang-plank, intending to cross the tracks of the Oregon Railroad and Navigation Company to seek refreshment in a cool breeze from the Columbia river, and also to urinate. Instead of going directly north, he turned to the west, and slowly walked in the darkness to the edge of the depot platform, which was not protected by a railing, and fell to the ground, sustaining such an injury that one of his legs

had to be amputated below the knee. As a witness in his own behalf he testified on cross-examination that he had been at Biggs several times prior to June 28, 1903; that he knew the station platform was level with the car tracks on the north, but elevated on the south, requiring a gang-plank, over which he had always passed in entering or leaving the coaches of the Columbia Southern Railway Company, but he had never particularly noticed the ground around the station; that he knew the platform did not extend indefinitely to the west; and, referring to the time when he was injured, he said, "It was the darkest night I ever saw."

In support of the judgment rendered it is asserted by his counsel that, as the defendants jointly maintain the depot at Biggs, each owes a duty to persons arriving on the cars of one company to take passage on those of the other to provide a reasonably safe platform, and to see that it is suitably lighted at night for a reasonable time before the arrival and after the departure of their trains, and for any neglect in these particulars they are jointly and severally liable for any damage resulting therefrom; that the Oregon Railroad and Navigation Company, having agreed to stop its train No. 3 at Biggs, on the night in question, ⁵⁶⁰ for the accommodation of persons coming on the special train from Shaniko and intending to go west over its line, thereby established the relation of carrier and passenger with such persons from the time of their arrival at the junction, and, neither company having lighted the depot or platform, plaintiff, who then was a passenger of both companies, and entitled to go on the platform for exercise and to secure pure air, had a right to assume from its dark condition that it was reasonably safe for his accommodation, but, having been dangerous by reason of the defendants' failure to maintain a railing or a light, he is entitled to recover from them the damages awarded by the jury, and hence no error was committed as alleged.

1. It will be remembered that the night passenger trains of the Oregon Railroad and Navigation Company were not scheduled to stop at Biggs, and for that reason no light was maintained there. The plaintiff's right to recover compensation of the injury sustained depends upon the existence of some duty owed him by the defendants, or either of them, the breach of which was the proximate cause of his hurt: *Emry v. Roanoke Nav. Co.*, 111 N. C. 94, 16 S. E. 18, 17 L. R. A. 699.

The law imposes on a railway company engaged in carrying persons for hire the duty of exercising reasonable care in keeping its platforms, approaches thereto, and station grounds, so far as passengers would naturally resort to them, properly lighted at night for a reasonable time next prior to the arrival or immediately following the departure of a train which its time cards specify will stop at night to take on or put off passengers: 3 Thompson on Negligence, sec. 2691; 4 Elliott on Railways, sec. 1641; Hutchinson on Carriers, 2d ed., sec. 516; Louisville etc. Ry. Co. v. Lucas, 119 Ind. 583, 21 N. E. 968, 6 L. R. A. 193; Ohio etc. Ry. Co. v. Stansberry, 132 Ind. 533, 32 N. E. 218. What constitutes a reasonable time during which such premises must be kept lighted is determined by the circumstances of each particular case, and depends upon the size and importance of the station and the number of persons who lawfully visit it at night for the purpose of transacting business with the railroad company: 3 Thompson on Negligence, sec. 2686; Alabama etc. Ry. Co. v. Arnold, 84 Ala. 159, 5 Am. St. Rep. 354, 4 South. 359; Louisville etc. Ry. Co. v. Treadway, 143 Ind. 689, 40 N. E. 807, 41 N. E. 794.

2. A person who has completed his journey on a railroad train and alighted therefrom at a station provided for the accommodation of the general public is allowed a reasonable time to leave the premises; and one who lawfully intends to secure passage on the cars is permitted to occupy the waiting-room of a depot a reasonable time immediately preceding the arrival of a train which he expects to take, during which such person sustains toward the carrier a relation analogous to that of a passenger, to whom the railway company owes a duty commensurate with the degree of danger to which such person may be exposed: 4 Elliott on Railways, sec. 1592; 2 Wood on Railways, Minor's ed., sec. 310. In Heinlein v. Boston etc. Ry. Co., 147 Mass. 136, 9 Am. St. Rep. 676, 16 N. E. 698, it was held that a person remaining at a station three or four minutes after he knows that the train which he desired to take had already gone, when there was nothing to detain him except his wish to take a street-car which would soon arrive at such station, ceases to have the rights of an intending passenger, and cannot recover for injuries sustained by him in attempting to leave the station by reason of the station door being closed, the station lights extinguished, and

the passage by which he endeavored to depart insufficiently illuminated. In *Quantz v. Southern Ry. Co.*, 137 N. C. 136, 49 S. E. 79, a person having arrived at night on a train at his destination left the station grounds, but, returning in a few minutes to the depot on business of his own, walked into an open doorway, and, falling, was injured, and it was ruled that he had ceased to be a passenger, and was only a licensee, to whom the railroad company did not owe the duty of keeping the door closed, but only of maintaining a way that was free from danger. In *Missouri Pac. Ry. Co. v. Neiswanger*, 41 Kan. 621, 13 Am. St. Rep. 304, 21 Pac. 582, the appellee, a stranger, arrived by rail at Beloit, Kansas, about 5 o'clock P. M., and went immediately into the depot, intending to go to Osborn, in that state, by the next train, which she was informed by the agents of the company would leave at 9:20 that night. Having secured a ticket entitling her to be carried on the appellant's cars to her destination, she left ⁵⁶² the depot, but returned "about dusk" on May 6th, and waited to resume her journey. Her train not having arrived at 11 o'clock P. M., she had occasion to go to the toilet, but, there being none in the building, she went upon the depot platform, which was not lighted, and walking off, sustained an injury, and it was held that the railroad company was liable therefor.

3. In *St. Louis etc. Ry. Co. v. Griffith*, 12 Tex. Civ. App. 631, 35 S. W. 741, the appellee, having secured a coupon ticket for the entire distance, left Gainesville, Texas, with her babe, for Mt. Vernon, in that state, going via Greenville, where she was to change cars. At the latter city she was transferred to the appellant's depot, which she reached at 2 o'clock P. M., and, being a stranger without money, and informed that no hotel or boarding-house was within a mile of the station, she concluded to remain in the waiting-room until 12 o'clock that night, when the next passenger train for Mt. Vernon would arrive. The station agent, knowing her intention, either consented, or at least made no objection, to her occupying the room until she could resume her journey. About 9:30 o'clock P. M. the appellant's night agent in charge of the depot entered the waiting-room, turned down the light, placed his arm around the appellee, and, over her protest, tried to kiss her, and also made improper proposals to her. She pleaded with him to desist, and not molest her, whereupon he returned to his office, and she quietly left the depot with her babe, and

went to a private residence, and notified the occupant of the attempted outrage. Mrs. Griffith commenced an action against the railroad company to recover damages for the assault, and, having secured a judgment, it was affirmed on appeal; the court holding that as she possessed a ticket, and had gone to the depot for the purpose of taking passage on the first train that arrived, and, by the assent of the station agent, was permitted to occupy the waiting-room, she sustained the relation of a passenger, to whom the company owed a duty to protect, and it was therefore liable in damages for the assault of its agent. In *Missouri Pac. Ry. Co. v. Neiswanger*, 41 Kan. 621, 13 Am. St. Rep. 304, 21 Pac. 582, the question of reasonable time before the arrival of a train when a person at a depot intending to take a train may be regarded in ⁵⁶³ the nature of a passenger was not involved, for, the train having been scheduled to reach the station at 9:30 P. M., and thereafter momentarily expected to arrive, when Mrs. Neiswanger was injured, shows that she was certainly entitled to protection. So, too, in *St. Louis etc. Ry. Co. v. Griffith*, 12 Tex. Civ. App. 631, 35 S. W. 741, the question of reasonable time was not in issue, for Mrs. Griffith's occupancy of the waiting-room at the depot was not in pursuance of an absolute right, but resulted from the station agent's knowledge that she intended to remain at the depot ten hours, waiting the arrival of her train, and his assent thereto. In the case at bar the testimony shows that the agents of the Columbia Southern Railway Company who operated the special train were informed that plaintiff intended to take passage for Portland on train No. 3 of the other company when it reached Biggs, and, knowing this, they assented to his occupying the car in which he had made the journey from Shaniko until the arrival of the other train. The Columbia Southern Railway Company, by reason of this assent of its agents, thereby treated plaintiff in the nature of a passenger, notwithstanding it had safely carried him the entire distance agreed upon.

4. The train-dispatcher of the Oregon Railroad and Navigation Company had agreed to stop train No. 3 at Biggs if the special train reached that station in time, and he must have known that some passenger would be at the depot intending to go west. This knowledge, however, in the absence of any stipulation to that effect, did not bind the last-named com-

pany to light its depot platform until a reasonable time next prior to the arrival of its west-bound passenger train.

5. The plaintiff, having accompanied the wool buyers going east to their train, returned to the car provided for his accommodation about three hours before train No. 3 was expected to arrive. Whether or not such period of time next prior to the arrival of a train is reasonable during which the Oregon Railroad and Navigation Company should have kept its depot platform lighted at a station where its night passenger trains were not scheduled to stop, is not now necessary to inquire, for that was a question exclusively for the jury to determine.

⁵⁰⁴ 6. In considering the action of the trial court in overruling the motions for judgments of nonsuit interposed on the ground of plaintiff's alleged contributory negligence we shall, for the present, treat the question as it relates to the duty of the Columbia Southern Railway Company only, basing our conclusion on its assent to plaintiff's occupying its car until the arrival of the west-bound passenger train on the road of the other company. This car was pro hac vice a depot to all intents and purposes, well lighted, and provided with a suitable toilet-room, so that it was unnecessary for plaintiff to leave it, as in the cases of *Missouri Pac. Ry. Co. v. Neiswanger*, 41 Kan. 621, 13 Am. St. Rep. 304, 21 Pac. 582, and *Louisville etc. Ry. Co. v. Treadway*, 143 Ind. 689, 40 N. E. 807, 41 N. E. 794, to obey an urgent call of nature. The testimony shows that the coach provided for plaintiff's accommodation was scented with tobacco smoke, but it nowhere appears in the bill of exceptions that the fumes of that weed were offensive to him, as in the case of *McDonald v. Chicago etc. Ry. Co.*, 26 Iowa, 124, 95 Am. Dec. 114, in which Mr. Chief Justice Dillon said: "If the station-room is full, or if it is intolerably offensive by reason of tobacco smoke, so that a passenger has good reason for not remaining there, while this will not justify him in violating reasonable rules and regulations of the company, which are known to him, respecting the place, mode, and time of entering the cars, it will justify his endeavor to enter the cars at as early a period as possible, especially if it is dark and cold without, if in so doing he uses proper care, and violates no rule or regulation of the company of which he has actual knowledge, or which, as a reasonable man, he would be bound to presume existed." At the time plaintiff

mony tending to show that the appellee was loitering along between the tracks, talking with acquaintances whom he met; that he had no reason to anticipate the receipt of a telegraphic order at that point; and that he was standing on or near the track, looking up at the telegraph wires, when struck. The ~~567~~ trial court, having instructed the jury in relation to the degree of care due from a railroad company to a passenger on a freight train, said:

"Now, when they reached Rising Fawn, that not being the plaintiff's place of destination, if he alighted from the car intending to go direct to the depot for a particular business purpose, and with the intention of returning when that purpose was accomplished, he would, while going to and from the depot, exercising the proper diligence due from a passenger, remain a passenger and would be entitled to the degree of care belonging to a passenger. Now, that rule applies until he had time to get off the car, going along exercising reasonable prudence to do so, attend to his business (if any he had), and return, and no longer. The liability of the company to him as a passenger lasted only so long as to give him a reasonable time in which to get to the depot and return after transacting his business, and did not extend to him after the lapse of that time. After that they owed him no duty except that which they owed to any stranger—not to wantonly or unnecessarily injure him. . . .

"Now, on the contrary, if, after they had got in the yard, he got out of the train, without having any business that required him to go to the depot, that not being his point of destination, or without having any particular business to go to the depot, and instead of going by the direct and usual route and within a reasonable time, such as any other man (a prudent man) would have required to go to the depot, and if, instead of that, he, out of mere curiosity, got out to look through the yard and talk with the employes in the yard—if he stopped in the yard and began to talk and loiter about the yards there in conversation, or if he began to look at the overhead wires, as one of the witnesses indicates probably he did (at least, there is a silent proof that tends to show that)—why, then, in each of these contingencies, he would cease to be a passenger, but would be there on the switchyard at his peril; and the only duty the defendant company would owe to him in such a situation as that would

be the duty not to wantonly or unnecessarily injure him, and they would owe him no greater duty than they would owe a stranger in the yard without any business."

588 A judgment having been rendered against the railroad company, was affirmed on appeal, Taft, J., in referring to the instructions, saying: "The foregoing states the law correctly, and leaves to the jury the issue in such a way as to enable them, without difficulty, justly to determine whether Congress was entitled to the high degree of care from the railroad company due a passenger when he was struck." Further, in the opinion it is said: "The authorities are not quite so uniform upon the question whether the obligation of the carrier extends to the same degree of care over the safety of its passengers when they alight at intermediate stations and go to the station-house while the train is waiting. But we think the weight of authority, reason and custom all require us to hold that where a passenger, without objection by the company or its agents, alights at an intermediate station, which is a station for the discharge and reception of passengers, for any reasonable and usual purpose, like that of refreshment, of the sending or receipt of telegrams, or of exercise by walking up and down the platform, or the like, he does not cease to be a passenger, and is justified in the belief that the company is exercising due care for his safety." In that case nothing is said as to what time the appellee was injured, but, as it is intimated that he was looking up at the telegraph wires when he was struck, it is to be inferred that it was daylight. This being so, what is said in the opinion about the right of a passenger to walk up and down the depot platform for exercise can have no application to explorations made at such a place in utter darkness.

In *St. Louis etc. Ry. Co. v. Coulson*, 8 Kan. App. 4, 54 Pac. 2, W. F. Coulson was a passenger on appellant's train, which stopped at an intermediate station for dinner. He left the car in which he was riding, and went to an eating-house, where he secured his lunch, and, having returned, he passed through a car to the depot platform, where, having been informed by the conductor that the train would start in three or four minutes, he walked to the platform on the opposite side, and stood five or six feet from the end of a coach. He then started toward the car, whereupon he caught his foot in a warped plank, and, falling, put out his hand for protection,

sustained the injury he did not go upon the station platform for the purpose of entering a car in which he expected to take passage, or to transact any business with either railroad company, nor was he for any reason necessarily compelled to leave the coach which he occupied. His act in leaving the car at the time and under the circumstances indicated, and going to the platform, which he knew was not lighted, is sought to be justified on the ground that he was entitled to walk for exercise, and to secure fresh air, and that he had a right to assume, from the extreme darkness, ^{see} and his knowledge that the defendant companies were aware that he was waiting the arrival of a train at a depot jointly used by them, that they had discharged the obligation devolving upon them of making the station platform reasonably safe, and that, relying thereon, he was injured in consequence of their breach of duty, thereby rendering them liable for the damages resulting from the injury which he sustained. He could undoubtedly have secured an abundant supply of fresh air by raising a window of the coach, thereby ventilating it, and hence he was not obliged to leave the car for that purpose.

This brings us to a consideration of the remaining question—whether or not a person sustaining the quasi relation of a passenger can, for the mere purpose of exercise, leave a well-lighted depot, provided with necessary accommodations, and go in the darkness upon a walk surrounding the station, and recover damages for an injury sustained in consequence of the carrier's failure to maintain a railing on or its omission to light the platform. A passenger, before reaching his destination, may leave a car or a boat to transact his own private business at any intermediate station or landing where a stop is made for any reasonable time to receive or discharge passengers; and if, without his fault, he is injured in consequence of the carrier's negligence on any part of the premises set apart by it for the use of the public, or used with its consent, he may recover the damages sustained: 1 Fetter on Carriers, sec. 234. Thus, in *Dice v. Willamette Transp. Co.*, 8 Or. 60, 34 Am. Rep. 575, 6 Am. Neg. Cas. 202, the plaintiff, a passenger, before reaching his destination, attempted to leave the defendant's steamboat to transact his own business at a landing where passengers and freight were being discharged. and, the night being dark and rainy, and the lights on the boat and on the wharf insufficient to enable him plainly to

see his way, he fell, sustaining an injury, and it was held that he had a right of action against the carrier for its negligence in not providing a safe means of egress from the boat to the wharf.

In *Hrebik v. Carr* (D. C.), 29 Fed. 298, notice having been given that a steamer would sail early on a certain morning, the plaintiff and her husband went on board the boat the evening before her departure, and soon thereafter he, in attempting to ⁵⁶⁶ cross to the wharf to secure some tobacco, fell from the gang-plank and was drowned. In an action to recover for the death it was held that a passenger on board a vessel before she left port had the right to go ashore for the purpose stated, and that it was the duty of the carrier to provide a safe means of passage from the steamer to the pier. In that case, it does not appear that the night had set in, or, if so, that the passageway was not lighted. In deciding the case *Benedict, J.*, says: "The necessity on the part of a passenger, who has taken his position as a passenger, to return to the pier, is a common incident to travel. It is constantly done to find lost baggage, to speak to a friend, and may be done to purchase tobacco by anyone addicted to the use of that weed. From this necessity arises the obligation on the part of the ship to keep and maintain for the passenger's use, at all proper times, a safe passageway from the steamer to the pier."

In *Alabama etc. Ry. Co. v. Coggins*, 88 Fed. 455, 32 C. C. A. 1, the appellee, a lineman in the employ of the Western Union Telegraph Company, was traveling in the caboose of a freight train to a point where repairs were to be made. The train on which he was riding stopped at Rising Fawn, Georgia, an intermediate station, at the usual place for the alighting of passengers from freight trains, which was about fifteen hundred feet from the station proper. The appellee got off the car and started to walk to the station by the only practicable way, which was between the main track and the house track, to see if there was any telegram for him from his employer. As he was going to the station he saw a part of the train on which he came backing toward him on the main line, and as it approached he concluded it would be safer to cross over near the house track, and in doing so he was struck and injured by a switching car on a cutoff. In an action to recover damages for the hurt inflicted the railroad company introduced testi-

and ⁵⁶⁹ as he did so the train simultaneously started, whereby he was injured. A judgment having been rendered against the railroad company for the damages sustained, it was contended by the appellant that its obligation under the contract ceased when Coulson got his lunch and returned to the car. The court, discussing this question, say: "We cannot consent to this doctrine. The train had stopped for dinner. The passengers were invited to this platform. It was maintained for their safety and convenience, and they were expected to get on and off. This was involved in and connected with the regular passenger service of the road. The act of Coulson in leaving the train at this particular point, after he had returned from his luncheon, is not sufficient to justify this court in declaring as a matter of law that he was negligent, or that the obligation of the company to provide safe passage for him had been fulfilled, or that the relationship as a passenger to the company had for the time ceased." In that case the injury occurred at the noon hour, when the passenger was undoubtedly afforded sufficient natural light plainly to see the passageway that had been provided by the railway company for the accommodation of the traveling public.

In *Chicago etc. Ry. Co. v. Woolridge*, 32 Ill. App. 237, the appellee having a railroad ticket, was walking on a depot platform about nine o'clock P. M., waiting the departure of his train, which stood on a sidetrack, and was expected to pull out after a "rally" meeting adjourned. Another train coming in rapidly hit a baggage truck which was being pulled on the platform, causing it to strike and injure him. In an action to recover the damages resulting from the hurt the court refused to instruct the jury that unless the appellee was at the place where he was injured on business with the railroad company, or was there to take a train about to depart from the station, or to meet some one expected to arrive on the train which struck the baggage truck, or to see some one about to leave, then, if there was a suitable waiting-room, though he was expecting to depart on some other train for which he might have been waiting, he had no right to be on the depot platform at the time he was injured. A judgment having been rendered against the company, was affirmed on appeal, the court, in referring to the charge ⁵⁷⁰ requested, saying: "We do not think this states the law correctly. To

hold that a passenger waiting at a railroad depot for his train to arrive must remain in the waiting-room, and that if he goes out upon the platform at any time before it becomes necessary to board his train he is guilty of such negligence as to prevent his recovery for an injury like the one in question, is not consistent with reason or common sense." In that case the baggage-master testified that he lighted the gas at the baggage-room door before the arrival of the train causing the injury. The depot platform must also have been lighted, for Woolridge testified that he saw the baggage truck when it was struck by the incoming train.

In *Lemery v. Great Northern Ry. Co.*, 83 Minn. 47, 85 N. W. 908, the plaintiff, having purchased a railroad ticket, entered a day coach at Duluth, Minnesota, for a continuous passage to Park River, North Dakota, on defendant's through train that did not stop at intermediate stations to receive or discharge passengers. After the train started, plaintiff left the car originally taken, passed to the rear into a sleeping-car, going through a coach occupied by a military company that maintained guards at each entrance of the car, but passengers were not prevented from passing through it when necessary. As the conductor entered the sleeper, plaintiff discovered that he had lost his ticket, and being compelled to pay his fare, he demanded a receipt therefor, but none was given him, the conductor claiming that his blank acknowledgments of payment were at the other end of the train. The plaintiff remained in the sleeper until the train arrived at Grand Rapids, Minnesota, where it was stopped at night, when it was very dark, for the purpose only of taking water. When the train came to a halt, plaintiff left the sleeper, as he insisted, to find the conductor and again to demand a receipt, and also to pass around the car occupied by the militia and enter the day coach, claiming that he was not permitted longer to remain in the sleeper, and that the military guards would not allow him to pass through the car which was under their care and protection. In alighting at the station, plaintiff fell between the steps of the sleeper and the depot platform, which was not lighted, sustaining an injury. An action having been begun to recover the damages ⁵⁷¹ resulting from the hurt sustained, a judgment of nonsuit was rendered, which was affirmed on appeal, the court finding that the reasons assigned by plaintiff for going to the station

platform were subterfuges, and holding that a through passenger on a train which did not stop at intermediate stations, who leaves such train without the knowledge, consent or invitation of the company at any intermediate station at which the train may stop for some purpose necessary to its operation and management only, abandons for the time being his relation as a passenger, and assumes all the risks incident to his movements. In rendering that decision Mr. Justice Brown, speaking for the court, says: "In the case of a local train the company is bound to know that passengers may be received and discharged at all stations at which a train may stop for that purpose, and is required by the rule to keep the approaches to the train in a safe condition for their egress and ingress." Further in the opinion it said: "This was not a local train, but a through train, and the plaintiff was a through passenger. The train did not stop at Grand Rapids to receive or discharge passengers. There was no invitation held out to plaintiff to leave the train at that station. There was no occasion for him to do so, and he must be taken to have assumed all risks incident thereto. There was not only no invitation, express or implied, to passengers to leave the train at this station, but the fact that the station platform was unlighted was in the nature of a warning to them to remain on board."

7. The cases to which attention has been called, illustrating the right of a passenger, without forfeiting his relation as such, to leave a car or a boat at an intermediate station or landing to transact business of his own, or for his own pleasure, where a stop is made to receive or discharge passengers, are relied upon by plaintiff's counsel to justify their client in assuming from the unlighted platform that it was safe for him to walk thereon. An examination of these cases will show that *Dice v. Willamette Transp. Co.*, 8 Or. 60, 34 Am. Rep. 575, 6 Am. Neg. Cas. 202, is the only one cited in which judgment is given for injuries received in the darkness by a passenger at an intermediate station or landing by leaving a car or a boat to transact business not ⁵⁷² connected with the carrier, and in that case it will be remembered that the steamboat and the wharf were lighted, but not sufficiently to enable the plaintiff to discover and avoid the danger to which he was exposed. In that case, the boat having made landing at night where passengers and freight were being discharged, Dice might

reasonably have inferred from the light on the wharf and on the steamer, which he must have seen, that the passageway was sufficiently illuminated to enable him safely to go ashore. In the case at bar, if the plaintiff had necessarily been compelled to leave the car because the Columbia Southern Railway Company neglected to furnish suitable accommodations, or if the train of the other company, upon which he expected to take passage, was approaching Biggs Station, so that to board it he was obliged to cross the depot platform in the darkness, a very different rule of law would be applicable. The right of a passenger, before reaching his destination, to leave a car and to walk on a depot platform for exercise, when the train is stopped in daylight, to receive or discharge passengers, or at night, even, when the walk is sufficiently illuminated, is admitted. The vibration of a car in rapid motion prevents a passenger from materially changing his position in a seat, the occupation of which for several hours necessarily produces extreme tension of the muscles of the lower limbs, to relax which relief is found in walking, and, as this cannot readily be secured in a car, it must be obtained, if at all, outside the coach, and when it is at rest. When a train is stopped in daylight for any reasonable length of time to receive or discharge passengers an invitation is thereby tacitly extended by the railroad company to the passengers in the coaches to alight for a few minutes' rest and invigoration by a change of position and a respiration of pure air. The same invitation, it would seem, must also be offered at night where a train is stopped for a reasonable time to receive or discharge passengers at a station, the platform of which is well lighted. A passenger on a train, before reaching his destination, cannot, in reason, be invited to leave the car every time a stop is made at night to receive or discharge passengers. If a contrary rule were to obtain, it would necessarily follow that a railroad company would not venture to stop a train when flagged at night at an insignificant ⁵⁷³ station, the platform of which was not illuminated, however urgent might be the call to board the train.

When the platform of a depot at which a train stops at night is not illuminated, the darkness is a notice to passengers in the cars who are not obliged to depart at that station to remain in the coaches: *Lemery v. Great Northern Ry. Co.*, 83 Minn. 47, 85 N. W. 908. So, too, where a person, intending

to take a train, goes at night to a well-lighted waiting-room of a depot, and, leaving it, walks to an unlighted freight platform, and there sustains an injury, his contributory negligence precludes a recovery: *Gunderman v. Missouri etc. Ry. Co.*, 58 Mo. App. 370. In that case the plaintiff, knowing the construction of the depot, went to a platform not intended to be used by passengers. It is cited, however, to show that an unlighted way imparts notice to all persons except such as are necessarily compelled to pass over it. In deciding that case the court, referring to the plaintiff, say: "He wantonly left the comfortable waiting-room and well-lighted passenger platform of defendant, and sauntered forth into the darkness, and upon the defendant's freight platform, and without there giving heed to the existing conditions, patent to his senses, and which were sufficient to have warned an ordinarily prudent man of the probable danger of proceeding further, he persisted in going forward until he fell into the pit. He was guilty of such contributory negligence as must preclude his recovery." To the same effect, see *Grimes v. Pennsylvania Co. (C. C.)*, 36 Fed. 72.

In the case at bar plaintiff had crossed the depot platform several times in daylight before he was injured, and though he testified that his attention was never called to the condition of the ground at the west end of the platform, he knew the south side of the walk surrounding the building was elevated, while the north side was level with the track of the Oregon Railroad and Navigation Company. Knowing these facts, reason must have taught him that the surface of the ground at the west end of the platform descended to the south, unless it had been graded up to that line.

If it was incumbent upon either of the defendants to light the depot platform three hours before a train was expected to arrive ⁵⁷⁴ the failure in this respect was known to the plaintiff, who, when he was injured, was not necessarily compelled to leave the well-lighted car that had been provided for his accommodation; but, having done so, on one of the darkest nights he ever saw, his injury results from his own contributory negligence, thereby precluding a recovery of damages for the hurt sustained: *Massey v. Seller*, 45 Or. 267, 77 Pac. 397; *Missouri etc. Ry. Co. v. Turley*, 85 Fed. 369, 29 C. C. A. 196; *Emery v. Chicago etc. Ry. Co.*, 77 Minn. 465, 80 N. W. 627.

There being no conflict in the testimony, an error was committed in refusing to give a judgment for nonsuit in favor of each defendant. The judgment is therefore reversed, and the cause remanded, with directions to sustain the motions interposed.

A Railroad Company must Keep Its Depot and the approaches thereto in a reasonably safe and comfortable condition for passengers, otherwise it will be deemed negligent: Barker v. Ohio River R. R. Co., 51 W. Va. 423, 90 Am. St. Rep. 808; St. Louis etc. Ry. Co. v. Wilson, 70 Ark. 136, 91 Am. St. Rep. 74; Klugherz v. Chicago etc. Ry. Co., 90 Minn. 17, 101 Am. St. Rep. 384; Pineus v. Atlantic Coast Line R. R. Co., 140 N. C. 450, 111 Am. St. Rep. 856.

The Duty of a Railroad Company to Maintain a Light at its depot in the night-time is said to be limited to the time of the arrival and departure of trains, and for a sufficient time before and after to enable persons to enter cars or alight therefrom, without undue haste, so as to secure safety: Alabama etc. R. R. Co. v. Arnold, 84 Ala. 159, 5 Am. St. Rep. 354; Heinlein v. Boston etc. R. R. Co., 147 Mass. 136, 9 Am. St. Rep. 676. See, too, Missouri Pac. Ry. Co. v. Neiswanger, 41 Kan. 621, 13 Am. St. Rep. 304.

POGUE v. SIMON.

[47 Or. 6, 81 Pac. 566.]

JUDGMENT LIEN—Equitable Interests.—A judgment is not a lien on a mere right or interest which can only be asserted or enforced in a court of equity, nor can such interest be sold under an execution at law. (p. 904.)

JUDGMENT LIEN, Attachment of, to Property to Which the Judgment Debtor is Entitled to a Sheriff's Deed.—One who has purchased property at an execution sale has, after the time for redemption has expired, and he has become entitled to a sheriff's deed, an interest in such property which is subject to a judgment lien and to a sale under execution. (pp. 904, 905.)

William M. Kaiser, Woodson T. Slater and Myron Edwin Pogue, for the appellant.

George Greenwood Bingham, for the respondent.

* BEAN, J. 1. This is an action to recover possession of real property formerly belonging to W. E. Hawkins. On October 12, 1895, it was sold at sheriff's sale on an execution issued on a judgment against Hawkins and in favor of Samuel Heitshu, and purchased by Heitshu. The sale was confirmed, ⁷ and, after the time for redemption had expired,

but before the execution of a sheriff's deed, Heitshu's interest was seized under an execution on a judgment against him, and sold to one Goodnough. This sale was confirmed, and in due time a sheriff's deed was regularly executed and delivered to the plaintiff, to whom the certificate of sale had in the meantime been assigned by Goodnough. Two days after the levy of the execution on Heitshu's interest he assigned his certificate of sale to a Mrs. Tuthill, to whom a sheriff's deed was subsequently made, and who conveyed the property to the defendant. It thus appears that both parties claim title through Heitshu, and the only question for decision is whether at the time of the levy under the execution on the judgment against him in favor of Goodnough he had such an estate or interest in the property as could be levied upon and sold under an execution at law. The statute (B. & C. Comp., sec. 227) provides that "all property, including franchises, or rights or interest therein, of the judgment debtor, shall be liable to an execution, except as in this section provided." It has been held that such a statute applies to an equitable as well as a legal interest in land: *Wright v. Douglass*, 2 N. Y. 373; *Higgins v. McConnell*, 130 N. Y. 487, 29 N. E. 978; *Page v. Rogers*, 31 Cal. 293. The ruling of this court, however, is that a judgment is not a lien on a mere right or interest which can only be asserted or enforced in a court of equity, nor can such an interest be seized and sold under an execution at law: *Smith v. Ingles*, 2 Or. 43; *Bloomfield v. Humason*, 11 Or. 229, 4 Pac. 332; *Silver v. Lee*, 38 Or. 508, 63 Pac. 882.

2. The estate or interest of Heitshu, however, at the time of the levy and sale under the execution on the judgment against him was more than such an equity. It was a substantial right or interest in the property. The time for redemption had expired and his inchoate right acquired ^s by his purchase had become absolute and indefeasible. It is true the sheriff's deed had not been made, and therefore the record title was still in the judgment debtor. But this was nothing more than a dry, naked legal title, without any beneficial interest, and one of which he could have been deprived at any time without his consent by a sheriff's deed. A purchaser at an execution sale is entitled to the possession of the property from the day of sale. Until the time for redemption has expired, his right or title is inchoate, and liable to be defeated

by a redemption. When the right of redemption no longer exists, his possession and estate are complete, although the technical naked legal or record title remains in the judgment debtor until the execution and delivery of the sheriff's deed. An equitable title is "a right or interest in land, which, not having the properties of a legal estate, but being merely a right of which courts of equity will take notice, requires the aid of such court to make it available": 1 Bouvier's Law Dictionary, Rawle's ed., p. 680. The estate or interest of a purchaser at an execution sale after the time for redemption has expired is not a right of which a court of equity alone will take notice, nor does it require the aid of such a court for its preservation or protection. It is a substantial legal estate, and in case of a refusal of the sheriff to make a deed as required, the remedy of the purchaser is not in equity, but by mandamus, or motion in the court from which the execution issued: 25 Am. & Eng. Ency. of Law, 2d ed., 809.

In speaking of the effect of a deed made in the name of a purchaser at an execution sale after his death, the supreme court of Washington says: "It is no doubt true that a deed so executed could have no force whatever, but it does not follow that no title was acquired by the purchaser at the execution sale. The certificate of purchase and confirmation of sale were alone essential to pass the substantial ⁹ title of the defendant in the execution to the purchaser at the sale. The execution of the deed after the time for redemption had expired was a purely ministerial act on the part of the officer, and could have been compelled by the purchaser, or those claiming under him, at any time in a proper proceeding for that purpose": *Diamond v. Turner*, 11 Wash. 189, 192, 39 Pac. 379. Mr. Justice Sawyer says, in *Page v. Rogers*, 31 Cal. 293, that the purchaser at an execution sale "acquires an equitable estate in the lands; conditional, it is true, but which may become absolute by simple lapse of time, without the performance of the only condition which can defeat the purchase. The legal title remains in the judgment debtor, with the further right in him and his creditors having subsequent liens to defeat the operation of a sale already made during a period of six months, after which the equitable estate acquired by the purchaser becomes absolute and indefeasible, and the mere dry, naked legal title remains in the judgment debtor, with authority in the sheriff to divest it by exe-

cuting a deed to the purchaser." And in a note to *McIlvaine v. Smith*, 97 Am. Dec. 311, it is said by the compiler that a "purchaser at execution, after the period of redemption has expired, and before conveyance to him by the sheriff, has an interest which is undoubtedly subject to execution; for in that case the equitable estate acquired by the purchaser becomes absolute and indefeasible."

We are of the opinion, therefore, that Heitshu had a title to the property in question at the time of the levy under the execution against him that could be legally seized and sold under execution, and therefore the judgment must be reversed.

For Authorities upon the question involved in the principal case, see the note to McIlvaine v. Smith, 97 Am. Dec. 311. As a rule, whenever an individual has an interest in property which can be aliened or assigned, that interest, whether legal or equitable, is liable to the payment of his debts: Wenzel v. Powder, 100 Md. 36, 108 Am. St. Rep. 380. It is said, however, that a judgment is not subject to levy and sale under execution: Dore v. Dougherty, 72 Cal. 232, 1 Am. St. Rep. 48.

WHELAN v. McMAHAN.

[47 Or. 37, 82 Pac. 19.]

JUDGMENTS.—Equity Will not Set Off One Judgment Against Another Unless the remedy at law is inadequate. (p. 907.)

JUDGMENTS.—Setoff in Equity.—If both parties are solvent, equity will not assume jurisdiction to set off one judgment against another. (p. 907.)

JUDGMENTS, Setoff of, in Equity.—The Return of Nulla Bona does not Justify a Decree to set off one judgment against another if the evidence shows that the person against whom the return was made was not insolvent, and has property subject to execution more than sufficient to satisfy the debt. (p. 907.)

APPEAL AND ERROR.—The Payment into Court of the Amount Required to set off one judgment against another does not prevent an appeal from the decree, where the court had not jurisdiction to enter it, because the defendant being solvent, there was an adequate remedy at law. (p. 908.)

Suit to obtain a decree to set off a judgment recovered by the plaintiff in the justice's court against two judgments recovered by the defendant in the circuit court. The allegation of the complaint was that the defendant had no property out of which the judgment against him could be collected.

Such allegation was denied and the defendant further pleaded payment of the judgment against him. Decree in favor of the plaintiff; the defendant appealed.

Charles L. McNary and Samuel T. Richardson, for the appellant.

John A. Jeffrey, for the respondent.

³⁸ BEAN, J. 1. The jurisdiction to set off one judgment against another was assumed by courts of equity at an early date, and still exists (25 Am. & Eng. Ency. of Law, 2d ed., 610); but its exercise depends upon the inadequacy of the remedy at law. It is only when there is some supervening equity, such as insolvency, nonresidence, or the like, which renders the interposition of the court necessary to protect the rights of the plaintiff that it will intervene at all. The ³⁹ mere existence of cross-demands is not sufficient: 25 Am. & Eng. Ency. of Law, 2d ed., 543; 2 Story on Equity, 10th ed., sec. 1436; 1 High on Injunctions, 3d ed., sec. 242; Waterman on Set-off, 2d ed., sec. 445; Tribble v. Taul, 7 T. B. Mon. 455; Haskins v. Jordan, 123 Cal. 157, 55 Pac. 786; Whitehead v. Jessup, 7 Colo. App. 460, 43 Pac. 1042.

2. "If both parties were solvent," says the supreme court of Tennessee, "so that both debts might ultimately be collected, the law would afford adequate relief, and no injustice would be wrought to either party. The one could not suffer by having to pay his own debt according to his contract, if he could ultimately compel the other to pay his debt according to his contract": Nashville Trust Co. v. Bank, 91 Tenn. 351, 18 S. W. 822, 15 L. R. A. 710. The insolvency of the defendant is therefore a material allegation of the complaint, and must be sustained by the proof, or plaintiff is not entitled to relief in equity: Hamilton v. Van Hook, 26 Tex. 302. Now, the plaintiff offered no evidence whatever on this subject, except the return "Nulla bona" on an execution issued on the judgment in his favor, while the defendant testified that he was the owner in his own right of an undivided one-half interest in one hundred and sixty acres of land, worth about nine thousand dollars, encumbered for only two thousand dollars, and that he was also the owner of notes and accounts of the value of two thousand dollars. This evidence stands absolutely uncontradicted, and there is no testimony that defendant is indebted in any sum whatever, unless it is the amount due on

plaintiff's judgment, and that he disputes, and gave evidence tending to show that he paid the judgment prior to the commencement of this suit. The plaintiff, therefore, fails in his proof, and does not show a case calling for equitable relief.

3. It is suggested that there is no real controversy between the parties on this appeal, because there is but two dollars difference between the amounts due on their ⁴⁰ respective judgments, and that such sum was paid into court at the time the decree was rendered, and the court simply set off one judgment against the other, without taxing costs against the defendant. But, unless the court had jurisdiction to hear and determine the cause by reason of the insolvency of the defendant, it could not render a decree that would terminate the controversy or prevent an appeal.

The decree is reversed, and the complaint dismissed.

The Setoff of One Judgment against another is considered in the note to *Duncan v. Bloomstock*, 13 Am. Dec. 729-731; and the right of setoff after insolvency is considered in the note to *St. Paul etc. Trust Co. v. Leck*, 47 Am. St. Rep. 578-595. One judgment may be set off against another, whenever such setoff is equitable: *Collins v. Campbell*, 97 Me. 23, 94 Am. St. Rep. 458. However, the setoff of one judgment against another is not a legal right, but is allowed by courts under their inherent powers in the administration of justice, and is governed by the principles of equity: *Leitz v. Hohman*, 207 Pa. 289, 99 Am. St. Rep. 791, and see the cases cited in the cross-reference note thereto.

BANNING v. ROY.

[47 Or. 119, 82 Pac. 708.]

EXECUTION Against the Person Where the Judgment does not Provide for Its Issuing.—If the action in which the judgment has been recovered is one in which the defendant might have been arrested, and the other conditions provided by statute existed, an execution against his person may properly issue without any order to that effect in the judgment. (p. 910.)

A JUDGMENT Need not Specify the Kind of Execution Which may Issue for Its Enforcement. When the judgment is rendered, the law, and not the court, determines that question. (p. 911.)

EXECUTION Against the Person.—The Neglect of the Sheriff to Return a Writ of Arrest Before Judgment is a mere irregularity with which the plaintiff is not chargeable, and does not render improper an execution issued on such judgment against the person of the defendant. (p. 911.)

EXECUTION AGAINST THE PERSON—Liability of Bail.—The fact that the defendant was in attendance upon the court dur-

ing the term at which the judgment against him was rendered and remained thereafter within its jurisdiction for some days does not relieve from liability the sureties giving bail for his appearance. It is a condition of their undertaking that he at all times render himself amenable to such process as may be issued to enforce the judgment. (pp. 911, 912.)

JUDGMENT, Collateral Attack Upon.—In an Action Against Bail, where the judgment is enforceable by an execution against the person the sufficiency of the complaint in the original action cannot be questioned. (p. 912.)

Action against the defendants Roy and Leneve on a bail bond given by them in an action commenced by the plaintiff against one Romander. About the 7th of March, 1904, an order and warrant for his arrest was issued and he was arrested thereon and was discharged on the next day on giving bail by the giving of a written undertaking executed by the defendants herein as sureties, to the effect that he would at all times render himself amenable to the process of the court during the pendency of the action and to such process as might be issued to enforce the judgment, should one be recovered. On the 26th of April following a judgment was rendered against Romander for two hundred and twelve dollars and fifty cents, with costs, but making no reference to the previous arrest and containing no provision respecting execution against the person of the defendant. Subsequently execution was issued against his property, and returned unsatisfied, and this was followed by an execution against his person on which the sheriff returned that he could not be found. The complaint in the present action alleged the order of arrest, the giving of the undertaking with the defendants as sureties, the rendition and nonpayment of the judgment, and the issuing and return of the execution against the property and person of the defendant. The answer admitting the allegation of the complaint alleged that the order of arrest was not returned until after the judgment had been entered; that the judgment made no reference to the arrest or warrant and contained no provision respecting an execution against the person; that Romander was present in court each day during the term at which judgment was rendered and remained within its jurisdiction until May 3, 1904. A demurrer to the new matter in the answer having been overruled, plaintiff declined to plead further, and judgment was entered against him on the pleadings, and he appealed.

Sperry & Chase, for the appellant.

Andrew Jackson Sherwood, for the respondents.

¹²¹ BEAN, J. 1. Before the plaintiff can recover on the undertaking given by the defendants for the discharge of Romander from arrest, it must appear that an execution against his person was legally issued on the judgment recovered against him. The contention of the defendants is that no such execution could rightfully issue, because the judgment makes no reference to the arrest or the warrant therefor, nor does it provide that it may be enforced by execution against the person. The question thus presented is whether, under our statute, to justify an arrest and imprisonment of a defendant upon an execution in a civil action, where he has been provisionally arrested and discharged on bail, it is necessary that the judgment should show the issuance of the writ or an order therefor, or direct an execution against the person.

Section 218, B. & C. Comp., provides that, if the action is one in which the defendant might have been arrested as provided in section 260, an execution against the person ¹²² may issue on the judgment therein after the return of an execution against his property unsatisfied in whole or in part (1) when it appears from the record that the cause of action is also a cause of arrest, (2) when the cause of arrest does not appear from the record, the execution may issue for any of the causes prescribed in section 260 that may exist at the time of the application; and (3) "when the defendant has been provisionally arrested in the action, or an order has been made allowing such arrest, and in either case the order has not been vacated." In the first and third the execution issues as a matter of course, but in the second it can only be issued upon leave of the court or judge thereof. This section (218) is the only law providing when and under what circumstances an execution may issue against the person of a defendant in a civil action, and it does not require or contemplate that the judgment shall contain any reference to the matter. If the action is in fact one in which the defendant might have been arrested, and the other conditions provided by section 218 exist, it is sufficient to entitle the plaintiff to an execution against his person, without any order to that effect in the judgment: *Corwin v. Free-*

land, 6 N. Y. 560; Hutchinson v. Brand, 9 N. Y. 208; Elwood v. Gardner, 45 N. Y. 349.

2. Unless the statute otherwise provides, a judgment is limited to the relief sought by the pleadings (11 Ency. of Pl. & Pr. 958), and it need not specify the kind or character of the execution, which may be issued for its enforcement: Cooney v. Van Rensselaar, 1 Code Rep. (N. Y.) 88. When the judgment is rendered, the law, and not the court, determines that question. There are two kinds of executions on judgments for the recovery of money in this state—one against the property and the other against the person: B. & C. Comp., sec. 214. An execution against the property generally issues as of right, but an execution against the person can only issue in certain enumerated cases and ¹²³ under certain particular circumstances: B. & C. Comp., secs. 218, 260. One of these is that it may be issued when the defendant has been provisionally arrested or an order has been made authorizing his arrest and is still in force, and the execution against his property has been returned unsatisfied, in whole or in part. And such was the case under consideration. It appears from the pleadings that the defendant in the action in which the undertaking for bail was given had been provisionally arrested, that the order for his arrest has not been vacated, and an execution against his property has been returned unsatisfied. The case, therefore, comes within the statute. The California and Washington cases relied upon by the defendants were under different statutes and are not controlling here: Burrichter v. Cline, 3 Wash. 135, 28 Pac. 367; Mattoon v. Eder, 6 Cal. 57; Davis v. Robinson, 10 Cal. 411; Payne v. Elliot, 54 Cal. 339, 35 Am. Rep. 80.

3. The other matters alleged in the answer as defenses were not argued in the brief of defendants, and are without merit. The neglect of the sheriff to return the writ of arrest before judgment was a mere irregularity for which the plaintiff was not chargeable (Neimitz v. Conrad, 22 Or. 164, 29 Pac. 548), and which in no way affected the validity of the arrest or the order therefor, or the undertaking given by the present defendants.

4. Nor is any defense that Romander was in attendance upon the court during the term at which the judgment was rendered or remained within its jurisdiction for a few days thereafter. One of the conditions of the undertaking is that

he would at all times render himself amenable to such process as might be issued to enforce the judgment, and there is no claim that execution against his person was not issued within the time, if it could legally be issued at all.

¹²⁴ 5. The sufficiency of the complaint in the action brought against him was, of course, determined by the court rendering judgment, and cannot be questioned in this collateral proceeding.

The judgment of the court below is reversed, and the cause remanded for such further proceedings as may be proper, not inconsistent with this opinion.

If a Judgment is for a Cause of Action warranting the issuance of an execution against the person of the defendant, the clerk may issue it without any special order from the court or judge, although the defendant has not previously been arrested: Hormann v. Sherin, 8 S. Dak. 36, 59 Am. St. Rep. 744.

KASTON v. STOREY.

[47 Or. 150, 80 Pac. 217.]

A MORTGAGE on Real Property Relates to the Lien Only, and does not Transfer the Legal Title. This remains in the mortgagor unless divested by a foreclosure sale and the execution of a conveyance thereunder. (p. 913.)

A JUDGMENT LIEN Attaches to the Interest of a Judgment Debtor After the Sale of His Property Under a Judgment Foreclosing a Mortgage, subject to be defeated only by the consummation of the sale by the execution of a sheriff's deed. (p. 913.)

EXECUTION SALE.—The Redemption of the Property Sold Under a Foreclosure Sale Defeats the Inchoate Right of the Purchaser and restores the property to the same condition as if no sale had been attempted. (p. 913.)

JUDGMENT LIEN.—A Judgment Obtained After the Sale of Property Under Execution is not cut off by the sale if a redemption therefrom is effected within the time prescribed by law. (p. 915.)

APPEAL AND ERROR—Question not Presented by the Record.—On an appeal in an action to enjoin an execution sale, the court cannot consider whether the plaintiff ought to be subrogated as against the defendant to the right of the mortgagee to have the property sold to satisfy his lien. (pp. 913, 916.)

Suit to enjoin the sale of real property on execution. The property in controversy was subject in August, 1902, to a decree against its owners, Lundin and wife, foreclosing a mortgage given by them, and under such judgment it was sold

on August 20, 1902. After the sale and before its consummation, a judgment was recovered against Lundin by Leonard and Wolff, which judgment was duly docketed, and a few days afterward the sale under the foreclosure was confirmed. Afterward Lundin and wife conveyed the property to Kaston, who, within the time prescribed by law, redeemed from the foreclosure sale. The judgment in favor of Leonard and Wolff was assigned to the defendant Paxton, who caused an execution to be issued thereon and the real property to be levied upon and advertised for sale. The purpose of the present action was to enjoin such sale. The trial court decreed in favor of the plaintiff; the defendants appealed.

Ossian Franklin Paxton, for the appellants.

Granville Gay Ames, Claude Strahan, Waldemar Seton, William York Masters, William Ambrose Munly and Andrew Taylor Lewis, for the respondents.

¹⁵³ BEAN, J. 1. A mortgage of real property in this state does not pass the title, but merely creates a lien: *Anderson v. Baxter*, 4 Or. 105; *Sellwood v. Gray*, 11 Or. 534, 5 Pac. 196. The legal title remains in the mortgagor or his successor in interest until a sale under a foreclosure decree has ripened into a title by the execution and delivery to the purchaser of a sheriff's deed in due course of law: *Dray v. Dray*, 21 Or. 59, 66, 27 Pac. 223.

2. Therefore, at the time the judgment of Leonard and Wolff against Lundin was recovered and docketed, the ¹⁵³ legal title to the property was in Lundin, subject to the inchoate right of the purchaser at the foreclosure sale, and the judgment became a lien on such property, subject to be defeated only by the consummation of such sale by the execution and delivery of a sheriff's deed: *B. & C. Comp.*, secs. 105, 227; 2 *Freeman on Executions*, 3d ed., sec. 182; 2 *Freeman on Judgments*, 4th ed., sec. 349; *Curtis v. Millard*, 14 Iowa, 128, 81 Am. Dec. 460; *Barnes v. Cavanagh*, 53 Iowa, 27, 3 N. W. 801.

3. The redemption by the plaintiff as the successor in interest of the judgment debtor, however, put an end to any further proceedings to enforce the decree, defeated the inchoate right or title of the purchaser, and restored the property to the same condition as if no sale had been attempted: *B. & C. Comp.*, secs. 250, 427; *Cartwright v. Savage*, 5 Or. 397;

Settlemire v. Newsome, 10 Or. 446; Flanders v. Aumack, 32 Or. 19, 67 Am. St. Rep. 504, 51 Pac. 447. The redemption obliterated every effect and consequence of the foreclosure sale, and the parties to this suit now stand in precisely the same position, so far as the right of the defendants to proceed on the judgment at law is concerned, as if there had been no proceedings to enforce the decree, and Lundin had, subsequent to the recovery and docketing of the judgment at law, conveyed the property to the plaintiff. In such a case the property would unquestionably be subject to the lien of the judgment and liable to a sale on the execution thereunder.

4. The plaintiff contends, however, that, as the judgment of Leonard & Wolff was obtained pendente lite and after the sale under the decree of foreclosure, it is effectually barred by such decree. Reliance is had in support of this position on Williams v. Wilson, 42 Or. 299, 95 Am. St. Rep. 745, 70 Pac. 1031. That case is essentially different from this. It was a suit to foreclose a mortgage. A judgment against the mortgagor has been recovered and ¹⁸⁴ docketed subsequent to the execution of the mortgage and prior to the commencement of the foreclosure suit. The judgment lien creditor was made a party to the suit. He appeared and set up his judgment by answer or cross-complaint, and secured a decree that the proceeds of the sale of the mortgaged property, after satisfying prior liens, should be applied in payment of his judgment. The court held that the rights of such a judgment lien creditor as against the particular property were merged in and must be worked out through the decree, and consequently he could not have the premises resold under an execution issued on his judgment at law for a deficiency due him thereon, when the property had been redeemed from the foreclosure sale by a grantee of the mortgagor, who took subsequent to the rendition of the decree. In this case Leonard and Wolff were not parties to the foreclosure suit, and could not have been made so. Their action at law was commenced, and judgment recovered, after the decree. They did not and could not have appeared in the foreclosure suit and set up their claim by answer or cross-bill, and their lien was not merged in the decree, and could not be worked out through it. Their rights did not in any way depend upon the decree of foreclosure, but wholly upon their judgment at law, obtained subsequent to the decree. Now, under the doctrine of *lis pendens*, one

who acquires title to, or a lien upon, or an interest in, mortgaged real property after the commencement of a foreclosure suit, is not a necessary party thereto, but is bound by the decree: 21 Am. & Eng. Ency. of Law, 2d ed., 645; *Houston v. Timmerman*, 17 Or. 49, 11 Am. St. Rep. 848, 21 Pac. 1037, 4 L. R. A. 716; *Jennings v. Kiernan*, 35 Or. 349, 55 Pac. 443, 56 Pac. 72; *People's Bank v. Hamilton Mfg. Co.*, 10 Paige, 481; *Whitney v. Higgins*, 10 Cal. 547, 70 Am. Dec. 748. And his interest is effectually cut off and barred by such decree, if a sale takes place thereunder, and such sale ¹⁵⁵ ripens into a title by the execution and delivery of a sheriff's deed: *Fuller v. Scribner*, 16 Hun, 130. When, however, an inchoate sale under the decree is arrested and the effect thereof terminated by the judgment debtor or his successor in interest redeeming, the judgment lien creditor is not deprived of his right to proceed on his judgment as against the debtor or his grantee: *Curtis v. Millard*, 14 Iowa, 128, 81 Am. Dec. 460. The observation of Mr. Jones, quoted in *Williams v. Wilson*, 42 Or. 299, 95 Am. St. Rep. 745, 70 Pac. 1031, that a creditor having judgment rendered before the sale but subsequent to the decree is as effectually barred by the sale as if he had been made a party to the proceedings (2 Jones on Mortgages, 6th ed., sec. 1437), manifestly has reference to a completed and not an inchoate sale. There is no sale, in the legal sense, under a judgment or decree until the title passes. Until that time the purchaser has a mere inchoate and defeasible right to a conveyance of the legal title. When the judgment debtor or his successor in interest redeems, the process of transfer of title to the purchaser is arrested, his equitable interest terminated, and is as if it had never existed: *Settlemire v. Newsome*, 10 Or. 446. We are of the opinion, therefore, that the defendant Paxton is not barred from proceeding under his judgment at law by the decree in the foreclosure suit or the subsequent proceedings had thereunder.

5. It is argued that in any event the plaintiff is entitled to be subrogated as against the defendant Paxton to the right of the plaintiff in the foreclosure suit, but that question is not properly here. This is not a suit for subrogation, but merely to enjoin a sale under the judgment at law. The only question for decision is whether the defendants had a right, under the facts as they appear in the complaint, to

proceed to a sale under the execution on the judgment ¹⁵⁶ recovered by Leonard and Wolff against Lundin, and not what interest the purchaser will acquire by such sale.

The decree of the court below is reversed, and the complaint dismissed.

A Redemption by the Judgment Debtor of his lands sold under execution reinstates the lien of the judgment for any balance remaining unpaid and subjects the lands to a resale to satisfy the balance. *Flanders v. Aumack*, 32 Or. 19, 67 Am. St. Rep. 504, and note. See, in this connection, *Williams v. Wilson*, 42 Or. 299, 95 Am. St. Rep. 745.

FULLER v. HAGER.

[47 Or. 242, 83 Pac. 782.]

JUDICIAL SALE.—The Failure of a Guardian to Take the Oath Prescribed by Law before fixing the time and place of sale is fatal to the purchaser's title. (p. 917.)

JUDICIAL SALES—Curative Statutes, Construction of.—A statute providing that all sales by guardians of their wards' real property to purchasers for a valuable consideration, which has been paid by them to such guardians in good faith, which have not been set aside by the court, shall be sufficient to sustain the guardians' deed to such purchasers, and all irregularities in obtaining the order of sale or in making or conducting the sale shall be disregarded, makes valid a sale by a guardian without taking the oath prescribed by statute before fixing the time and place of the sale. (pp. 917, 918.)

CONSTITUTIONAL LAW—Statutes Validating Judicial Sales.—Unless prohibited by the constitution, the legislature may validate or legalize retroactively judicial or execution sales, though the defects or irregularities therein are of so gross a character as to render them inoperative, so long as it does not undertake to infuse life into proceedings void for want of jurisdiction. (p. 918.)

JUDICIAL SALES—Constitutional Law.—A Statute Having the Effect of Validating Guardians' Sales made without giving the oath prescribed by statute before fixing the time and place of sale is constitutional. (p. 919.)

Carson & Cannon and C. E. Woodson, for the appellants.

James A. Fee and Gilbert Walyer Phelps, for the respondent.

²⁴² **BEAN, J.** This is an action of ejectment to recover the possession of certain real property in Morrow county. The only question raised is as to the validity of a guardian's sale of plaintiffs' interest in the land. The sale was made December 14, 1889, by the guardian to the defendant at pub-

lie auction, ²⁴³ in pursuance of a license or order of the county court, and the purchase was made and the purchase price paid to the guardian in good faith. The sale was reported to and regularly confirmed by the county court on January 7, 1890, a guardian's deed made to the purchaser on January 10th, and he has ever since been in possession of the property.

1. The contention is that the sale was invalid because the guardian did not take the oath required by law before fixing the time and place of sale, or at all until four days before the sale. Section 5602, B. & C. Comp., provides: "Such guardian shall, before fixing on the time and place of sale, take and subscribe an oath, before the county judge, or some other officer competent to administer the same, in substance as follows: That in disposing of the estate which he is licensed to sell, he will use his best judgment in fixing the time and place of sale, and that he will exert his utmost endeavors to dispose of the same in such manner as will be most for the advantage of all persons interested therein."

And section 5611 declares: "In case of an action relating to any estate sold by a guardian under the provisions of this chapter, in which the ward or any person claiming under him shall contest the validity of the sale, the same shall not be avoided on account of any irregularity in the proceedings: Provided, it shall appear (1) that the guardian was licensed to make the sale by a county court of competent jurisdiction; (2) that he gave a bond that was approved by the county judge; (3) that he took the oath prescribed in this chapter; (4) that he gave notice of the time and place of sale as prescribed by law; and (5) that the premises were sold accordingly at public auction, and are held by one who purchased them in good faith."

The selection of the time and place of sale by a guardian in advance of taking the prescribed oath is, under the decisions construing similar statutes, fatal to the purchaser's title: *Freeman on Void Judicial Sales*, sec. 22; *Gager v. Henry*, ²⁴⁴ 5 Saw. 237, Fed. Cas. No. 5172; *Blackman v. Baumann*, 22 Wis. 611; *Wilkinson v. Filby*, 24 Wis. 441; *Ryder v. Flanders*, 30 Mich. 336; *Bachelor v. Korb*, 58 Neb. 122, 76 Am. St. Rep. 70, 78 N. W. 485.

2. But the defect or irregularity in the proceedings complained of in this case was, we think, cured, and the sale

validated, by a subsequent curative act of the legislature which provides: "All sales by . . . guardians of their wards' real property in this state to purchase for a valuable consideration, which has been paid by such purchasers to such guardians or their successors in good faith, and such sales shall not have been set aside by the county or probate court, but shall have been confirmed or acquiesced in by such county or probate court, shall be sufficient to sustain a . . . guardian's deed to such purchaser for such real property; . . . and all irregularities in obtaining the order of the court for such sale, and all irregularities in making or conducting the same by such . . . guardian, shall be disregarded": Laws 1899, p. 64, sec. 3.

3. It is a well-recognized rule of law that the legislature may, unless prohibited by the constitution, validate or legalize, retrospectively, judicial or execution sales, even though the defects or irregularities therein are of so grave a character as to render them inoperative, so long as it does not undertake to infuse life into proceedings utterly void for want of jurisdiction: Freeman on Void Judicial Sales, 57; Endlich on Interpretation of Statutes, sec. 291; Wilkinson v. Leland, 27 U. S. (2 Pet.) 627, 7 L. ed. 542; Sohler v. Massachusetts Gen. Hospital, 3 Cush. 483; Sanders v. Greenstreet, 23 Kan. 425; Smith v. Callaghan, 66 Iowa, 552, 24 N. W. 50; Boyce v. Sinclair, 3 Bush, 261. Mr. Cooley says: "There is no doubt of the right of the legislature to pass statutes which reach back to and change or modify the effect of prior transactions, provided retrospective laws are not forbidden, *eo nomine*, by the state constitution, and provided further, that no ²⁴⁵ other objection exists to them than their retrospective character. . . . The rule applicable to cases of this description is substantially the following: If the thing wanting, or which failed to be done, and which constitutes the defect in the proceedings, is something the necessity for which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute. And if the irregularity consists in doing some act, or in the mode or manner of doing some act, which the legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law": Cooley's Constitutional Limitations, 6th ed., 455-457; Cooley's Constitutional Limitations,

7th ed., 529-531. See, also, *Stanley v. Smith*, 15 Or. 505, 16 Pac. 174; *Grady v. Dundon*, 30 Or. 333, 47 Pac. 915; *Nottage v. Portland*, 35 Or. 539, 76 Am. St. Rep. 513, 58 Pac. 883.

Now, the taking by a guardian of an oath after obtaining a license for the sale of his ward's property, and before fixing the time and place of sale, was a matter which the legislature might have dispensed with entirely in the first instance. It did not affect the jurisdiction of the court to license or confirm the sale, or the guardian to make it, but was merely a matter of procedure. It was therefore within the power of the legislature to validate by subsequent act a departure from the prescribed method. It could have authorized the sale in the first instance without requiring the oath, and so could render a failure to take it immaterial by subsequent law. This is the effect and construction given the curative act now under consideration by this court in *McCulloch v. Estes*, 20 Or. 349, 25 Pac. 724. That was an action by a ward to recover lands sold by his guardian. The objection to the validity of the sale was that the guardian did not give "notice of the time and place of sale as prescribed by law"—a matter made as important and essential by section 5611 as the taking of the oath. ²⁴⁶ The court said: "The case before us comes directly within the purview of this statute, which was intended to obviate or cure such defects or irregularities as is sought to be made available in this action." The curative act of 1899 did not attempt to amend, repeal or modify the law governing a sale by a guardian of his ward's property, but was intended to, and did, cure such defects in proceedings already had as did not go to the question of jurisdiction.

It follows that the judgment must be affirmed, and it is so ordered.

The Legislature may Ratify and Confirm any Act which it might lawfully have authorized in the first instance, where the defect arises out of the neglect of some legal formality, and the curative act interferes with no vested rights: Steger v. Traveling Men's Bldg. Assn., 208 Ill. 236, 100 Am. St. Rep. 225, and see the cases cited in the cross-reference note thereto.

LIVESLEY v. LITCHFIELD.

[47 Or. 248, 83 Pac. 142.]

ELECTIONS—Power to Limit the Persons Who may Vote.—

Any person not disqualified by the provisions of the constitution of the state is entitled to vote, and it is not within the power of the legislature to deny, abridge, extend or change the qualifications so prescribed. (p. 921.)

ELECTIONS—Municipal Corporations—Power to Limit the

Right to Vote.—Though the legislature is given authority by the constitution to provide the time and manner in which municipal officers may be elected or appointed, it cannot determine what shall constitute a legal voter, and hence may not prohibit persons from voting who have not paid their poll taxes, where the constitution of the state purports to prescribe the qualifications of voters at all elections prescribed by law. (p. 925.)

Action against the officers of election of the city of Salem for refusing to permit plaintiff to vote at an election held therein on the ground that he had not paid his poll taxes. The object of the action was to test the constitutionality of a provision in the charter of Salem prohibiting any person from voting at a city election who had not paid poll taxes for the year in which he offered to vote unless he was exempt from such payment. Judgment for the defendants, and the plaintiff appealed.

S. T. Richardson and W. E. Richardson, for the appellant.

Henry Johnson Bigger, for the respondents.

²⁴⁹ BEAN, J. 1. The general rule is that the electorate of a state or any of its governmental subdivisions is created and defined by the fundamental law, and that the source of all authority to vote at any popular election is the state constitution. Any citizen possessing the qualifications of an elector as defined by that instrument, and who is not disqualified by any of its provisions, is entitled to the right of suffrage ²⁵⁰ and it is not within the power of the legislature to deny, abridge, extend or change the qualifications so prescribed: Cooley's Constitutional Limitations, 7th ed., 899; 10 Am. & Eng. Ency. of Law, 2d ed., 576. Section 2 of article 2 of the constitution of this state reads: "In all elections not otherwise provided for by this constitution, every white male citizen of the United States, of the age of twenty-one years and upwards, who shall have resided in the state during the

six months immediately preceding such election, and every white male of foreign birth of the age of twenty-one years and upwards, who shall have resided in this state during the six months immediately preceding such election, and shall have declared his intention to become a citizen of the United States one year preceding such election, conformably to the laws of the United States on the subject of naturalization, shall be entitled to vote at all elections authorized by law."

This provision is by its terms expressly made applicable to all elections not otherwise provided by the constitution. To empower the legislature, therefore, to add to or abridge the qualifications of a voter as thus defined, some other provision of the constitution must be pointed out which confers such authority in express terms, or by necessary implication.

2. The only provisions bearing on the question now under consideration to which our attention has been called are section 2, article 11, and sections 6 and 7 of article 6, which are as follows:

"Corporations may be formed under general laws, but shall not be created by special laws, except for municipal purposes. All laws passed pursuant to this section may be altered, amended or repealed, but not so as to impair or destroy any vested corporate rights": Const. Or., art. 11, sec. 2.

"There shall be elected in each county, by the qualified electors thereof, at the time of holding general elections, a county clerk, treasurer, sheriff, coroner, and surveyor, ²⁵¹ who shall severally hold their offices for the term of two years": Const. Or., art. 6, sec. 6.

"Such other county, township, precinct, and city officers as may be necessary shall be elected or appointed in such manner as may be prescribed by law": Const. Or., art. 6, sec. 7.

In support of the judgment of the court below it is contended that the sections just quoted vest in the legislature plenary power to create corporations for municipal purposes, and to prescribe and define the qualifications of voters at elections to be held therein, and *Harris v. Burr*, 32 Or. 348, 52 Pac. 17, 39 L. R. A. 768, *Buckner v. Gordon*, 81 Ky. 665, *McMahon v. Savannah*, 66 Ga. 217, 42 Am. Rep. 65, *Town of Valverde v. Shattuck*, 19 Colo. 104, 41 Am. St. Rep. 208, 34 Pac. 947, *Hanna v. Young*, 84 Md. 179, 57 Am. St. Rep. 396, 35 Atl. 674, 34 L. R. A. 55, and *State v. Dillon*, 32

Fla. 545, 14 South. 383, 22 L. R. A. 124, are cited in support of this position. *Harris v. Burr*, 32 Or. 348, 39 L. R. A. 768, 52 Pac. 17, involved the validity of an act of the legislature conferring upon women the right to vote at school district elections, and the court, after reviewing at length the legislation in respect to the qualifications of voters at school elections prior to, at the time, and since the adoption of the constitution, concluded that in view of such legislation and of the fact that the constitution does not name or mention school officers or school elections, but in express terms relegates to the legislature the duty of establishing "an uniform and general system of common schools" (Const. Or., art. 8, sec. 3), it was competent for it to prescribe the qualifications of a voter at a school district meeting. "The power ascribed to the legislature under the constitution," says Mr. Justice Wolverton, "to provide for the establishment of a uniform and the general system of common schools, carries with it plenary power to establish the unit of that system, ²⁵² denominated a school district, to determine what officers shall administer its affairs, who and what manner of persons shall be eligible to office, and how and by whom they should be chosen. The elective franchise conferred by section 2 of article 2 does not, nor was intended to, fix and define the qualification of voters at school meetings, but was designed only to govern in all general and special elections not otherwise provided for by the constitution, and applies to the election of all officers known to the constitution, as well as to such as may be provided for thereunder, aside from those provided for under the special power of the legislature to establish a uniform and general system of common schools." It will thus be seen that this case proceeds wholly on the theory that the constitution has in express terms authorized and empowered the legislature to establish a system of common schools, and that it intended [to] and did confer upon that body the power to declare the qualifications of voters for district officers. Such elections are therefore "otherwise provided" by the constitution, and expressly exempted from the operation of section 2, article 2. But no such provision is to be found in the constitution as it respects municipal corporations.

The legislature has power to create such corporations by special laws, and "to prescribe by law" the "manner" of

the election or appointment of the officers thereof. The power thus conferred is not like that to establish and organize school districts, but more nearly resembles that granted for the organization of counties. A municipal corporation is but a governmental agency or local organization for governmental purposes. Its officers are none the less governmental officers because elected or chosen by the people of a particular locality. It is difficult, if not impossible, to conceive that, when section 7 of article 6 declares that the officers of a city may be elected or appointed ²⁵³ as prescribed by law, it did not contemplate that the election, if held, should be by the qualified electorate of the municipality, for, as said by Mr. Justice Christiancy, in *People v. Hurlburt*, 24 Mich. 44, 9 Am. Rep. 103: "It may be said with certainty that, wherever in the constitution the election of an officer is provided for, it means an election by the electors of the state, if it be a state office, or of the district or political subdivision for which he is to be elected, unless the constitution itself, as to any particular election, provides otherwise."

The authority given by section 7 of article 6 to prescribe "the time and manner" in which municipal officers may be elected or appointed does not, we think, include the power to determine what shall constitute a legal voter. The constitution of Michigan declares that the legislature shall "provide for the incorporation and organization of cities and villages," and that "judicial officers of cities and villages shall be elected and all other officers shall be elected or appointed at such time and in such manner as the legislature may direct." The legislature passed an act conferring upon women the right to vote in all village and city elections, but it was held invalid because in violation of the section of the constitution prescribing who shall be electors and entitled to vote in all elections. The court said: "The authority to direct the time and manner in which judicial officers shall be elected, and the other officers elected or appointed, does not involve the power to determine who shall constitute the electorate. The word 'manner,' it is true, is one of large signification, but it is clear that it cannot exceed the subject to which it belongs. It relates to the word 'elected.' The constitution has already provided for electors, and when it provides that an officer shall be elected it certainly contemplates an election by the electorate which it has constituted.

No other election is known to the constitution, and, when it ²⁵⁴ provides that the legislature may direct the manner in which an officer shall be elected, it simply empowers the legislature to provide the details for the holding of such election. The machinery of government differs in its details in cities, villages and townships, and there must necessarily be differences in methods and officers to administer the election laws": *Coffin v. Election Commrs.*, 97 Mich. 188, 56 N. W. 567, 21 L. R. A. 662.

The same construction was given to the word "manner" in a like constitutional provision by the supreme court of Illinois, in *People v. English*, 139 Ill. 622, 29 N. E. 678, 15 L. R. A. 131. In that case the relator, a female, claimed the right to vote for county school superintendent. The constitution printed that "there may be a county superintendent of schools in each county, whose qualifications, duties and compensation and the time and manner of his election and term of office shall be prescribed by law." The court held the law conferring the right upon women to vote for such officer unconstitutional, saying: "The constitution having thus made provision for such officer, and for his and her 'election,' and having prescribed, in section 1 of article 7 (Ill. Const.), the qualifications essential to entitle a person to vote at 'any election,' it must be presumed that it was and is the true intent and meaning of that instrument that no person shall have the right to vote for a county superintendent of schools who does not possess such qualifications. . . . Said section 5 (article 8) provides, not only that the qualifications, powers, duties, compensation and term of office of the county superintendent of schools shall be prescribed by law, but also that the 'time and manner of election' of such superintendent 'shall be prescribed by law.' What is meant by the expression 'manner of election'? Was it intended thereby to give to the legislature the power of prescribing the qualifications which would entitle persons to vote at any ²⁵⁵ election for such county superintendent? The word 'manner' is usually defined as meaning way of performing or executing, method, custom, habitual practice, etc. . . . [It] indicates merely that the legislature may provide by law the usual, ordinary, or necessary details required for the holding of the election."

The Michigan and Illinois cases referred to are much to the purpose in the present discussion, because the courts of

each of these states have held that under a constitution like ours, imposing on the legislature the duty of providing for and establishing a common school system, it is competent to confer the right to vote at school elections upon women, and these cases were relied upon as supplying the conclusion reached in *Harris v. Burr*, 32 Or. 348, 52 Pac. 17, 39 L. R. A. 768; *Plummer v. Yost*, 144 Ill. 68, 33 N. E. 191, 19 L. R. A. 110; *Belles v. Burr*, 76 Mich. 1, 43 N. W. 24. The cases cited from these states illustrate and point out the distinction between the right to vote at school district meetings and at an election for city and municipal officers.

The Kentucky, Maryland, Georgia, Colorado, and Florida cases all involved the right to vote at municipal elections, but the decisions were made under constitutions essentially different from ours. The constitution of Kentucky provided that "every free white male citizen," etc., "shall be a voter" (3 Const. Ky., art. 2, sec. 8), without undertaking to designate at what election or for what officer the vote might be cast, and the court held, considering this section in connection with other provisions of the constitution, that it was intended to apply only in the election of constitutional officers, as distinguished from those created by legislative act. Our constitution, however, prescribes the qualifications of voters "in all elections not otherwise provided by this constitution," and "at all elections prescribed by law," so that, in place of being applicable ²⁵⁶ to constitutional officers only, it is expressly made applicable to all elections authorized by law, unless the constitution itself otherwise provides. The power to take from or add to the qualifications of a voter, as prescribed in section 2 of article 2, at any election, must be found in that instrument. The qualification of a voter as thus defined is intended to apply to the election of all officers, whether provided by the constitution or by a law authorized thereby, unless authority for the exemption can be found in the instrument itself.

The constitution of Maryland named and defined the qualifications of voters in the state at large and in the city of Baltimore, and in general terms authorized the creation of other corporations for municipal purposes, thus leaving to the legislature, so the court held, the power to add to the qualifications of voters residing within the corporate limits of a town so created any reasonable restriction it might deem proper. The

constitution of Georgia, after defining the qualification of voters, empowered the legislature to prescribe from time to time for the registration of all voters. It was held that a law requiring the payment of a certain sum in lieu of poll-tax as a condition to the right of registration for a city election was not adding to the qualification of voters, but was a mere statutory requirement, designed "to secure the discharge of the duties citizens owed the municipal government and to protect the purity of the ballot." The Colorado constitution defined the qualification of voters "at all elections," and the court held that it applied only to elections of "public officers," and not to a law for the dissolution and annexation of contiguous cities and towns. The Florida constitution defined the qualification of electors at all elections "under this constitution," and it was held that it did not apply to municipal elections because they were not held under the constitution. None of the cases are, therefore, ²⁵⁷ in point or authority under our constitution, which has specially prescribed the qualification of voters at all elections not otherwise provided in that instrument itself.

3. Without pursuing the discussion further, we are all agreed that the provision of the Salem charter in question is void, and this conclusion finds support in *St. Joseph etc. Ry. Co. v. Buchanan County Court*, 39 Mo. 485, *Allison v. Blake*, 57 N. J. L. 6, 29 Atl. 417, 25 L. R. A. 480; and *People v. Canaday*, 73 N. C. 198, 21 Am. Rep. 465, in addition to the authorities already referred to.

The judgment of the court below will be reversed, and the cause remanded.

No Election Law is Valid which, under the pretext of regulation, destroys the constitutional right to vote, by annexing an additional qualification as to the number of days a voter must reside within the precinct before he can vote, or any other requisite in direct opposition to the constitutional requirements: *Attorney General v. Common Council*, 78 Mich. 545, 18 Am. St. Rep. 458. Where the constitution provides that every male person twenty-one years old, resident in the state twelve months, and in the county thirty days, shall be an elector, a statutory provision requiring ninety days' residence as a qualification for voting for city officers is unconstitutional: *People v. Canaday*, 73 N. C. 198, 21 Am. Rep. 465.

GRIMBERG v. COLUMBIA PACKERS' ASSOCIATION.

[47 Or. 257, 83 Pac. 194.]

VESSELS.—The Presumption is Against the Demise of a Vessel, and the contract is construed as one for affreightment, unless its terms show a clear intention to the contrary. (p. 930.)

VESSELS.—The Presumption in Favor of a Contract of Affreightment Instead of a Lease is not Rebutted by the fact that the persons entitled to the possession of the vessel thereunder employed the plaintiff and other sailors, and also the officers, except the captain. (p. 931.)

VESSELS.—The General Construction Relating to a Charter-party is that if the vessel, the subject of the agreement, is so let that there is a transfer or relinquishment to the charterer of the entire command, possession, and subsequent control, he will be treated as the owner for the time being—that is, for the voyage or other particular service stipulated for; but if the charter-party is but an agreement or covenant for the general use of the vessel or some designated part thereof, the general owner at the same time retaining the command, possession and control of its navigation, the charterer must be regarded as a charterer only for the designated or specified service, which does not alter the duties and responsibilities of the owners. (p. 931.)

VESSELS.—The Word "Freighting" Signifies the loading of goods or commodities for transportation. (p. 932.)

VESSELS.—The Word "Charter" does not Necessarily Mean the letting of the ship by way of demise, and is equally consistent with the idea of a contract of affreightment. (p. 932.)

VESSELS.—Contract, When Amounts to an Affreightment, and not a Demise.—An agreement between the owners of a vessel and another that the latter covenants and agrees to the freighting and chartering of the vessel for a voyage between designated ports, during which the vessel shall be kept tight, staunch, and in good condition, and provided with every requirement necessary for the voyage, and that the whole of the vessel, except the private apartments of the master, shall be at the sole use and disposal of the other party who charts and hires the vessel, and agrees to pay a stipulated price therefor until the voyage is terminated and the vessel is discharged of her cargo, constitutes a contract of affreightment rather than a demise. (pp. 932-934.)

VESSELS.—The Presumption in Favor of a Contract of Affreightment and Against a Demise is not Rebutted by the fact that the charterer is to pay all the wages of the crew excepting the captain, all port charges and labor bills, and furnish all necessary provisions, fuel, etc., during the whole of the voyage, and at the termination of the charter to deliver the vessel at the port of destination in good condition, and employ the vessel only in lawful trade. (pp. 934, 935.)

VESSEL.—Liability of, for Injury to One of the Crew.—A charterer of a vessel under a contract of affreightment is not liable for injury suffered by one of the crew through carelessness in suffering an appliance to become insecure and unsafe. (p. 938.)

Action by an administratrix to recover damages for the death of a sailor on the vessel "St. Nicholas," alleged to have been caused by the negligence of the defendants while he was in their employ through allowing a becket on the mizzen topgallant yard to become insecure and unsafe, whereby, on its giving way, he was precipitated to the deck and killed. The vessel belonged to George W. Hume & Co., of San Francisco, and the defendants were operating it under a contract, the terms of which are set forth in the opinion. The trial court granted a nonsuit, and the plaintiff appealed.

F. D. Winton and Noland & Smith, for the appellant.

Fulton Brothers, for the respondent.

²⁵⁹ WOLVERTON, C. J. From the allegations in the complaint the accident must be deemed to have happened upon the high seas, for the vessel was on her homeward voyage from her port of destination in Alaska to her port of final discharge in Oregon. The theory of plaintiff is that defendant was the owner of the vessel pro hac vice for the voyage, and, therefore, being in possession and command, was responsible for the accident and liable in damages for the injury sustained. The defendant combats the proposition, and contends that the liability is with Hume & Co., the general owners of the vessel. It is practically conceded by appellant's counsel that, unless the defendant was the lessee of the vessel "St. Nicholas," under a demise from the owner, it is not liable for the damages sustained. Whether, therefore, the charter-party between Hume & Co. and the defendant, touching the navigation of the vessel, constitutes a demise thereof, or is a mere contract of affreightment, is at the outset a material, if not the vital, question for our consideration.

The charter-party was made and concluded in San Francisco between George W. Hume & Co. of the first part and ²⁶⁰ the Columbia River Packers' Association of the second part. The following is an abstract of the provisions of the charter-party, material for our purpose, viz.: That the party of the first part "does covenant and agree on the freighting and chartering of the said vessel unto" the second party "for one voyage from the port of San Francisco, California, with option via Astoria, Oregon, to Nushagak Harbor, Bristol Bay, Alaska, and thence to Astoria or Puget Sound,

final port of destination," and "does engage that the said vessel, in and during the said voyage, shall be kept tight, staunch, well fitted, tackled, and provided with every requisite necessary for such a voyage. That the whole of such vessel, except the private apartments of the master in the cabin, and his navigation room, and necessary room on the ship for sails and necessary extra tackle, shall be at the sole use and disposal of the" second party "during the voyage aforesaid; and that no goods or merchandise whatever shall be laden on board otherwise than for said party of the second part or its agent without its consent." That the second party "does covenant and agree . . . to charter and hire said vessel as aforesaid," and to pay "for the charter of said vessel, including the captain's salary, during the voyage aforesaid," fifteen hundred dollars "on the day of acceptance of said vessel alongside of the wharf in San Francisco, and thereafter fifteen hundred dollars monthly in advance and pro rata for fractional part of a month, until said vessel is discharged of all her cargo in Astoria, Oregon, or Puget Sound, the final port of destination. It is further agreed" that the second party "shall pay all wages of crew (excepting captain) and all port charges and labor bills from the date this charter-party commences, and to furnish all necessary provisions, fuel, water and lights during the whole of said voyage, and at the termination of this charter to deliver the said vessel in port of Astoria or Puget Sound to the" first party "in as good condition (reasonable wear ²⁶¹ and tear excepted) as she is at the commencement of this charter, dangers of the sea and navigation, and acts of God and the elements and fire excepted," and that it will "employ said vessel only in lawful trade, and no goods or merchandise shall be laden on board thereof for the purpose of unlawful trading." That the first party "will place the aforesaid vessel, with swept hold ready for cargo . . . alongside of such safe wharf in San Francisco as the party of the second part may direct, . . . at which time, said vessel being safely moored, said charter shall commence," but that, if "said ship shall not be delivered to the party of the second part in the manner and at the time designated, then the party of the second part may at its option cancel this charter"; and that, "in case the said vessel be lost or wrecked," the second party shall pay to the

first party "the freight under this charter up to the day the said vessel is lost or wrecked, and in case the said vessel shall return to this, or any other port, unable to complete the said voyage, this charter shall cease and terminate." The second party further agrees that "on the delivery of said vessel at the termination of the charter she shall be clear and free of any liens for services performed to or on board the same, and for materials furnished. Payments for services or materials are by this charter-party required to be made by the party of the second part. That she shall be free from all or any claims or demands or liens for breach of passengers or carrying contract, unless the damages caused shall be by reason of the unseaworthiness of the vessel, but not otherwise," and that the second party shall "at all times have enough men aboard to properly care for ship and her safety." That the first party "shall furnish and supply said ship with sufficient tackle, gear, and falls to handle cargo, and necessary lines for moorings."

²⁶² 1. The question presented arises almost wholly upon a construction of the charter-party, for there are but few extraneous facts that shed any light upon the subject, which is whether the agreement constituted a demise of the vessel to the defendant or was merely a contract of affreightment, the general owners retaining the control, management and navigation thereof. It is well to observe at the outset that the presumption primarily is against a demise, and the contract is to be construed as one for an affreightment, unless the terms show a clear intendment to the contrary. Say the learned authors of the American and English Encyclopaedia of Law, second edition, volume 7, page 167: "The presumption is that the ownership of the vessel, even during the period covered by the charter-party, continues in the general owner; and, unless the intention to transfer the possession and ownership to the charterer is unequivocally manifested by the contract, a charter-party will not be treated as a lease or demise of the ship, but will be treated as a contract of affreightment." So, in *Reed v. United States*, 78 U. S. (11 Wall.) 591, 20 L. ed. 220, Mr. Justice Clifford, says: "Courts of justice are not inclined to regard the contract as a demise of the ship, if the end in view can conveniently be accomplished without the transfer of the vessel to the charterer, but where the vessel herself is demised or

let to hire, and the general owner parts with the possession, command and navigation of the ship, the hirer becomes the owner during the term of the contract, and, if need be, he may appoint the master and ship the mariners, and he becomes responsible for their acts." The burden, therefore, lies with the plaintiff to overcome this presumption.

2. About the only extraneous evidence, important to the inquiry, is that the decedent was employed by the defendant at Astoria, Oregon, in the capacity of a sailor on the voyage, and others were so employed by defendant for a ²⁶³ like service; that they shipped on the vessel at Astoria; that there were three mates in the service of the ship; and that the second mate directed the deceased to go aloft, which order being obeyed, he met with the mishap in question, causing his death. Aside from the bearing this evidence may have as showing what was done in pursuance of the charter-party, the instrument itself must be construed as other contracts, and, when the true intentment of the parties is ascertained, it must prevail. We should keep in mind, however, the presumption applicable, so that the doubt, if one exists, may be resolved in favor of a contract of affreightment, rather than a demise of the vessel: See, further, *Adams v. Homeyer*, 45 Mo. 545, 100 Am. Dec. 391; and *Certain Logs of Mahogany*, 2 Sum. 589, Fed. Cas. No. 2559.

3. The general rule of construction relating to the charter-party is that if the vessel, the subject of the agreement, be let so that there is a transfer or relinquishment to the charterer of the entire command, possession and subsequent control, he will be treated as owner for the time being—that is, for the voyage or particular service stipulated for. However, if the charter-party is but an agreement or covenant for the use of the vessel or some designated part thereof, the general owner at the same time retaining command, possession and control over its navigation, the charterer must be regarded as a contractor only for a designated or specific service, which does not alter the duties and responsibilities of the owner. In the one case the charter-party operates as a lease or demise of the vessel, whereby the lessee assumes the duties and liabilities, in a large measure, at least, of the owner; while in the other the agreement is for a special service to be rendered by the owner of the vessel: *Reed v. United States*, 78 U. S. (11 Wall.) 591, 20 L. ed. 220.

"All the cases agree," says Mr. Justice Field, in *Leary v. United States*, ²⁶⁴ 81 U. S. (14 Wall.) 607, 20 L. ed. 756, "that entire command and possession of the vessel, and consequent control over its navigation, must be surrendered to the charterer before he can be held as special owner for the voyage or other service mentioned." "But," says Mr. Justice Story, in *Marcardier v. Chesapeake Ins. Co.*, 12 U. S. (8 Cranch), 39, 3 L. ed. 481, "where the general owner retains the possession, command, and navigation of the ship, and contracts to carry a cargo on freight for the voyage, the charter-party is considered as a mere affreightment, sounding in covenant, and the freighter is not clothed with the character or legal responsibility of ownership": See, also, *United States v. Shea*, 152 U. S. 178, 14 Sup. Ct. Rep. 519, 38 L. ed. 403, and *Emery v. Hersey*, 4 Greene, 404, 16 Am. Dec. 268. So that the distinguishing feature between a demise of the ship, whereby the legal responsibilities of ownership are transferred to and assumed by the charterer, and an agreement for affreightment, is clear, and the main difficulty lies in determining what the parties intended by the charter-party, considering the language in which it is clothed.

4. The first clause of the charter-party consists exclusively of words of covenant, and not of demise. They are that the first party "does covenant and agree on the freighting and chartering of the said vessel unto" the second party "for one voyage." "Freighting" signifies a loading with goods or other commodities for transportation: *Webster's Dictionary*.

5. The word "chartering" does not necessarily mean a letting of the ship by way of demise, and is equally as consistent with the idea of a contract for affreightment: *Ross v. Charleston etc. Transp. Co.*, 42 S. C. 447, 20 S. E. 285.

6. Following this are engagements of the first party in two clauses—the first to the effect "that the said vessel. ²⁶⁵ in and during the voyage, shall be kept tight, staunch, well fitted, tackled," etc.; and the second that "the whole of such vessel, excepting the private apartments of the master in the cabin," etc., "shall be at the sole use and disposal of the" second party during the voyage, and that no goods "shall be laden on board otherwise than for said" second party. These contain cogent and forcible expressions indicating that an affreightment only was intended, and not

a demise. They imply, first, that the owners shall have an oversight of the ship to see that it be kept in proper condition during the voyage, and, second, that they should engage in freighting the vessel, consistent with the previous clause, agreeing that no goods should be laden thereon except such as the charterer should designate. The engagements are simply what they purport to be, covenants on the parts of the owners, and are inconsistent and incompatible with the idea of a demise: *Leary v. United States*, 81 U. S. (14 Wall.) 607, 20 L. ed. 756.

7. We come, now, to the next clause, which consists of stipulations on the part of the defendant. It reads, in effect, that the second party "does covenant and agree to charter and hire said vessel," and "to pay for the charter of said vessel, including the captain's salary, during the voyage," fifteen hundred dollars on the day of acceptance of the vessel, and fifteen hundred dollars per month, until "said vessel is discharged of all her cargo." The clause runs in covenant and agreement by its direct terms; that is to say, it is a covenant to charter and hire, and to pay the stipulated sum of fifteen hundred dollars per month for the charter. The use of the term "hire," like the word "charter," is not inconsistent with the idea of a covenant or agreement only for freighting accommodations aboard ship. Says Mr. Justice Bliss, in *Adams v. Homeyer*, 45 Mo. 545, 100 Am. Dec. 391: "Nor can anything be inferred from the repeated use of the term 'hire,' for the word may as well apply to the price for service as of a lease." ²⁶⁶ But, in the connection in which the word is used in the present instance, the inference would be rather against the signification of a leasing, for it is contained in a covenant on the part of the charterer, while the owners have not on their part employed any terms which are ordinarily considered operative words in a lease or demise. But these clauses, considered simply in their relations one to another, are not controlling, but may yet be dominated and their true intentment governed by subsequent conditions of the charter-party. In *Marcadier v. Chesapeake Ins. Co.*, 12 U. S. (8 Cranch), 39, 3 L. ed. 481, the charter-party contained this language: "Granted and to freight-let, . . . the said brig, excepting and reserving her cabin for the use of the master." And by the first clause in the case of *Clarkson v. Edes*, 4 Cow. 470, the

owner agreed "to freight and to let" to the charterer the whole of the ship, and yet it was held in each of those cases, considering all the terms of the charter-party, that the ownership and possession was retained by the general owner. Here were positive terms used, strongly indicative of an intendment that the ship should pass to the charterer under a demise.

8. The first payment in the present charter-party was to be made on "the day of the acceptance" of the vessel by the charterer. The word "acceptance" has a significance that we will discuss presently. By succeeding clauses it was agreed that the charterer should pay all wages of the crew, excepting the captain, all port charges and labor bills, and furnish all necessary provisions, fuel, etc., during the whole of the voyage, and should at the termination of the charter deliver the vessel in port of destination to the owner in as good condition as when chartered, reasonable deterioration for usage excepted, and that it should "employ" the vessel only in lawful trade. These clauses certainly militate strongly against the idea of a contract of affreightment, for the charterer has taken upon himself ^{and} the entire expense of the voyage, except the wages of the captain, which are provided for in the consideration for the charter of the vessel. In other words, the captain's wages were included in the monthly payments to be made for the charter. Who were to furnish the crew we are not advised. By all reasonable intendment the owners were to furnish the captain or master, for why should they provide for the payment of his wages along with the consideration for the charter of the vessel? If the charterer was to provide such master, it would be a matter of indifference with the owners respecting the payment of such wages, except that they would probably have required a stipulation on the part of the charterer, as they have with reference to the wages of the crew, that such wages should be discharged, so that they would not become a lien upon the ship. From evidence aliunde we know that the decedent and others were employed by defendant to ship as sailors for the voyage. But there were mates aboard who undoubtedly participated in the navigation of the ship and we are unadvised as to who furnished or employed them, the owners or the charterer. Their wages were to be paid by the charterer. The provisions touching the expense

of the voyage are certainly largely inimical to the idea of a contract of an affreightment only: *Drinkwater v. Spartan*, 1 Ware, *149, Fed. Cas. No. 4085; *First Nat. Bank of Marquette v. Stewart*, 26 Mich. 83. So it would seem as to the agreement on the part of the charterer that it should employ the vessel only in lawful trade.

The word "employ" indicates a purpose of control and management. Yet the defendant might reasonably have made such a covenant without taking a demise of the vessel. The covenant or agreement is perhaps common to most charter-parties. By a subsequent clause the owners agreed to place the vessel, ready for cargo, alongside ²⁶⁸ of such wharf in San Francisco as the charter might direct, at which time, the vessel being safely moored, the charter should "commence," but that, if the ship should not be "delivered" in the manner designated, then that the charterers might at their option cancel the charter. Then later in the agreement the charterer stipulates that "on the delivery of said vessel at the termination of the charter she shall be free and clear of any liens," etc. The use of the terms "acceptance" and "delivery" with relation to the ship would seem almost conclusively to indicate an intendment that the command and possession were surrendered to the charterers, to be by them delivered back to the owners at the termination of the voyage, and would evidence a demise, and yet not a single technical term of demise, and no other term of such significance that could not as well be used in drafting a contract of affreightment, is employed in the charter-party between the parties. The mere circumstance that such terms were not employed is in itself significant. There are some other provisions of minor moment, namely, that the charterer shall, in case the vessel is disabled for service or lost, pay "freight" to the time of such disablement or loss only, the charter terminating by the event; that the charterer shall at all times have men on board sufficient properly to care for the ship and her safety, and that the owners shall supply the ship with tackle, etc., to handle cargo, and necessary lines for mooring. These are not inconsistent, either with the demise of the vessel or a contract of affreightment, and may as well be employed in the one case as in the other. We will recur, therefore, to a further consideration of the preceding conditions touching the acceptance and delivery and redelivery of the vessel.

In the case of *Adams v. Homeyer*, 45 Mo. 545, 100 Am. Dec. 391, there arose very much such a conflict of inconsistent clauses in the charter-party as here, and the court ²⁶⁹ gave them most careful and intelligent consideration, resulting in the conclusion that the charter-party did not effectuate a demise of the vessel. There is a significant distinction in one respect only. In that case the owners agreed and claimed the right to provide the captain "to command and run the steamer, and to furnish a man to take charge of and manage the barges, both of whom were to be paid by the plaintiffs." While the owners here do in fact provide the captain or master, and pay his wages, nothing is said regarding his command or control of the vessel. Beyond this the charterer was to insure the steamer for the benefit of the owners and pay them "for the use and hire" of the boat and barges a stipulated sum every fifteen days, "until the charter was terminated by the delivery of said steamer and all of the said barges to the owners," or until otherwise terminated. In case of loss or disablement of the boat, it was further agreed that he might deliver the barges to the owners, "pay up the hire of said steamer and barges to the date of such delivery," and be discharged from liability or loss and "for further hire"; that upon failure on the part of the charterer to pay expenses or liabilities of steamer or barges, or to keep the former insured, or to "pay the hire," his rights were to be forfeited; that the owners might terminate the charter and "resume possession of the steamer and barges"; and that in case of loss of the steamer the charterer should "be discharged from all liability to deliver said steamer as aforesaid." After speaking of the effect of other clauses of the charter-party, all supporting the presumption of ownership in the general owners, the court say: "What, then, must the parties have intended by the language used by them in relation to the surrender of possession at the termination of the contract? Clearly and only that, at the time and on the occasion referred to, the contract should end; that the owners should then have the independent use and control, absolved from ²⁷⁰ any obligation to run and carry exclusively for the charterer. This meaning renders the whole instrument, and the action of the parties under it, consistent and harmonious; while the one contended for would require that Capelle, who never was in actual posses-

sion, should yield possession to the owners, who had all along, by their officers, though for Capelle's use, been running the boat and barges." A little later the court continues: "The general owner may let his ship with a master and crew of his own choosing, and, if there is evidence of intention to part with the possession, it is held to be a demise. But a covenant that he shall have the right to appoint the master to control and navigate clearly indicates an intention not to trust the property in the hands of others, but to control it by his own agents for the use of the charterer."

Now, as previously observed, the parties have employed no technical words of grant or demise, nor was the vessel, in terms, let to hire. The charterer covenanted and agreed to "charter and hire," but we look in vain for any letting to "hire" on the part of the owners, nor was there any express declaration that the charterer was to take the vessel into its own possession. The owners provided the master and presumably the mates, while the charterer engaged to employ the crew. The natural deduction would be that the owners retained command and possession and the consequent navigation of the vessel through the master and mates. So that here are conditions altogether incompatible with any idea of a demise whatever, and, while the term "hire" might be consistent with a demise, it is not inconsistent with a contract of affreightment. The clause with reference to the charterer's payment of the wages of the crew, etc., is, however, consistent with a demise, yet it is not controlling. So, with the stipulations concerning acceptance, delivery and redelivery, considering the other conditions of the charter-party. These terms are more ²⁷¹ readily reconcilable with the idea of their employment with reference to the commencement and termination of the charter-party than that they portend a transfer of the possession, control and management of the ship from one party to the other.

These considerations, taken in connection with the legal presumption that obtains in favor of the continuance of ownership of the ship in the general owners, and against any transfer thereof for the voyage, impel us to the conclusion that the contract is one of affreightment only, and does not constitute a demise. The presumption alluded to is said to be so strong that, if the end sought to be effected

by the charter-party can conveniently be accomplished without a transfer of the vessel to the charterers, the law is not disposed to regard the contract as a demise; and this, even if there be express words of grant in the formal parts of the instrument: *Hagar v. Clark*, 78 N. Y. 45. No such words whatever are found in the present charter-party.

Such being our conclusion, it is conceded that the defendant is not liable for the injury resulting to the decedent, and the judgment of the circuit court will therefore be affirmed.

When It is Doubtful on the Face of a Charter-party whether or not it was intended to clothe the charterer with ownership in the ship, the presumption is against such intention. As between the two possible constructions, the law inclines to a contract of affreightment rather than a contract of ownership or lease of the ship: Swift v. Tatner, 89 Ga. 660, 32 Am. St. Rep. 101.

The Owner of a Vessel may Lease it, giving up all possession and control, reserving only rent, and in that case the lessee, although the lease assumes the form of a charter-party, becomes the owner for the term: Adams v. Homeyer, 45 Mo. 545, 100 Am. Dec. 391.

HUFFMAN v. SMYTH.

[47 Or. 573, 84 Pac. 80.]

PUBLIC LANDS—Inchoate Right to Homestead, Jurisdiction to Protect.—One who has settled on unsurveyed public lands with a view to maintaining and acquiring a homestead therein under the laws of the United States is entitled to the aid of the state courts as against persons subsequently entering thereon, and whose possession, if continued, will deprive him of his right to take the measures necessary to acquire title under such laws. (p. 940.)

PUBLIC LANDS—Homestead Right is not Abandoned or Forfeited by Absence in Prison.—One who has entered upon unsurveyed public lands with a view of making his homestead thereon, and to thereby acquire title under the laws of the United States is not deemed to have waived or forfeited his claim by his absence therefrom while in prison under a conviction for crime. (p. 942.)

Suit in equity for the possession of unsurveyed public land and to enjoin the defendants from interfering with the possession thereof. The complaint alleged the necessary qualifications on the part of the plaintiff as a homesteader, his entry into possession of the lands in question with the intention of filing upon them as a homestead when surveyed, his cultivat-

ing, farming, and improving such land, and his continued occupation thereof until the year 1900, when he was convicted of felony and sent to the penitentiary, where he was confined until 1905, when a pardon was issued to him; that at the time of his conviction, the defendant Fanny Smyth was his wife; that she afterward procured a decree of divorce from him, in which the court ordered that she should have as alimony possession of the premises; that such award by the court was void and of no effect; that while plaintiff was absent and in prison, she, without any right other than was conferred by the decree of court, took possession of the lands; that her codefendant was her husband and claimed some interest in the premises; that before the commencement of the suit plaintiff demanded possession thereof, which was refused. There were also allegations respecting the amount of hay produced annually upon the land, that a large crop was growing ready to be harvested, which the defendants, if not enjoined, would harvest and apply to their use, to the plaintiff's irreparable damage. The defendants demurred on the ground that the court did not have jurisdiction of the subject matter and that the complaint did not state facts sufficient to constitute a cause of action, which demurrer having been sustained, the plaintiff appealed.

King & Brooke and Biggs & Biggs, for the appellant.

William Miller, for the respondents.

⁵⁷⁶ HAILEY, J. The questions raised by this demurrer will be treated in their order.

1. Had the lower court jurisdiction of the subject matter? The complaint alleges the necessary qualifications ⁵⁷⁷ of the appellant as a homesteader under the federal laws and his settlement upon and improvement of lands and personal occupation thereof to a certain time, his absence from that time, and the reason therefor, together with his intention of claiming the lands under the homestead laws when surveyed, the unlawful entry of the respondents during his absence, and their refusal to vacate, and his inability to comply with the homestead laws and protect his rights of settlement and improvements made thereunder because of the acts of respondents, and also the absence of rights on the part of respondents. The act of Congress of May 14, 1880, chapter 89, sec-

tion 3, 21 Stats. U. S. 140, 141 (U. S. Comp. Stats. 1902, p. 1393, 6 Fed. Stats. Ann, 300, 301), provides: "That any settler who has settled, or who shall hereafter settle, on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States land office as is now allowed to settlers under the pre-emption laws to put their claims on record and his right shall relate back to the date of settlement, the same as if he settled under the pre-emption laws."

Under this section any person qualified to acquire lands under the federal homestead law can lawfully settle upon unsurveyed public lands, and, if such settlement is made with the intention of claiming the lands under such homestead law, such settler acquires a prior right to file upon the same in the local land office when surveyed. This prior right carries with it the right to the possession of the land settled upon, and such a settler will be protected in his right of possession when unlawfully disturbed by another: See *Kalyton v. Kalyton*, 45 Or. 116, 74 Pac. 491, 78 Pac. 332, where this is declared to be the settled rule in this state, and where the authorities therefor are cited. ⁵⁷⁸ The subject matter of this suit is the right to the possession of the land claimed, the legal title to which is in the government, the appellant's only title being the equitable right to its possession for the purpose of acquiring the legal title; hence, under the doctrine above mentioned, the court had jurisdiction of the subject matter. The respondents, however, claim that this case comes within the rule declared in *Frink v. Thomas*, 20 Or. 265, 25 Pac. 717, 12 L. R. A. 239, which holds that, where a controversy between claimants to public lands is pending before the land department of the United States, a court of equity will not undertake to inquire into the question as to who has the better right to the lands under the provisions of the land laws of the government prior to the final determination of the cause in the land department. It does not appear from the record in this case that such controversy is pending before the land department. On the contrary, the land appears to be unsurveyed, and the land department has never yet acquired any jurisdiction thereof as between these litigants; therefore the rule invoked does not apply to the case at bar.

2. Does the complaint state facts sufficient to constitute a cause of suit? The respondents contend that the allegation in the complaint regarding the conviction and confinement of the appellant in the penitentiary negatives whatever rights he may have as shown by the other allegations in the complaint, and that such conviction and confinement are, as a matter of law, an abandonment of his rights to the lands in controversy; and in support of their contention that the voluntary commission of a crime, followed by conviction and confinement in the penitentiary, is in effect an abandonment, cite the case of *Gore v. Brew*, 12 Land Dec. Dep. Int. 239. This case, however, differs greatly from the one at bar. Brew filed a homestead entry, but never established any residence thereon, and within ⁵⁷⁹ the time for so doing was convicted and sentenced to the penitentiary for a period of six years. Some two years afterward Gore instituted a contest on the ground of abandonment, and the land department held that, Brew never having established a residence on the land, his residence after his sentence is presumed, in contemplation of the law, to have remained where it was at the time of his arrest and conviction. In the decision of this case the assistant secretary stated: "It is not parallel with the case of *Anderson v. Anderson*, 5 Land Dec. Dep. Int. 6," in which the decision was rendered by Secretary Lamar, who was afterward an associate justice of the supreme court of the United States, and in which he said: "While it is true that residence under the homestead law must be continuous and personal, it is also true that residence once established can be changed only when the act and intention of the settler unite to effect such a change." Anderson had settled on the tract in controversy some ten or twelve years prior to the contest, which was in 1883, and had continuously resided there with his family until February, 1882, when he was arrested, and afterward convicted and committed to the penitentiary for life. His claim was then contested on the ground of abandonment, but the contest was dismissed, and the honorable secretary, in speaking of this matter, said: "Anderson had lived on this tract for many years, and up to the date of his arrest had complied with the requirements of the law as to residence and cultivation. His absence from the land since that date is by judicial compulsion, which would certainly be a valid excuse for temporary absence."

The distinction apparently made by the land department in those cases arises from actual residence. If, prior to the establishment of actual residence upon the land by the settler, he is prevented from establishing such residence by his own voluntary act, even though it be the commission ⁵⁸⁰ of a crime which results in his enforced incarceration, an abandonment follows as a matter of law; but, if the settler has established an actual residence and made improvements upon the land, then his removal therefrom and enforced absence by reason of conviction for crime will not work an abandonment. The reason for this latter rule is doubtless twofold: First, that residence and abandonment are each determined in part by intention, and it cannot be said that the enforced absence of a settler by compulsion of the law from his established residence carries with it the intention to establish a home in the place of his confinement or the intention to abandon that from which he has been unwillingly removed. Secondly, that abandonment is something more than the relinquishment of possession. It must be the voluntary relinquishment of possession united with an intention to abandon: 1 Cyc. 6; Dodge v. Marden, 7 Or. 456; Hindman v. Rizor, 21 Or. 112, 27 Pac. 13. We therefore hold that the mere allegation in the complaint of the conviction and confinement of the appellant in the penitentiary is not, as a matter of law, an abandonment of his rights to the lands in controversy.

The decree of the lower court will therefore be reversed, and the cause remanded for such further proceedings, not inconsistent with this opinion, as may be proper.

An Involuntary Absence from a Homestead is not proof of an abandonment of it: Lyons v. Andry, 106 La. 356, 87 Am. St. Rep. 299; Rogers v. Day, 115 Mich. 664, 69 Am. St. Rep. 593.

HUFFMAN v. HUFFMAN.

[47 Or. 610, 86 Pac. 593.]

DIVORCE—Alimony.—The Authority to Allow Alimony and Decree the Dissolution of the Marriage must be found in some statute expressly conferring the right. (p. 944.)

DIVORCE.—Maintenance and Permanent Alimony are Synonymous Terms, and mean an allowance in money to be recovered on decree of divorce from the party in fault for the support of the innocent. (p. 946.)

DIVORCE—Alimony, Power to Award Wife Possession of Land.—The court, in a suit for divorce, has no power to award a wife possession of land upon which the husband has entered and acquired a residence for the purpose of obtaining title thereto under the homestead laws of the United States, and that portion of the decree making such allowance is void and hence vulnerable to collateral attack. (p. 947.)

JUDGMENT, Vacating, Irrespective of the Lapse of Time.—Superior courts possess the power at all times to vacate void judgments, decrees and orders. (pp. 947, 948.)

Application to vacate a part of a decree entered in a suit for divorce, by which the defendant therein was, as alimony, awarded the possession of certain property, being the same property referred to in the opinion in the case of *Huffman v. Smyth*, 47 Or. 573, ante, p. 938, 84 Pac. 80. The motion was denied, and the plaintiff appealed.

King & Brooks and Biggs & Biggs, for the appellant.

William Miller, for the respondent.

⁶¹³ MOORE, J. 1. It is contended by the defendant's counsel that, as the plaintiff voluntarily transferred his right of possession to the public land, he thereby relinquished all claim to the premises; and, this being so, no error was committed in denying the motion. The court, in granting the divorce, vacated as fraudulent and void the pretended assignments on the assumption that they were made in secret trust for the plaintiff's use. To allow him now to assert that the ⁶¹⁴ transfers were invalid might seem like permitting him to take advantage of his own wrong; but, however this may be, as the determination of the ultimate right to the land necessarily devolves upon the officers of the land department of the United States, it is proper to leave to them the decision of the question whether or not the plaintiff can hereafter come into their tribunals with clean hands. Be-

sides, the consideration by this court of the legal principle suggested would be equivalent to reviewing the merits of the original decree, and, as no appeal was taken therefrom, the only question that can arise at this time is an alleged want of jurisdiction.

2. Examining the principal inquiry, the appeal challenges the right of the court to provide for the maintenance of the defendant by setting apart to her the possession of the real property specified. To understand the principle whereby alimony was given in divorce proceedings, a cursory examination of the rules originally applicable thereto in the country from which we derive the principles of common law may not be deemed inappropriate. In England, prior to 1858, no absolute judicial divorces were granted; but the ecclesiastical courts, assuming jurisdiction of the marital relation, permitted legal separations, which were known as "*a mensa et thoro*": Stewart on Marriage and Divorce, sec. 200. As an incident of such divorces and based on the husband's duty to support the wife, the church courts granted her, when she was not in fault, alimony, which consisted of an allowance that was measured by the social standing of the parties, proportioned by the wife's necessities and to the husband's financial ability, usually amounting to one-half of their joint income; but, if there were children of the union, the allowance was generally limited to one-third of such income: Stewart on Marriage and Divorce, sec. 362. The ecclesiastical courts having been abolished during the commonwealth, the authority to award alimony ⁶¹⁵ was expressly conferred upon the equity judges, whose decrees in compliance therewith were ratified after the restoration by an act of parliament: 1 Bishop on Marriage and Divorce, sec. 1394. The law of England relating to marriage and divorce was brought by the colonists to this country, where the ecclesiastical courts were never recognized as possessing authority to allow alimony. As these immigrants did not bring their courts with them, the law adverted to, and which is here known as the unwritten or common law of the several states, remained in abeyance until called into activity by the creation of tribunals on which such jurisdiction was directly or by implication conferred: Bishop on Marriage and Divorce, secs. 116, 121. A few courts of last resort in the United States have maintained that a grant of power to sever the marital relation carries with it by necessary intendment an-

thority to allow permanent alimony in the absence of any enactment to that effect: Stewart on Marriage and Divorce, sec. 363. The great weight of judicial utterances, however, is to the effect that all authority to award alimony on decreeing a dissolution of the marriage must be found in the statute expressly conferring the right, which legislation is in general declaratory of the ecclesiastical law: 2 Bishop on Marriage and Divorce, sec. 1039; Stewart on Marriage and Divorce, sec. 364; Weber v. Weber, 16 Or. 163, 17 Pac. 866; Houston v. Timmerman, 17 Or. 499, 11 Am. St. Rep. 848, 21 Pac. 1037, 4 L. R. A. 716.

3. Our statute relating to the land owned by married persons which is required to be divided in certain instances when they are divorced, and providing for the maintenance of the innocent party, is in effect as follows: Whenever a marriage shall be declared void or dissolved, the party at whose prayer the decree is given shall be entitled to the undivided one-third part in his or her individual right in fee of the whole of the real estate owned by the other at the time of the decree: B. & C. Comp., sec. 511. In addition to such share of the real property, the court is empowered, whenever a marriage is declared void or dissolved, to provide for the future care and education of the minor children of the marriage, giving their custody in preference to the party not in fault, and for the recovery from the adverse party, when not allowed the custody of the children, such an amount in money as may be just and proper to contribute for such purposes, and also for the further recovery of such an amount of money as may be just and proper for the party in fault to bear toward the maintenance of the other party: B. & C. Comp., sec. 513. Under the ecclesiastical law the wife only was entitled to alimony, and as a condition precedent thereto a valid marriage of the parties was indispensable: Stewart on Marriage and Divorce, sec. 362. A comparison of that law with our enactment on the subject discloses that in this state the husband as well as the wife may secure maintenance, and this, too, when the marriage is declared void, so that our statute is an enlargement of the ancient law: Henderson v. Henderson, 37 Or. 141, 82 Am. St. Rep. 741, 60 Pac. 597, 61 Pac. 136, 48 L. R. A. 766.

4. In construing the first provision of the statute referred to, it has been held that in granting a divorce a court cannot set off to the innocent party more than an undivided one-

third of the real property (Rees v. Rees, 7 Or. 47), nor apportion any part of such land in severalty, the decree making the parties tenants in common of the premises: Benfield v. Benfield, 44 Or. 94, 74 Pac. 495. Where the husband conveyed real property to a third person for his own use, to prevent the marital rights of his wife from attaching thereto in case she instituted a suit for divorce, it was ruled that the equitable estate of the husband in the premises made him the "owner" of the land, within the meaning of that term as used in the statute, and when the trustee was made a party to such suit the court possessed ⁶¹⁷ power to divest him of the legal title and to invest the wife therewith: Wetmore v. Wetmore, 5 Or. 469. In the case at bar the plaintiff was not the "owner" of the public land, the possession of which was given to the defendant, nor did he have such an equitable estate therein as could be reached or affected in any manner by the decree rendered. It will be remembered that the court, adopting the averments of the supplemental cross-complaint, found that the improvements on the public land were purchased by funds jointly earned by the plaintiff and the defendant. No finding was made as to what part of the sum which was earned by the defendant was so employed, nor that she was entitled to the land or any part thereof by reason of the investment of her money therein. The rule is well settled that as an incident to granting a divorce a court is empowered to restore to an innocent wife the entire property brought to the husband by reason of the marriage, and it is also held in some states that in dissolving the bonds of matrimony a partition of the accumulations may be made: 14 Cyc. 781; Stewart on Marriage and Divorce, sec. 375; Brandt v. Brandt, 40 Or. 477, 67 Pac. 508. This legal principle, however, cannot have any application to the case at bar, for the decree herein is based solely on the ground of awarding to the defendant maintenance for herself and support for her children under section 513, B. & C. Comp.

Maintenance and permanent alimony are synonymous terms, and mean an allowance in money to be recovered on decree of a divorce from the party in fault for the support of the innocent party: B. & C. Comp., sec. 513; Calame v. Calame, 25 N. J. Eq. 548. A text-writer, in discussing this subject, says: "Unless so provided by statute, no fixed por-

tion of the estate of either party is to be allotted to the other upon a divorce": 14 Cyc. 792. Thus, under a statute of New York which authorized provision to be made ⁶¹⁸ for the support of an innocent party, and for the education of the children of the marriage, on decreeing a divorce, it was held that no power was conferred upon the court to set apart to the wife and daughter any specific household goods of the husband for the purposes specified, and that the decree should have compelled him to support them by supplying their daily needs: *Doe v. Doe*, 52 Hun, 405, 5 N. Y. Supp. 514. In *Crain v. Cavana*, 62 Barb. 109, a divorce a mensa et thoro having been given, the wife was awarded four hundred and fifty dollars, which sum the decree stipulated should be "in lieu and satisfaction of all alimony, dower, right of dower, and all other claims which she (the complainant) may or can have, to the property of the defendant." The husband having died seised of certain lands, a suit was instituted to partition the widow's dower, and it was held that the provision of the decree as to the condition of payment was void, in consequence of which the right of dower was not barred. In referring to the conclusion thus reached, Mr. Vanfleet, in his work on Collateral Attack (section 733), makes the following observation: "This case seems to me to be wrong. The court had complete jurisdiction, with authority to determine all the rights of the parties, and a grant of money instead of specific property was merely an error of law which did not destroy the jurisdiction." It is believed, however, that the better rule is that, as the right to maintenance is conferred by statute, which in this state authorizes the payment of a sum of money only to the innocent party on granting a divorce, the court was without power to award to the defendant the possession of public land, and hence that part of the decree is void and vulnerable to collateral attack: 14 Cyc. 794.

5. The remaining question is whether or not the court erred in refusing to vacate the part of the decree so assailed. Though jurisdiction of valid judgments and decrees ⁶¹⁹ ceases with the close of the term at which they are given, unless authority over them is retained by motion or other appropriate proceeding (*Deering & Co. v. Quivey*, 26 Or. 556, 38 Pac. 710), superior courts possess ample power at all times to vacate void judgments, decrees and orders, and

it is incumbent upon them to purge their records of the entries of such nullities when their attention is called thereto: Black on Judgments, sec. 307; 17 Am. & Eng. Ency. of Law, 2d ed., 825; Evans v. Christian, 4 Or. 375; State v. McKinnon, 8 Or. 487; Ladd v. Mason, 10 Or. 308; Slate's Estate, 40 Or. 349, 68 Pac. 339; White v. Ladd, 41 Or. 324, 93 Am. St. Rep. 732, 68 Pac. 739; Conant's Estate, 43 Or. 530, 73 Pac. 1018.

An error having been committed as indicated, the action of the court in denying the motion is reversed, and the part of the decree complained of vacated.

Alimony and counsel fees cannot be decreed, according to some authorities, except in a case specified in the statutes: Kelley v. Kelley, 161 Mass. 111, 42 Am. St. Rep. 389. See, however, the note to Methvin v. Methvin, 60 Am. Dec. 666. For authorities holding that real estate may be awarded as alimony to a wife, see Wesner v. O'Brien, 56 Kan. 724, 54 Am. St. Rep. 604; Powell v. Campbell, 20 Nev. 232, 19 Am. St. Rep. 350; Herron v. Herron, 47 Ohio St. 544, 21 Am. St. Rep. 854.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

**FARMERS' DEPOSIT NATIONAL BANK v. WESTERN
PENNSYLVANIA FUEL COMPANY.**

[215 Pa. 115, 64 Atl. 374.]

LANDLORD AND TENANT—Action for Rent—Defenses.—A tenant in an office building owned and occupied in part by a national bank cannot set up as a defense in an action against him for rent that such bank has no power under its charter to erect an office building and let offices therein. (p. 950.)

LANDLORD AND TENANT.—Lessees cannot impeach the title of their lessors for any cause except fraud. (pp. 950, 951.)

BANKS AND BANKING—National Banks—Penalties.—The power of a national bank to erect an office building and to let out offices therein can be questioned only by proceedings instituted by the United States government, and not by a tenant in such building. (p. 952.)

G. C. Bradshaw, for the appellant.

S. McClay and Reed, Smith, Shaw & Beal, for the appellee.

116 POTTER, J. The plaintiff in this case brought an action of assumpsit to recover rent, claimed to be due by the defendant, for offices in its building known as the Farmers' Bank Building, Pittsburg. Defendant, in its affidavit of defense, admitted the contract and the nonpayment of the rent claimed. But it alleged that it had abandoned the premises and surrendered them to plaintiff before the rent accrued, and that plaintiff had refused to accept the surrender. It further alleged as a defense that plaintiff was a corporation organized and chartered under the national banking act, and as such had no power to purchase, lease, rent,

deal in or hold real estate, except such as was necessary for its immediate accommodation in the transacting of its business, or such as it might obtain as security for or in satisfaction of previously contracted debts; that the building in which the offices leased to defendant were situated was not owned or held by plaintiff for any of the purposes allowed by the act of Congress, but for an entirely different and foreign purpose; that said building was twenty-two stories in height and only one-fourth of the first floor was occupied by the plaintiff as a place for transacting its business; that the remainder of the first floor is occupied by a large entrance to the office building, a state bank, a jewelry store, and for other purposes, and all of the rooms in the twenty-one stories above the first floor are leased to corporations and individuals for purposes entirely unconnected with plaintiff's banking business; that the building containing the leased premises were erected and held by plaintiff in violation of the laws of the United States, at enormous expense, out of its capital or surplus, and was wholly unnecessary for carrying on its banking business, but was erected for another and different purpose, ¹¹⁷ the investment of its funds in a manner forbidden by law; that, therefore, plaintiff had no power to enter into the lease sued on and defendant was not bound by any of the terms and covenants contained therein.

The court of common pleas made absolute a rule for judgment against defendant for want of a sufficient affidavit of defense, and the superior court affirmed this judgment.

In the opinion of the latter court, the question of the power of a national bank to invest its funds in the erection of a large office building, in part of which its own offices are located, was not passed upon. The affirmance was based upon the ground that "a lessee cannot impeach the title of his lessor for any cause except fraud."

We think this ground was well taken, and the decision of the case might well rest upon that point. "The law is well settled that where a person is in possession of property, and leases it to another and puts him in possession, the tenant cannot object to the title of his lessor, who can recover for rent, or for use and occupation if no rent was agreed upon": *Gleim v. Rise*, 6 Watts, 44.

And the same principle is thus stated in *Trickett on Landlord and Tenant in Pennsylvania*, section 756. "By accepting a lease and the possession of the premises in pursuance

of it, the tenant precludes himself from effectively refusing to pay the rent on account of the defects of the title of the lessor. He may be compelled to pay the rent, despite such defects, if any, and therefore proof of such defects is irrelevant and inadmissible in actions of assumpsit for the rent." The rule that a tenant cannot impeach or question the title of his landlord, except for fraud, applies also, when the tenant has vacated the premises before the rent sued for has accrued: *Howard v. Murphy*, 23 Pa. 173.

In that case Justice Woodward said (page 175): "The plaintiffs in error are to be considered as occupying under the lease with Murphy's (the landlord's) agent, for if they did not remain in the actual possession of the premises, they might have done so. They were not evicted or disturbed in their possession by any title paramount to Murphy's, and if they turned themselves out, it was their own fault and no reason for refusing the stipulated rent. A tenant cannot be compelled ¹¹⁸ to occupy the premises he leases. If he chooses that they shall stand vacant, his will is law to himself, but let him not imagine that his caprice, or change of interest, will excuse his payment of the rent." This statement applies closely to the facts of the present case.

But it is urged in the argument for appellant that the contract of leasing was ultra vires, and therefore void, for the reason that the bank had no power to invest its funds in the erection of an immense office building, vastly greater than anything required for its own use, in carrying on the business of banking. But if the bank has exceeded its powers in this respect, we think it is for the government to call it to account, and private parties cannot directly or indirectly usurp this function of the government. With regard to the infraction of a similar provision of the law, Justice White says, in *Schuyler Nat. Bank v. Gadsden*, 191 U. S. 451, 24 Sup. Ct. Rep. 129, 48 L. ed. 258, "it is no longer open to controversy that the provisions of the statutes of the United States forbidding the taking of real estate security by a national bank, for a debt coincidentally contracted, do not operate to make the security void, and thus enable the individual who has contracted with the bank to defeat recovery, but simply subjects the bank to be called to account by the government for exceeding its powers." Substantially the question now under consideration was passed upon in *Brown v. Schleier*, 118 Fed. 981, 55 C. C. A. 475. Judge Thayer there

said (page 983): "It is urged, in substance, that the lease was ultra vires the bank, because it undertook, in violation of section 5137 of the Revised Statutes, to erect a building on the demised premises, which it did not contemplate using 'for its immediate accommodation in the transaction of its business,' but did intend to rent in part to third parties."

After pointing out that a national bank has the right to lease as well as purchase property with a view to securing an eligible location, the opinion goes on: "Nor do we perceive any reason why a national bank, when it purchases or leases property for the erection of a banking-house, should be compelled to use it exclusively for banking purposes. If the land which it purchases or leases for the accommodation of its business is very valuable, it should be accorded the same rights that belong to other land owners, of improving it in the way that will yield the ¹¹⁰ largest income, lessening its own rent and rendering that part of its funds which are invested in realty most productive. There is nothing, we think, in the national bank act, when rightly construed, which precludes national banks, so long as they act in good faith, from pursuing the policy above outlined."

The reasoning in this case commends itself to our judgment. But in any event it is certainly safer to leave the matter of any alleged violation of the national banking act, in dealing with real estate, to be determined by the government. "Power is usually expressly given (to banks) to own realty sufficient for a place of business. . . . The effect of exceeding its powers and buying or taking land beyond its authority is usually in this country no more than the risk of forfeiture of franchises at suit of the sovereign. The title is good": Morse on Banks and Banking, 4th ed., sec. 55.

It appears clearly from the decisions of the supreme court of the United States in such cases as *Union Nat. Bank v. Matthews*, 98 U. S. 621, 25 L. ed. 188, and *National Bank of Genesee v. Whitney*, 103 U. S. 99, 26 L. ed. 443, that violation of the prohibitory clauses of the banking act makes the association liable only to such penalties as may be imposed in proceedings instituted against the bank by the government.

The assignments of error are dismissed, and the judgment of the superior court is affirmed.

The Estoppel of a Tenant to deny his landlord's title is the subject of a monographic note to Davis v. Williams, 89 Am. St. Rep. 62-115.

HECKMAN v. HECKMAN.

[215 Pa. 203, 64 Atl. 425.]

MARRIED WOMAN—Suit Against Husband.—A statute declaring that a married woman shall own and enjoy her separate property secures to her the title and right of possession thereto, which a court of equity will recognize and protect. Hence a married woman may maintain a bill in equity against her husband for the protection of her separate estate against his fraud or wrongdoing. (pp. 954, 955.)

MARRIED WOMEN—Suit Against Husband.—A statute simply prohibiting a married woman from suing her husband is applicable only to actions at law, and does not deprive her of any right which she theretofore possessed of invoking the aid of a court of equity against her husband. (p. 956.)

HUSBAND AND WIFE—Conveyances Between—Setting Aside.—If a wife conveys her real estate to her husband under a deed obtained by him of her under threats on his part of a permanent separation, and by such persistent importunities that the peace of the wife is destroyed, a court of equity will set such conveyance aside, at the suit of the wife. (p. 957.)

WITNESSES—Husband and Wife.—Neither plaintiff nor defendant is competent to testify in a suit in equity by a wife against her husband to cancel a deed made to him by her through his fraud, and to compel a reconveyance of her separate estate. (p. 957.)

R. C. Stewart, for the appellant.

C. F. Smith, for the appellee.

²⁰⁴ MESTREZAT, J. We have no doubt as to the jurisdiction of the court below to entertain the bill and to give the plaintiff such relief as the facts may warrant. The plaintiff is the wife of the defendant and avers in her bill that by fraud, undue influence and coercion, and without any consideration, the defendant procured ²⁰⁵ the execution and delivery to him of a deed conveying the undivided one-half of certain real estate, her separate property, to a third party, who, without consideration, reconveyed it to the defendant. She prays a reconveyance of the property. An answer was filed admitting the real estate to have been the separate property of the plaintiff, but denying the truth of the averments of fraud, undue influence, coercion and want of consideration.

It is unquestionably true that at common law a wife could not maintain an action against her husband to enforce a property right. The legal entity of the marriage relation prevented such an action. Such is still the law of this state except

where a statute has provided otherwise. But since, if not prior to, the passage of the married woman's act of April 11, 1848 (Pub. Laws 536, 2 Purd. 1298), equity has permitted a married woman in Pennsylvania to protect her separate estate and enforce her property rights in a suit against her husband. That act declares that every species and description of property owned by a single woman shall continue to be her property as fully after her marriage as before, and that such property as shall accrue during coverture shall be owned, used and enjoyed by her as her own separate property. That act contains no provision which enables a wife to protect or enforce her rights to her property against the claim or acts of her husband. Nor has subsequent legislation provided her with a remedy at law against her husband while living with his wife for an invasion of her property rights. But as said by Paxson, C. J., in *McKendry v. McKendry*, 131 Pa. 24, 18 Atl. 1078, 6 L. R. A. 506: "The act (of 1848) having given the right, there must be a remedy to enforce it; otherwise it would fail of its purpose, in part, at least." The entity of the marriage relation which denies the wife a remedy at law cannot be revoked to oust the jurisdiction of equity when appealed to by her for the protection of her separate estate against the fraud or other wrong of her husband. The purpose of equity is to correct that wherein the law is inadequate or deficient, and as the law gives an injured wife no relief against her husband for an invasion of her rights of property or for an infringement of contracts relative thereto, equity will come to her aid and give such redress as the circumstances and facts of the case may require. Especially is ²⁰⁶ this true in Pennsylvania where our statute of June 16, 1836 (Pub. Laws 789), confers upon the court of common pleas the jurisdiction and powers of a court of chancery so far as relates to "the prevention or restraint of the commission or continuance of acts contrary to law, and prejudicial to the rights of individuals." Indeed, the right of the wife to invoke the aid of a court of equity in such cases necessarily follows in every jurisdiction where the wife has the right to own and enjoy her separate property. Legislation like the act of 1848, which secures a wife's separate property as against her husband and his creditors, would avail her but little if there was no remedy for an infringement of her rights to the property. If he, by fraud or other unconscionable

acts, can with impunity deprive her of the title or possession, the act of 1848, which was enacted as a shield and protection for her, and which declares that she shall own, use and enjoy her separate property, is vain legislation, and the disabilities imposed upon her by the common law will, to a great extent, still remain. When, therefore, the act of 1848 declared that a married woman shall own and enjoy her separate property, it secured to her the title and right to the possession of the property which a court of equity will recognize and protect.

The right of a wife to invoke the aid of a chancellor for the protection of her separate property against her husband is sustained by abundant authority in this and other jurisdictions. Before the passage of the act of 1848 it was said by Rogers, J., in *Hutton v. Duey*, 3 Pa. 100, "that a wife can acquire a separate property which a court of equity will protect is ruled in many cases, and is recognized in *McKenna v. Phillips*, 6 Whart. 571, 37 Am. Dec. 438." The same principle is recognized in *Bergey's Appeal*, 60 Pa. 408, 100 Am. Dec. 578. In *McKendry v. McKendry*, 131 Pa. 24, 18 Atl. 1078, 6 L. R. A. 506, it is said by this court (page 35): "We think a bill in equity would lie against the husband at the suit of the wife to protect her in the enjoyment of her separate estate, independently of the act of 1856. As before observed, it is an act contrary to law, and prejudicial to the interests of the wife, for a husband to deprive her of the possession and enjoyment of her separate estate, and, as there is no remedy at law provided for such case, we have no doubt that the jurisdiction of equity would attach under the act of 1836, conferring equity powers upon the courts." In *Fry v. Fry*, 7 Paige, 461, a conveyance from the ²⁰⁷ wife to the husband after marriage was set aside in equity on the ground that it was improperly obtained by him by taking advantage of her ignorance of her rights and her confidence in him. And in *Lombard v. Morse*, 155 Mass. 136, 29 N. E. 205, 14 L. R. A. 273, it was held that a husband could maintain a bill in equity against his wife to recover property which she had obtained from him by fraud shortly before and in contemplation of marriage. In the recent case of *Frankel v. Frankel*, 173 Mass. 214, 73 Am. St. Rep. 266, 53 N. E. 398, it was held that a suit in equity can be maintained by a wife against her husband to recover her separate property obtained from her by his fraud and coercion, but an action at law cannot be

maintained. In that case the property which the wife sought to recover was her separate property, and was obtained from her, as the court found, by the fraud and coercion of her husband. In *Stone v. Wood*, 85 Ill. 603, the husband alleged fraud by his wife in procuring a conveyance of his real estate. Mr. Justice Walker, delivering the opinion, says (page 609): "There can be no doubt that a man may have relief from such frauds as this, in equity, against his wife. So may the wife against the husband. There is nothing in the marriage relation that can prohibit it. If it were not so, there would be a wrong without a remedy. That courts are seldom called on in such cases, does not militate the rule. It is a fraud that is not sanctified by that relation. When either party becomes untrue to his or her vows and marital duties, and by fraud obtains an unjust advantage of the other, equity will as readily afford relief as it will between other persons not occupying that relation." Equity jurisdiction in such cases is also recognized in the text-books: 1 *Daniell's Chancery Pleading and Practice*, *109; *Story's Equity Jurisprudence*, 13th ed., 699; 2 *Cord on Legal and Equitable Rights of Married Women*, sec. 979c; *Brightly's Equity Jurisprudence in Pennsylvania*, sec. 521.

The third section of the act of June 8, 1893 (*Pub. Laws* 344, 2 *Purd.* 1303), when read in the light of the legislation enacted in this state during the last half century, cannot be construed as depriving a married woman of the right to invoke the assistance of a court of equity to secure to her the possession and enjoyment of her separate property against the fraud of her husband. The tendency of that legislation has been to invest her with the absolute control of her separate property, untrammelled with ²⁰⁸ any clogs or fetters imposed under the common law by the marriage relation, so that at present her disability to enjoy and protect it is the exception, and not the rule, of law in this state. It is therefore apparent that the prohibition in this section of the act of 1893 against the right to sue her husband should be interpreted as applicable only to an action at law. It was not intended by that legislation to deprive her of the right she hitherto possessed of invoking the assistance of a chancellor to furnish her a remedy which the law had always denied. The act of 1893 is an enabling and remedial statute, and, in line with the spirit of previous legislation on the subject, enlarged her

powers of enjoyment and control of her separate property, and deprived her of no remedy for its protection, which our equity jurisdiction confers.

We have carefully read the evidence and, assuming the burden to be on the plaintiff, it fully warrants the findings of fact by the learned trial judge. There is not a shadow of doubt, under the testimony, that the plaintiff was induced to convey the half of her real estate to her husband by his persistent and continuous importunities and threats of a permanent separation by himself from his wife. Avarice and greed, but not affection, are manifestly the predominant attributes of his nature. He converted his power to annoy and coerce his wife into his most valuable property asset by exchanging it for one-half of her real estate. He persisted in his importunities for a deed to the property until the peace of his wife was almost destroyed, and, to regain it, she executed the conveyance. That was the only consideration for the conveyance of the property. From evidence, amply sufficient, the court below found "that the execution of the deeds in controversy was in strict line with the persistent importunities of the defendant, culminating in his separating himself from his wife for almost a year against her earnest entreaties for his return, and that when he did return it was only on condition that she would do the act complained of in the present bill. I further find that the plaintiff received no consideration for her deed, the only consideration set up being her husband's return, but 'the law cannot recognize such a consideration.' "

Since 1896 the plaintiff and defendant had been, and at the time of the trial were, living together as husband and wife, and, ²⁰⁹therefore neither party was competent to testify against the other. At common law both were incompetent witnesses. The act of May 23, 1887 (Pub. Laws 158, 1 Purd. 817), permits each party to prove the fact of marriage in divorce proceedings, and to testify generally in such proceedings where there has been a service of the subpoena. The fourth section of the act of June 8, 1893 (Pub. Laws 344, 2 Purd. 1304), makes both parties competent witnesses to testify in a proceeding authorized by the third section of the act to protect or recover her separate property when her husband has deserted her. It is obvious that neither of the acts of assembly makes the plaintiff or defendant a competent wit-

ness to testify in a suit of equity by a wife against her husband to cancel a deed and compel a reconveyance of her separate property.

The numerous authorities cited in the appellee's brief show that, under the facts of this case, the delay of the plaintiff in bringing this suit will not avail the defendant.

The decree of the court below is affirmed.

Suits Between Husband and Wife, when maintainable: See note to Frankel v. Frankel, 73 Am. St. Rep. 268-271.

DELAHUNT v. UNITED TELEPHONE AND TELEGRAPH COMPANY.

[215 Pa. 241, 64 Atl. 515.]

TELEPHONE COMPANIES—Negligence.—If a person is killed by an electric current from a telephone on his premises, this fact of itself is evidence of negligence on the part of the telephone company. (p. 960.)

TELEPHONE COMPANIES—Duty to Patrons—Negligence.—A telephone company owes a duty to its patrons to exercise at all times the highest degree of care and vigilance to protect them from a dangerous electric current over its wires from any source. (p. 960.)

TELEPHONE COMPANIES—Negligence—Burden of Proof.—When it is shown that telephone wires have become conductors of dangerous currents of electricity inflicting bodily injury to a patron of the telephone company, there is reasonable evidence that there has been a neglect of duty and the burden is cast upon the telephone company of showing that it has not been negligent. (p. 961.)

NEGLIGENCE Causing Death—Damages—Instructions.—In an action by children to recover for the death of their father caused by the negligence of a telephone company, if the court instructs the jury that if they can recover, the amount of the verdict must be limited to compensation to them for loss of what they could have expected from him for their support and education during their minority, a remark of the court that one of the plaintiffs, being a deaf mute, the father might have been liable to contribute more to such child's support than he ordinarily would, is not ground for reversal. (p. 962.)

WITNESSES—Admission of Testimony of, Given at Former Trial.—If there is evidence of an effort to subpoena a witness who does not appear, it is within the discretion of the trial court whether his testimony given at a former trial shall be admitted or not. (p. 962.)

A. B. Geary and I. H. Hinkson, for the appellant.

O. B. Dickinson and J. E. McDonough, for the appellees

²⁴⁵ BROWN, J. The father of the appellees was a patron of the appellant. During the month of February, 1902, there was a severe storm, and the connection of his telephone with the exchange was broken. This disconnection continued for some weeks, and, ²⁴⁶ according to the theory of the appellant, which seems to be accepted as correct, the telephone was not connected with the exchange at the time the decedent was shocked to death in taking hold of the transmitter. The allegation of the appellees, as set forth in their statement, is that the appellant, "by its careless and negligent management of its wire system, permitted one of its wires, which was not properly insulated, to come in contact with the wires of another company, heavily charged with electricity, whereby the said electric current was conveyed to the said telephone of said Thomas F. Delahunt when he was making proper and lawful use thereof, whereby, by reason of the premises and the negligence of the said defendant company he received a heavy shock of electricity and was thereby then and there killed."

During the disconnection of decedent's telephone with the exchange he received a letter from the manager of the company, which was properly admitted in evidence by the court, and of which the following is a copy:

"United Telephone & Telegraph Company.

"Chester, March 18, 1902.

"Mr. Thomas F. Delahunt, 21st and Edgmont Avenue, Chester, Pa.

"Dear Sir: I regret to hear you have been among the unfortunate subscribers living along Edgmont avenue, and assure you we are making every possible effort to get you back into service, and hope to do so by the last of this week or the first of next. I will gladly make your 'phone one of special importance and get you connected at the earliest possible moment. We are going to renew your service up Walnut street, thus explaining the seeming neglect of that part of the city.

Yours very truly,

"W. P. HULL,

"Manager."

On the evening of April 9, 1902, a sound resembling the noise made by a cricket came from the direction of the telephone, and the deceased said, "I believe that is the 'phone. I wonder if it is in use." He then got up, walked over to it

and took hold ²⁴⁷ of the transmitter with both hands, drawing it down. As he did so there was a flash of flame all around the telephone, and he was almost instantly killed by an electric shock. After the appellees had shown this, they were about to prove the specific negligence charged against the appellant, when the learned trial judge, evidently of opinion that the case came within the rule *res ipsa loquitur*, told them that it was not necessary to do so, and that the testimony which they proposed to offer might be admissible in rebuttal, if the defendant should show it had exercised proper care. It offered no testimony, and on this appeal from the judgment on the verdict against it the important and main question is the correctness of the ruling of the trial judge that the plaintiffs were not required, in the first instance, to prove more than that their father was killed by an electric shock in using the instrument which, with its connections, the appellant had furnished to him as one of its subscribers. This ruling was made on the authority of *Alexander v. Nanticoke Light Co.*, 209 Pa. 571, 58 Atl. 1068, 67 L. R. A. 475.

Electricity is the agent by which telephones become the means of communication from one point to another, and it may be conceded, as the appellant contends, that the current needed for their use is not a dangerous one. In this case it may be still further conceded that the current with which the deceased came in contact did not come from the exchange of the appellant; but at the same time it cannot be questioned that it came over one of its wires leading to the telephone of one of its patrons. Though this wire was intended to conduct only a harmless current, the appellant was bound to know that it could become the conductor of a deadly one, and that such a current would pass over it if it was not properly insulated and should come in contact with a wire heavily and dangerously charged. It was, therefore, as much the duty of the company to see that no such current should thus pass over its wires as it was to send only a harmless one from its own exchange. Its duty to its patrons was to exercise at all times the highest degree of care and vigilance to protect them from a dangerous electric current over its wires from any source. This is the implied undertaking of every telephone company, and in towns and cities threaded with dangerous electric wires the duty of the company is, by constant supervision ²⁴⁸ of its wires, to prevent their becoming

conductors of a dangerous current from others. When they do become conductors of it, there is reasonable evidence that there has been a neglect of duty, and the burden is cast upon the telephone company of showing that it had not been negligent. As it is not an insurer of its patrons against the danger of electric currents on its wires, the law will not hold it responsible for what it cannot help and for what may happen in spite of its exercise of the care and vigilance required of it; but when, as here, there is an accident, which in itself affords reasonable evidence of negligence, it must show why it should be relieved from liability. The rule upon this subject, as laid down in *Scott v. London etc. Docks Co.*, 3 Hurl. & C. 596, is: "Where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanations by the defendants, that the accident arose from want of care." This rule, reannounced in *Oil Co. v. Pennsylvania Torpedo Co.*, 190 Pa. 350, 42 Atl. 707, is not stretched in applying it to the present case.

By a number of assignments of error we are asked to say that the court erred in not directing a verdict for the defendant on the ground of the contributory negligence of the deceased. Counsel for appellant very properly state that the current of electricity necessary to operate a telephone will injure no one. The deceased knew this, and, of course, felt that his telephone was as harmless as it was useful, and there was no reason why he should have hesitated to take hold of the transmitter. He had been notified by the manager of the company that the connection of his telephone with the exchange would be established "at the earliest possible moment," and when he heard the noise coming from it he evidently thought it had been connected, for he said, "I believe that is the 'phone." In then getting up, walking over to it and taking hold of the transmitter, he did just about what anybody else would have done under the circumstances; but because he happened to stand on a wet carpet and the transmitter was made of metal, it seems to be seriously contended that he was ²⁴⁹ guilty of negligence, and that the court ought to have so instructed the jury. If the current of electricity needed for telephones were dangerous, consideration

might possibly be given to this proposition; but it cannot be so dignified under the facts in the present case. In submitting the question of the contributory negligence of the deceased to the jury, the appellant was given a chance to escape, of which the appellees might fairly have complained, if the finding had been against them. The assignments of the appellant relating to this feature of the case are all overruled.

One of the appellees, a daughter of the deceased, is a deaf mute, who was about seven years of age at the time of her father's death. In allowing her condition to be made known to the jury, the learned trial judge stated that, in view of it, the father might have been liable to contribute more to her support "than he ordinarily would." This remark was true as a matter of fact, and as a legal proposition did no harm to the appellant, for the jury were distinctly instructed in language that they could not have misunderstood that if the appellees were entitled to recover, the amount of the verdict would have to be limited to compensation to them for loss of what they could have expected from their father for their support and education while in their minority, during which period he would have been entitled to their earnings.

When the testimony of James Mullen, taken at a former trial of the case, was offered, objection was made that it had not been proven that proper effort had been made to secure the attendance of the absent witness. This was a matter for the court below, with the proof before it of the effort that had been made to subpoena the witness, and no error was committed in admitting the testimony. Of the assignments relating to the charge of the court and the refusal to affirm defendant's points, nothing need be said, except that they are all overruled.

If the verdict was excessive, it was for the court below to correct it. It is not so manifestly unjust as to call for our interference with it.

Judgment affirmed.

The Duty and Liability of Electric Companies to their patrons are considered in the note to *Hebert v. Lake Charles Ice etc. Co.*, 100 Am. St. Rep. 518. Generally speaking, those utilizing the agencies of electricity are held to a very high degree of care, a degree commensurate with the dangers involved: See *Fisher v. New Bern*, 140 N. C. 506, 111 Am. St. Rep. 857, and cases cited in the cross-reference note thereto.

BURNS v. ROSS.

[215 Pa. 293, 64 Atl. 526.]

JUDGMENTS—Record of—Indexing Christian Names.—When it is commonly known that certain first or Christian names are interchangeably used, and the initial and dominant letters of each are identical, indicating to the eye that they are the same, and giving the same sound and substance to each, a prospective purchaser of property, examining the judgment index for the existence of liens must look for each name. (p. 965.)

REGISTRATION OF LIENS—Similarity of Names—Index—Duty of Purchaser.—A prospective purchaser from the heirs of "Francis Ross" is bound to look in the record of liens for liens recorded and indexed in the lifetime of the decedent against "Frank Ross." (p. 966.)

J. W. Laws, for the appellant.

J. Alcorn, for the appellee.

²⁹⁴ BROWN, J. On February 1, 1887, the firm of Thomas Carrick & Company, of which the appellee is the surviving member, entered a judgment against Frank Ross. The note on which it was entered had been given by Francis Ross, who signed his name to it "Frank Ross." At the time the judgment was entered Ross was the owner of the property purchased by the appellant from his heirs on March 14, 1904. He had acquired title to it on February 21, 1868, from Thomas Hodgson, by a deed in which as the grantee he was named "Francis Ross." He died September 23, 1899, on which date the judgment held by the appellee was revived. When the appellant took title from the heirs of Francis Ross, among whom was a son, Frank Ross, he had a search made for liens against the property. This search was for the liens of judgment against the heirs entered after they had acquired title under the intestate laws and for those which had attached in the lifetime of Francis Ross. From September 23, 1899, to March 14, 1904, search was made for judgments and mortgages given by Frank Ross, one of the sons, and for the five years prior to the death of the father the search was only for mortgages and judgments indexed against Francis Ross, no attention having been paid to the name "Frank Ross." Upon the report of the searcher that there was but one judgment indexed against Francis Ross, the decedent, which was not a lien against the property, and that

there were no liens against Frank Ross, the son, the appellant took the title. In June, 1904, the firm of the appellee issued a scire facias to revive the judgment against Frank Ross, with notice to the appellant as terre-tenant. He resisted the attempt to revive it against him as the owner of the property, but a verdict was directed against him, upon which judgment ²⁹⁵ was subsequently entered. On this appeal we are asked to say that, as the judgment of Thomas Carrick & Company was indexed against Frank Ross, the appellant had no notice of it as a lien upon the property belonging to Francis Ross when he purchased it from the heirs.

It is undoubtedly true that the first or Christian name of a defendant in a judgment must appear in the judgment index for the protection of an innocent purchaser, who is not bound to look beyond it for judgment liens against his vendor; but this rule must have a reasonable construction. In *Crouse v. Murphy*, 140 Pa. 335, the case upon which the appellant seems to place his chief reliance, we held that, under the particular circumstances surrounding that case, a judgment given by Daniel J. Murphy, but signed by him "Daniel Murphy" and so indexed, was not a lien upon property owned and sold by him as "Daniel J. Murphy," as against a purchaser who looked for liens only against "Daniel J. Murphy." The member of the court who wrote the opinion stated that he had looked into the city directory and found the name of Daniel Murphy, with various middle letters and without any, occurring twenty times, and that to exhaust the possibilities as to D. Murphy would have required searches running into the hundreds. The purchaser was protected because he found no liens indexed "against Daniel J. Murphy, or D. J. Murphy." By this it was clearly intimated that if a judgment had been indexed "D. J. Murphy," it would have been notice to the purchaser that it might be a lien against property owned by Daniel J. Murphy.

What was reasonably required of this appellant? In answering this we disregard the contention of the appellee that he ought to have been put on notice by the indexing of other judgments and mortgages in the name of Frank Ross given by Francis Ross, who was, according to the testimony produced by the appellee, commonly known to others than the appellant as Frank Ross. We pass only upon the simple question whether a purchaser from the heirs of Francis Ross

was bound to look for liens indexed in his lifetime against Frank Ross.

In Jones' Estate, 27 Pa. 336, the court below was reversed for holding that a judgment docketed against "A. Jones" did not give the holders of it priority of lien over those holding ~~296~~ judgments subsequently docketed against "Abel Jones," as whose property the real estate was sold by the sheriff, and in awarding the fund to those lien creditors whose judgments had been docketed against "A. Jones," it was said by Woodward, J.: "A description of persons by the name by which they are commonly known is sufficient in pleading, either criminal or civil, and as much, I presume, as the act of assembly, prescribing judgment dockets, meant to require. The use of names is to describe the individual of whom we speak, so as to distinguish him from all other persons. They are like definitions in mathematics, though less exact. Where two names, said Judge Washington, in *Gordon v. Holiday*, 1 Wash. C. C. 289, have the same original derivation, or where one is an abbreviation or corruption of the other, but both are taken promiscuously and according to common use to be the same, though differing in sound, the use of one for the other is not a material misnomer. If in common use the names be the same, the person cannot be misnamed if either be used. In *Fenton v. Perkins*, 3 Mo. 23, it was held that courts take judicial notice of the abbreviation of a man's Christian name, though a doubt was made about an abbreviation of the family name." Under the authority of this case a judgment indexed "F. Ross" might have been notice to a purchaser looking for liens against "Francis Ross."

The indexing of the name of the defendant in a judgment as he is commonly known is not, as a general rule, sufficient to meet the requirements of the act of April 22, 1856 (Pub. Laws, 532), relating to the indexing of judgments; but its requirements are met when the first or Christian name of a defendant is so indexed that a prospective purchaser examining the index ought to know from it of the existence of a lien against the property which he is about to purchase. When it is commonly known that certain first or Christian names are interchangeably used, and the initial and dominant letters of each are identical, indicating to the eye that they are the same and giving the same sound and substance to each, the judgment index must be searched for each. In the

absence of a statutory requirement that the Christian name of a defendant in a judgment must be indexed exactly as it is written in the deed under which he holds title, any other rule would offend reason. When the appellant, as a prospective purchaser of the Ross property, was looking for liens against ²⁹⁷ Francis Ross, why should he not have looked for those indexed against Frank? The two names are the same, and are used, as is universally known, as being the same: Standard Dictionary in English, p. 2138; Webster's International Dictionary, p. 1902. When looking for liens against "Jacob" a searcher must know that the world knows no difference between "Jacob" and "Jake," and that a judgment indexed against "Jake" may be a lien on the property of "Jacob." As a rule "Mike" is used for the more dignified "Michael," and the bearer of the latter name as the grantee of a title to him is generally known, not only to himself, but to the community in which he lives, as plain "Mike"; and so a stronger illustration is the name "Frank" given to "Francis." It is a matter of common knowledge that seldom is one bearing the Christian name of "Francis" known by any other name than "Frank." These illustrations need be pursued no further. When the appellant was looking for the title to be free from encumbrances cast upon it by Francis Ross, it was his duty to see that the owner had not encumbered it in the name of "Frank Ross."

The assignments of error are overruled, and the judgment is affirmed.

For Authorities bearing upon the decision in the principal case, see the notes to Thornily v. Prentice, 100 Am. St. Rep. 322; Koch v. West, 96 Am. St. Rep. 397.

MULDERIG v. WILKES-BARRE TIMES.

[215 Pa. 470, 64 Atl. 636.]

LIBEL OF PUBLIC OFFICER—Privileged Communication—
Burden of Proof.—Criticism of a public officer as to his official conduct is privileged, but if there is that in the publication which furnishes a basis for reasonable inference that malice was back of it, the burden of proof remains with the person making the charge to establish either its truth or probable ground for believing it true. (p. 969.)

LIBEL OF PUBLIC OFFICER—Privileged Communication—
Malice.—A publication charging an officer with misconduct in his office as a civil magistrate, so gross and flagrant as to demand, in an opinion expressed editorially, his impeachment, and a full investigation into his past record, which it was declared might possibly develop other charges for securing his ignominious discharge, and also charging him with being a party to a conspiracy to humiliate a person charged with a misdemeanor by sending him to jail over night, contains expressions which exceed the limits of privilege, and are evidence of malice, and the case must go to the jury. Hence, it is error in such case to direct a nonsuit. (p. 970.)

The publication complained of follows:

“A weekly contemporary has suggested the dropping of the Dillionis case, a much to be desired result, but the prosecutors of that much abused man will not let the matter drop. And as the principle of free speech, so dear to all Americans is involved, the matter must be fought out with these ignorant foreigners until they are taught that they are not now in barbarous Russia. The last and worst feature of the Dillionis episode was the prosecution, on Friday night, before a Justice named Mulderig, of the Rev. J. J. Fletcher, the pastor of the First Presbyterian Church, of Pittston, an eminent Christian minister, on trumped up charges under the disorderly conduct Act of 1895.

“The head and front of the Rev. Mr. Fletcher’s offending is that he has stood up in defense of Dillionis and in behalf of that constitutional right of every American, free speech. It appears that on the night of February 3d, the reverend gentleman went to Booth’s Hall, Pittston, and on his arrival he found a fight on, the crowd having Dillionis in a side room. Mr. Fletcher endeavored to assist him, and remonstrated with the assailants. These very assailants are now the prosecutors of Mr. Fletcher and it was hoped by the assistance of one Mulderig, Justice of the Peace, at Inkerman, that they would humiliate him and compel him to spend a

night in jail. The evidence of the prosecutors to the effect that he was flourishing a revolver was entirely disproved, but the sycophantic Justice immediately gave judgment.

"He said that under the testimony given and in view of the fact that Mr. Fletcher admitted going to the place in question, and as disorderly conduct was committed (?) he would find the defendant guilty and would fine him \$10 and costs or thirty days in jail.

"So determined was he to send Mr. Fletcher to the county prison after the latter had refused to pay the fine, that he hesitated about obeying Judge Halsey's order to allow the defendant to give bail in \$30 and appeal.

"This man Mulderig ought to be impeached and a full investigation into his past record might possibly develop other charges for securing his ignominious discharge from a magisterial office.

"Never in coercion days in Ireland was there a more wicked conspiracy to deprive men of their right to their spoken opinions and to railroad them to prison for daring to stand up in defense of those rights.

"This man Mulderig has certainly mistaken his vocation and has not yet realized that he is living in the land of the free and the home of the brave.

"The vicious disorderly conduct Act of 1895 is largely responsible for opening the way for wicked and unfounded charges, and many an innocent man and woman has been 'pulled,' under a certain construction of its clauses, and mulcted in heavy fines and costs and in default sent up to jail. These charges are invariably heard at night so that very little opportunity is given to the defendants to obtain bail, hence it has been 'pay up promptly or go to jail.'

"Ample illustrations can be given of the dangerous character of this Act, and we hope no effort will be spared to secure its repeal this session. There is not a decent member of Luzerne bar that will speak a word in its favor and there is no better body of legal gentlemen in the State of Pennsylvania. Pittston and West Pittston has never had an opportunity of fairly testing this blot upon our statute books and realizing its vicious character. A special petition should therefore be sent by the citizens to the legislature without delay and we have no doubt it will be extensively signed."

"The court entered a compulsory nonsuit which it subsequently refused to take off."

J. M. Garman and J. C. Murray, for the appellant.

T. F. Farrell, for the appellee.

⁴⁷³ STEWART, J. That the publication complained of by the appellant tended to expose him to contempt, ridicule, hatred and derogation of character must be admitted. If it was malicious, it was libelous. It must be adjudged malicious, except it be shown to be true or justifiably made. Its truth was not asserted, and dare not be assumed. Though untrue, it might yet have been justifiably made. If a privileged communication, it was justifiable, and the publisher of it may not be held legally answerable. It was a privileged communication if made upon proper occasion, through proper motives, upon reasonable cause, and made in the proper manner. Since the immunity of a privileged communication is an exception to the general rule that nothing short of proof of the truth is a defense to a libel, he who relies on the exception must prove all the facts necessary and bring himself within it: *Conroy v. Pittsburg Times*, 139 Pa. 334, 23 Am. St. Rep. 188, 21 Atl. 154, 11 L. R. A. 725. A party defendant is relieved of this burden when the publication intrinsically supplies the required facts. But such is not the case here. Admittedly this was a privileged communication so far as regards the occasion of its publication. It was a criticism of the official conduct of a public officer, always a proper subject for public discussion and information. As was said in *Neeb v. Hope*, 111 Pa. 145, 2 Atl. 568, and repeated in many other cases, the conduct of public officers is open to public criticism, and it is for the interest of society that their acts be freely published with fitting comments ⁴⁷⁴ or strictures. But privileged occasion, without more, can justify only in exceptional cases, as where the publication itself or the circumstances connected therewith, negative the presumption of malice. If there is that in the publication which furnishes a basis for reasonable inference that malice was back of it, the burden remains with the party charged to establish either its truth or the probable ground for believing it true. When such is not the case there must be some evidence beyond the mere fact of publication; but there is no requirement as to what the form of evidence shall be. It may be intrinsic, from the style and tone of the article: *Conroy v. Pittsburg Times*, 139 Pa. 334, 23 Am. St. Rep. 188, 21 Atl. 154, 11 L. R. A. 725. "If the communication contains ex-

pressions which exceed the limits of privilege, such expressions are evidence of malice and the case shall be given to the jury": *Neeb v. Hope*, 111 Pa. 145, 2 Atl. 568.

The publication here complained of charged the appellant with misconduct in his office as a civil magistrate, so gross and flagrant as to demand, in the opinion expressed editorially, his impeachment, and a full investigation into his past record, which it was declared might possibly develop other charges for securing his ignominious discharge. It characterized him as a "sycophantic justice," and in unmistakable language accused him of being party to a conspiracy to humiliate, by sending to jail overnight, a person charged before him with misdemeanor. "Never in coercion days in Ireland," the publication proceeds, "was there a more wicked conspiracy to deprive men of their right to their spoken opinions, and to railroad them to prison for daring to stand up in defense of those rights. This man Mulderig has certainly mistaken his vocation, and has not yet realized that he is living in the land of the free." We are of one mind that the extreme severity of the criticism indulged in here, the epithets and language employed in connection with the charge preferred, the reference to appellant's past record, all tend to overcome the *prima facie* presumption of protection under the privilege, and were sufficient in themselves to put upon the defendant the burden of justifying. The case was for the jury, and it was error to direct a nonsuit.

Judgment reversed and a *procedendo* awarded.

For Authorities upon the question involved in the principal case, see the note to Holmes v. Clisby, 100 Am. St. Rep. 133, on privileged communications.

MESSINGER v. PENNSYLVANIA RAILROAD CO.

[215 Pa. 497, 64 Atl. 682.]

RAILROADS — Accident at Crossing — Negligence — Safety Gates.—If, in an action against a railroad company to recover for injuries received by being struck by a train at a crossing, the evidence shows that plaintiff stopped to look and listen at a point eighty feet from the crossing, where people usually stopped to look and listen, and that at such crossing the safety gates were raised at the time of the accident, the question of plaintiff's contributory negligence is for the jury to determine. (p. 972.)

RAILROADS—Safety Gates—Negligence.—Safety gates at railroad crossings, which should be closed in case of danger, if standing open, are an invitation to a traveler on the highway to cross, and while this fact does not relieve him from the duty of exercising care, it is a fact for the consideration of the jury in determining whether he exercised care according to the circumstances. (pp. 972, 973.)

J. R. Thomson, for the appellant.

J. W. Sproul and C. G. Olmstead, for the appellee.

⁴⁹⁸ **ELKIN, J.** We agree with the statement of the rule of law set out in the argument of the learned counsel for appellant wherein it is said to be the absolute, imperative and unbending duty of a person about to cross the tracks of a railroad at grade, to stop, look and listen. It must be conceded, also, that it is not a compliance with this rule to stop at a point where the traveler cannot see, and it is his duty to continue to use care in approaching and even crossing the tracks, and in some instances a performance of his duty may require the driver to get out of his wagon and go ahead of his horses to look and listen. We are not convinced, however, that under the facts of the case at bar there was such neglect of duty in these respects as would justify a court in holding as a question of law that plaintiff was guilty of contributory negligence. The most favorable view that can be taken of this contention is that whether the plaintiff stopped at a proper place and exercised due care in approaching and crossing the tracks after he had stopped, looked and listened, was a question of fact to be determined by the jury.

On the question of whether the plaintiff observed the rule the learned trial judge in his charge to the jury said: "There was evidence that the plaintiff did stop, look and listen at a certain point. There is considerable evidence that this is the ⁴⁹⁹ point at which the people about to cross these tracks usually stop, look and listen, so we could not, as a matter of law, say there was negligence because of the stopping at that particular point." As to whether this was a proper place to stop, and whether Messinger and the driver could see in the direction of the approaching train, the court further instructed the jury as follows: "At the place where they stopped, looked and listened, they could see the tower-house a distance of some eighty feet from the crossing. There was evidence to the effect that one could see no farther until after having crossed several of the tracks, while there was some

evidence that the track could be seen some little distance when one was at the gate, but a person could not get that view while in his rig until his horses were already on one of the tracks, and then, according to the testimony of defendant's engineer, only a point on defendant's road could have been seen."

Under these circumstances, it was clearly a question for the jury to say whether Messinger stopped at the proper place, whether he could see at that place, and whether there was a better place at which he should have stopped in order to comply with the rule. It is earnestly contended, however, that under the facts of this case, it was the duty of the driver or plaintiff to get out of the wagon and go ahead to look and listen for approaching trains. *Kinter v. Pennsylvania R. R. Co.*, 204 Pa. 497, 93 Am. St. Rep. 795, 54 Atl. 276, is relied on to support this position. The rule of that case is not applicable to the facts of the present case, as will appear from *Hanna v. Philadelphia R. Co.*, 213 Pa. 157, 62 Atl. 643, 4 L. R. A., N. S., 344, wherein it was said: "In that case it was held to be the duty of Kinter to stop, look and listen at a place where he could see the approaching train. The evidence showed that he did not stop at such a point, and it being conceded that he could not see where he did stop, it was for the court to say that he had not observed the rule requiring him to look." In the present case the weight of the testimony shows that Messinger did stop at the usual and customary place, that he had an unobstructed view of the tracks to the tower about eighty feet east of the crossing, and the testimony is conflicting as to whether there was any better place at which he could have stopped. The contention that there was a point near the safety gates from which he could see a point on the railroad about one hundred and sixty feet east ⁵⁰⁰ of the tower would not justify the court in holding, as a matter of law, that he should have stopped at that point, because before the driver could see from that point his horses would have passed the safety gates and be upon the first tracks, and then he could only see a particular point on the railroad. Then, again, the safety gates were raised, which was an invitation to cross over, and while it did not relieve appellee from the duty to observe care, it certainly raised a question for the jury to determine whether proper care had been exercised under the circumstances. In *Roberts v. Delaware etc. Canal Co.*, 177 Pa. 183,

35 Atl. 723, it was said: "Safety gates which should be closed in case of danger, if standing open, are an invitation to the traveler on the highway to cross, and while this fact does not relieve the traveler from the duty of exercising care, it is a fact for the consideration of the jury in determining whether he exercised care according to the circumstances." All of our cases recognize this rule.

The peculiar facts of this case are the best answer to the contention of the learned counsel for the appellant in so far as he asks the court to say as a question of law that there can be no recovery. The tracks of three railroad companies cross the avenue at the place where the accident occurred. The first was the track of the W. N. Y. & P. R. R. Co., which was located within nine feet of the south safety gate, from which direction Messinger approached. The next two tracks were those of the Erie railroad, the next two tracks of the Pennsylvania railroad, and then the two interchangeable switches used in common by all these roads. The accident occurred on the second track of the Pennsylvania railroad and the fifth on the crossing. In other words, having been invited by the raised safety gates to cross over, and there being testimony tending to show that appellee exercised proper care in approaching the crossing, and being on the fifth track before the collision occurred, and having testified that he continued to use care while on the crossing, it was clearly a case for the jury. In the recent case of *Beach v. Pennsylvania R. R. Co.*, 212 Pa. 567, 61 Atl. 1106, Mr. Justice Fell stated the rule applicable to the facts of the present case wherein he said: "Stopping is opposed to the idea of negligence, and unless notwithstanding the stop the whole evidence shows negligence so clear that no other inference can ⁵⁰¹ properly be drawn from it, the court cannot draw that inference as a conclusion of law, but must send the case to the jury."

After a careful examination of the testimony, the charge of the trial judge and the arguments in the case, we are convinced that this was a case for the jury, and that no error has been committed in submitting it for their determination.

Assignments of error overruled and judgment affirmed.

For Decisions upon the question involved in the principal case, see *Kock v. Southern Cal. Ry. Co.*, 148 Cal. 677, 113 Am. St. Rep. 332; *Northern Cent. Ry. Co. v. State*, 100 Md. 404, 108 Am. St. Rep. 439; *Pennsylvania Co. v. Stegmeier*, 118 Ind. 305, 10 Am. St. Rep. 136; *Mitchell v. Illinois Cent. R. R. Co.*, 110 La. 630, 98 Am. St. Rep. 472.

GORGAS v. PHILADELPHIA, HARRISBURG AND
PITTSBURG RAILROAD COMPANY.

[215 Pa. 501, 64 Atl. 680.]

EMINENT DOMAIN—Division of Land—Damages.—If the owner of an entire tract of land divides part of it into town lots, and a railroad company afterward condemns a right of way through the latter part, the whole tract being used for agricultural purposes, the owner is not entitled to assess his damages as for injury done to the latter tract alone, as being the only part of the tract affected by the condemnation proceedings. In estimating the damages the whole tract must be considered as one body of land. (pp. 974, 975.)

EMINENT DOMAIN—Railroad Right of Way—Measure of Damages.—The measure of damages for land taken under the right of eminent domain for a railroad right of way is the difference in the market value of the tract as a whole immediately before and immediately after the taking. In estimating the damages, the land owner is entitled to have considered the value of his property for any and every purpose or use to which it may be adapted, and to have the damages assessed upon a basis of the most valuable use to which the property may be adapted, and the railroad company is entitled to offset any benefits or advantages which may accrue to the part of the tract of land not taken or injured. (p. 975.)

EMINENT DOMAIN—Division of Land—Damages.—If the owner of an entire tract of land divides a part thereof into town lots, and a railroad company afterward condemns a right of way through the latter part, but while the whole tract is used for agricultural purposes, the owner is not entitled to show, to enhance his damages, the number of lots that would be taken, according to his plan of the lots, nor can he show the average value thereof. (p. 976.)

EMINENT DOMAIN—Evidence of Value of Land.—In condemnation proceedings under the right of eminent domain a witness as to land values cannot testify in his examination in chief as to the money value of land similar to that under consideration. (p. 977.)

EMINENT DOMAIN—Plan of Town Lots as Evidence.—An unrecorded plan of town lots which were not marked on the ground, made several years prior to condemnation proceedings, and not including all of the land on which damages are to be assessed, is not admissible in evidence. (p. 977.)

C. Hambleton and J. W. Wetzel, for the appellant.

S. B. Sadler and F. E. Beltzhoover, for the appellees.

502 **MESTREZAT, J.** It was error for the court below to permit the plaintiff to divide his farm into two tracts of land and to assess his damages for the injuries done to one of the tracts. Since 1886 he has owned both tracts, and they are physically connected and have been used as one tract by him for agricultural purposes. In estimating his dam-

ages, therefore, occasioned by the defendant company's appropriation of a strip of the land for widening its right of way, the tract should have been considered as one body of land, and the well-established rule for determining the damages should have been applied to the whole tract and not to a part of it: Schuylkill River etc. R. R. Co. v. Stocker, 128 Pa. 233, 18 Atl. 399. As correctly said in that case (page 251): "If a witness may select a portion of the whole property affected by the building of a railroad, and determine the extent to which that alone is damaged, without valuing or even examining the ⁵⁰³ remainder of the property, it is evident that both the letter and the spirit of the rule will be violated." Plaintiff was entitled to recover the difference in the market value of the one hundred and fifty acres of land immediately before and immediately after the defendant company had appropriated the strip for its use. Instead of applying this rule, the learned court permitted the plaintiff to show the damage done by the construction of the defendant's road to ninety acres of the tract which it was alleged had been platted and laid out in town lots in 1893. In adjusting the difference in the value of the whole tract before and after the appropriation by the company, the plaintiff could show any and all uses to which the land or any part of it had been or might be applied. As elements of value, he was entitled to prove that the land or any part of it was ripe for building or any other purpose which would enhance its value. But his measure of damages was not the difference in value between the ninety acres, now utilized for building or any other advantageous purpose, before and after the construction of the road, but the difference in value between the whole tract of one hundred and fifty acres before and after the appropriation by the defendant company. In other words, the plaintiff was entitled to have considered any and all proper elements of value of all or any part of his farm in determining the value of the farm before it was entered upon by the defendant, but the injury resulting from the defendant's appropriation of a strip of the land was the depreciation of the market value of the whole tract and not a part of it. As against the injuries sustained by the plaintiff by reason of the appropriation of the defendant company for its right of way, the defendant was entitled to set off the advantages or benefits actual and special to the entire tract

of the plaintiff's land by reason of the construction of the railroad. It was therefore error for the court to permit the plaintiff to assess his damages against the ninety acres as "the only part of the property of the plaintiffs which is affected by the appropriation of land by the railroad." It is true that in his charge the learned judge gave the jury the proper measure of damages, but that did not cure the harm done in admitting the evidence complained of in the several assignments of error.

It was manifest error for the court to permit the plaintiff, in order to establish his damages, to introduce testimony showing ⁵⁰⁴ that the railroad would take so many lots shown on the plan, and the average value of the lots. One of the witnesses, in reply to a question put by plaintiff's counsel in chief as to the items of damages, said: "Three thousand dollars for the lots taken. I base my judgment on the lots that are cut by the railroad company—almost fifty lots—when the plat of ground is thrown into the market they ought to bring on an average of about two hundred dollars a lot. In this lot, where there are five acres, the ground taken by the railroad company is one and fourteen hundredths acres, and I consider the ground they have taken will, according to that valuation, amount to three thousand dollars." In *Pennsylvania etc. R. R. Co. v. Cleary*, 125 Pa. 442, 11 Am. St. Rep. 913, 17 Atl. 468, Mr. Justice Williams speaking for the court said (page 452): "Equally improper is evidence showing how many building lots the tract under consideration could be divided into, and what such lots would be worth separately. It is proper to inquire what the tract is worth, having in view the purposes for which it is best adapted, but it is the tract, and not the lots into which it might be divided, that is to be valued. . . . The jury are to value the tract of land, and that only. They are not to determine how it could best be divided into building lots, nor conjecture how fast they could be sold, nor at what price per lot. . . . They are not to inquire what a speculator might be able to realize out of a resale in the future, but what a present purchaser would be willing to pay for it in the condition it is now in. This is a rule that is well settled, and the court should have drawn the attention of the jury to it so as to have left no room for uncertainty on their part. They should have been told that they had nothing to do with the subdivision of this tract, the

price of the lots, or the probability of their sale; but that they were to ascertain the fair selling value of the land before and after the entry by the railroad company, in order to determine the actual damage done to its owner." Such unquestionably is the rule in this state, and the trial judge should have adhered strictly to it in ruling on the offers of testimony as well as in his charge to the jury.

The question put to the witness Baughman to elicit his knowledge of the price at which the Sherban land was held should have been excluded. It was not necessary to admit it for the purpose of showing the witness' knowledge as an expert, and the only effect of his testimony was to put before the ⁵⁰⁵ jury a more or less speculative value of the Sherban property as a basis for assessing the damages in this case. It is quite true, as suggested by plaintiff's counsel, that a witness may qualify himself to testify to the market value of property by showing that he has a knowledge of sales in the community and that he knows what property is held at in the community, but he cannot be interrogated in chief as to the money values of similar properties. This would be showing the general selling price of the property injured by evidence of particular sales of alleged similar property, which this court has uniformly held cannot be done: *East Pennsylvania R. R. Co. v. Hiester*, 40 Pa. 53; *Pittsburgh etc. Ry. Co. v. Vance*, 115 Pa. 325, 8 Atl. 764. The witness may be asked on cross-examination his knowledge of particular sales and the prices asked for property in the community for the purpose of testing his competency to testify, but such evidence in chief is clearly incompetent: *Becker v. Philadelphia etc. R. R. Co.*, 177 Pa. 252, 35 Atl. 617, 35 L. R. A. 583.

We think it was error to admit in evidence the plan of lots offered by the plaintiff. It purported to be a plat of lots laid out in 1893 in Lower Allen township, Cumberland county, and covered the entire ninety acres of ground but excluded the residue of the plaintiff's one hundred and fifty acre tract. The plan was not recorded and had been changed since it was made in 1893. The ground was not staked or marked off as shown on the plat, nor were any streets or roads marked on the ground conformable to those shown on the plan. This plan of lots, therefore, did not show the actual condition of the ninety acres at the time the defendant company appropriated a part of the land, nor did it show all the land owned

by the plaintiff which was affected by the defendant's appropriation. It simply showed an unrecorded paper plan of lots which were not marked on the ground, made twelve years prior to the time of the appropriation, and hence was not evidence that the ground was adapted to building purposes or had actually been devoted to such purposes. Any evidence which tended to show that the land was available for improvements, not simply capable of being laid out on a paper plan or on the ground even, was admissible, but this plat was not of that character and should therefore have been excluded. Its only effect would be to lead the jury to believe that the defendant company had appropriated ⁵⁰⁶ so many lots or parts of lots as shown on the plan, and thereby enable the jury to erroneously ascertain the damages by allowing the plaintiff the supposed value of those lots. Parol testimony was not admissible to show that the land taken could be laid out into a certain number of lots for the purpose of determining the damage done the plaintiff, and this plan was equally incompetent for that purpose.

There may be some merit in the defendant's allegation that the charge was not adequate nor strictly impartial. If so, the learned judge will no doubt profit by this suggestion on the next trial, and observe what has been said by this court in some recent cases as to the duty of the trial court in submitting this class of cases to the jury.

There are other errors in the record covered by some of the numerous assignments of error to which we have not adverted and which need not be noticed, as they may be attributable to omissions in transcribing the notes, as suggested in the plaintiff's argument, and will, of course, not occur on another trial.

The assignments of error are sustained so far as the matters complained of therein are in conflict with the views above expressed, and the judgment is reversed with a venire facias de novo.

In Eminent Domain Proceedings to condemn a right of way, disconnected properties are generally treated as separate and distinct tracts, and the damages are ordinarily assessed on this principle: *Potts v. Pennsylvania etc. Ry. Co.*, 119 Pa. 278, 4 Am. St. Rep. 646; *Pennsylvania Co. v. Pennsylvania etc. R. R. Co.*, 151 Pa. 334, 31 Am. St. Rep. 762. But the mere platting of land into blocks on a map does not divide it into separate tracts so as to limit the owner's damages to the value of a particular block, a small parallelogram of

which, as it appears on the map, is actually taken: *Currie v. Waverly etc. R. R. Co.*, 52 N. J. L. 381, 19 Am. St. Rep. 452.

In Proceedings to Assess Damages for Land Condemned for railroad purposes, it is proper to inquire what the whole tract is worth, having in view the purposes for which it is best adapted; but the testimony showing how many building lots the tract could be divided into, and what each would be worth separately, is admissible: *Pennsylvania etc. R. R. Co. v. Cleary*, 125 Pa. 422, 11 Am. St. Rep. 913.

COX v. PHILADELPHIA, HARRISBURG AND PITTSBURG RAILROAD COMPANY.

[215 Pa. 506, 64 Atl. 729.]

EMINENT DOMAIN.—Measure of Damages for land taken or injured by a railroad company under the right of eminent domain is the difference in the market value of the tract as a whole immediately before and immediately after the taking, and in assessing the damages, the land owner is entitled to have considered the value of his land for any and every purpose or use to which it may be adapted, and to have the damages assessed upon the basis of the most valuable use to which the property may be adapted, while the railroad company is entitled to offset any benefits or advantages which may accrue to the part of the tract of land not taken or injured. (p. 980.)

EMINENT DOMAIN—Damages—Business Profits.—In eminent domain proceedings, the land owner is not entitled to have the profits of his business considered in determining the value of the property as affected or injured by the taking. (p. 981.)

EMINENT DOMAIN—Damages—Evidence.—In eminent domain proceedings the land owner is not limited to any particular use to which his property may be available, and he is entitled to have its value considered for any and all purposes for which it may be used. He may show, by any competent testimony, expert or otherwise, that his property is especially valuable for a particular purpose or business, but he cannot show the profits which would arise if the property were actually used for such purpose or business. (p. 982.)

EMINENT DOMAIN—Map as Evidence.—In eminent domain proceedings, a map which is shown to be an incorrect representation of the land, and to have been made by a person who did not have data from which to make an accurate map, is not admissible in evidence. (pp. 983, 984.)

EMINENT DOMAIN—Damages—Evidence.—In eminent domain proceedings to condemn a railroad right of way, the railroad company cannot show that the use of the land to which the owner claims it is peculiarly adapted would pollute a stream passing through it. Such evidence would raise a collateral issue, which could not be determined in the case as to matters between such owner and lower riparian proprietors. (p. 984.)

J. W. Wetzel, for the appellant.

F. E. Beltzhoover and S. B. Sadler, for the appellee.

⁵⁰⁸ MESTREZAT, J. This was a proceeding in the court below to assess the damages sustained by the plaintiff by reason of the defendant company's appropriation of a strip of his land for widening his right of way. The viewers having reported in favor of the plaintiff, the defendant appealed to the common pleas, in which an issue was framed and the case was tried before a jury, resulting in a verdict and judgment for the plaintiff. The defendant has appealed to this court.

It is well settled that the measure of damages for land taken or injured by a railroad company under the right of eminent domain is the difference in the market value of the tract as a whole before the taking and afterward, as affected by it. In adjusting this difference, the land owner is entitled to have the jury take into consideration the value of his property for any and every purpose or use to which it may be adapted, and to have the damages assessed upon a basis of the most valuable use to which the property may be adapted. As said by the present chief justice in *Harris v. Schuylkill River etc. R. R.*, 141 Pa. 242, 23 Am. St. Rep. 278, 21 Atl. 590: "In estimating the value of the lot before the taking, its possible and probable uses are important elements, and may be shown by the opinion of experts." On the other hand, the defendant company is entitled to any benefits or advantages which may accrue to the part of the tract of land not taken or injured by reason of the construction of the improvement. In ascertaining the damages, therefore, the jury must take into consideration the value of the land for the uses to which it has been or may be applied, and the special advantage the construction of the road may be to the residue of the tract through which it is constructed.

While these general principles, applicable to the assessment of damages in condemnation proceedings, are well settled, there is another rule which has been recognized and enforced for ⁵⁰⁹ more than three-quarters of a century in this state, which prohibits the land owner from having the profits of his business considered by the jury in determining the value of the property which is affected or injured by the improvement. "We have so often said," said Mr. Justice Green in *Becker v. Philadelphia etc. R. R. Co.*, 177 Pa. 252, 35 Atl. 617, 35 L. R.

A. 583, "that the profits of business could not be recovered in condemnation proceedings that it seems like a waste of time to cite the decisions. As far back as Thoburn's Case, 7 Serg. & R. 411, it was held that, in estimating the damages done to the land owner, the jury are to value the injury to the property at the time the injury was suffered, without reference to the person of the owner or the state of his business. The allowance of damages for an actual or supposed loss of profits in a business carried on upon the premises by reason of the taking, was most emphatically condemned in the opinion, and that decision has been followed by this court from that day to this. . . . After stating the injustice of allowing for the profits of business to be carried on, the chief justice added (in Thoburn's Case, 7 Serg. & R. 411), 'That would make the defendant an insurer of ordinary profits in a new state of the business, pushed to a morbid extent, and would put it in the power of the plaintiff to increase the damages to any extent he might think proper. I mention this to show the danger of taking into consideration circumstances posterior to the time when the privilege is fully entered on, and its consequences to the individual to be compensated are ascertained.' " *Pittsburg etc. R. R. Co. v. Patterson*, 107 Pa. 461, originated in a proceeding for the assessment of damages occasioned by reason of the location of the defendant's road through the plaintiff's land. In delivering the opinion in that case, Mr. Justice Clark said (p. 464): "The use to which the property has been or may be applied is proper for the consideration of the jury, in the estimate of its value; its adaptation for any particular purpose may enhance its market value, but the court was certainly correct in saying that the jury could not take into consideration any supposed loss to the plaintiff of profits in his business. Such an assessment would be purely speculative, and the rule which justified it would lead to most ruinous results. If the property, by reason of its location or otherwise, is especially adapted to any particular use to which it is applied, if it is ⁵¹⁰ worth more for that particular use than for any other, its market value will be measured accordingly."

In the case at bar it was proper for the plaintiff to call witnesses to show the uses or purposes for which his land was specially adapted, including that of duck raising. The land owner, in condemnation proceedings, is not limited to any one

use for which his property may be available, but he is entitled to have its value considered for any and all purposes for which it can be used. He may, therefore, show by any competent testimony, expert or otherwise, that it is specially valuable for a certain particular purpose and that purpose must enter into its value before the jury. So, here, it was proper for the plaintiff to show by competent expert testimony the value of his property for duck-breeding purposes, and the jury was required, in passing upon the case, to take into consideration its value for that purpose. But in every case of this character the parties to establish their contention are required to produce competent testimony, and the question of competency was one for the court to determine. The plaintiff called at least four witnesses as experts to show the value of his farm for duck-raising purposes. Conceding that they disclosed sufficient knowledge of the business to make them competent to testify as to the adaptability of the property for a duck farm, their testimony clearly showed that their valuation of the property for such purpose rested upon an erroneous basis, the profits which the plaintiff would realize out of the business conducted upon the land. Mr. Stouffer fixed the plaintiff's damages by reason of the construction of the road through the premises, at \$8,000. Of this sum he allowed \$6,000 as the value of a pen on the premises destroyed by the defendant company. In testifying as to this item of depreciation, he said: "That will depreciate the capacity about two thousand ducks a year—our books will show twenty per cent apiece profit on a duck; that will be \$400 a year. I arrive at that conclusion in this way—that is not taken for one year—it is taken for all time. . . . If we were in business for twenty years—and there is no reason why we should not be—that would be \$8,000 loss, without any interest." Mr. Cox, the plaintiff, fixed the damages at about \$10,000. He said the land was worth \$1,500 as land and that the encroachment of the railroad on the part of the land used as a ⁵¹¹ duck farm had reduced its capacity or output to the extent of a capitalization of \$8,000. He testified: "Q. How much of the \$8,000 do you estimate as loss to the farm as a duck farm? A. It reduces their output to that extent. Q. How much? A. About \$500 or \$600 a year—it reduced the breeding pens so that the eggs laid and the ducks produced are less by at least two thousand per year—two thousand marketable ducks. Q. And you calculate so much profit on each duck? A. Yes

Q. What profit do you count on that? A. The duck people usually get twenty cents per duck. Q. Is that the way you estimate the \$8,000 by estimating the profits? A. Yes." Mr. Morgan, another witness, estimated the plaintiff's damages at from \$8,000 to \$10,000. He thought the space cut off on the waterfront would be sixty feet, and based his estimate of the damages on that fact. He testified: "Well, that (sixty feet) will accommodate even breeding ducks, which would produce 6,000 ducks; I figure fifteen cents profit—that represents a loss of \$900 a year." George Woods, called by the plaintiff, fixed the damages at \$8,000. His manner in arriving at this sum as damages is stated in his testimony as follows: "You could handle about two hundred breeders there, which would produce eggs enough from which you could probably market six thousand ducks, at, say, from fifteen to twenty cents apiece profit—or it could be used as a fattening pen for fattening ducks. I think two thousand can be handled in that building in a season, in a year, and from those two thousand, judging from the market profits, \$400 should be derived." William Nicholson, another witness, places the damages at from \$8,000 to \$10,000. His estimate was based upon the fact that the defendant company destroyed the best duck pen on the premises, in which two thousand ducks could be raised for the market in a season and that would decrease the capacity of the farm to that extent. His estimate was fixed by allowing twenty cents profit on each duck raised.

At the close of the case the defendant's counsel moved to strike out that part of the testimony of the above witnesses relating to the value placed by them on the injury done to the plaintiff's property, but the motion was denied. The testimony discloses the fact that the witnesses arrived at their conclusion as to the damages sustained by the plaintiff on an erroneous basis. Their estimates were made upon the profits which they ⁵¹² thought the plaintiff would derive from the duck-raising business. Such basis was entirely too uncertain and speculative to permit it to enter into any calculation or estimate of the damages which the plaintiff sustained by reason of the construction of the defendant's road through his premises. In speaking of the manner of estimating the value of land in eminent domain cases by considering the profits realized therefrom, Mr. Justice Williams in *Reading etc. R. R. Co. v. Balthaser*, 126 Pa. 1, 17 Atl. 518, said (page 10): "We held (on a former appeal of the same case) that

such a method for fixing the value of the land was speculative, and could not be applied to land taken by virtue of the right of eminent domain. It involves an uncertain estimate of the quantity and quality of the stone, includes necessarily the use of labor and capital, requires skill and intelligent supervision on the part of the operator, and vigilance and success in the financial management. No human mind can foresee the presence of these elements of business success, or forecast the profit or loss of actual operations, if the stone be removed at the ordinary rate of quarrying." We are clearly of opinion that the defendant's motion should have been allowed, and the estimates of the witnesses as to the value of the plaintiff's land and the damages suffered by the construction of the road through it should have been struck from the record.

The court did not err in excluding the map offered in evidence by the defendant company. It was not shown to be a correct representation of the ground taken nor of the buildings affected; on the other hand, it appeared by the testimony of the party who made it that he did not have the data from which he could make an accurate map. In the trial of cases of this character there should be a map of the locus in quo, as it aids most materially the court as well as the jury in the consideration of the case. From the evidence before us, it is difficult to determine the location of the spring or the buildings or the course of the stream with reference to the strip of land condemned.

The offer by the defendant to show that the use of the plaintiff's land as a duck farm would pollute the stream passing through it, and thereby prevent the use of the land for that purpose, was properly rejected as raising a collateral issue which could not be determined in this case. Whether the lower ⁵¹³ riparian owners would object to such use of the land was uncertain and purely speculative; and if they did, non constat that the objection could not, at small expense, be removed. At all events, the defendant company is not in a position to assert the rights of the lower riparian owners who alone have an action against the plaintiff here for any injury which they may sustain by an interference with the purity or flow of the stream.

The eighth assignment must be sustained, notwithstanding the attempt to cure the error in the general charge. The plaintiff had the right, as we have held, to show that his farm was

adapted to the use of and was valuable for duck raising, but he could not show the average number of ducks he raised on the farm each year. While in one sense such testimony would show the productive capacity of the farm per year, it would also afford the jury an opportunity to estimate the profits of the land. The plaintiff could show by competent testimony the acreage of his land and also its adaptability for the duck business by reason of its location, water, etc., which the jury was required to consider as an element of value; but when he was permitted to show that he produced from forty-five thousand to fifty thousand ducks per year, it furnished the jury the data from which it could, and doubtless did, ascertain the profits of the business, which it used as a basis in determining the market value of the plaintiff's property. The number of ducks the plaintiff may produce on the land in the future depends upon so many contingencies that any estimate thereof would be purely speculative, and should not go to the jury even as evidence of the productive capacity of the farm.

The assignments of error are sustained so far as the matters complained of therein are in conflict with the views above expressed, and the judgment is reversed with a venire facias de novo.

The Question Involved in the Principal Case will be found discussed in the note to Board of Trade Tel. Co. v. Darst, 85 Am. St. Rep. 291-314. Generally speaking, in estimating the value of property taken for a public use, it is the market value which is to be considered, and in ascertaining such value, all the capabilities of the property and all the legitimate uses to which it may be applied or for which it is adapted, are to be considered, and not merely the condition it is in, and the use to which it is applied at present: McKinney v. Nashville, 102 Tenn. 131, 73 Am. St. Rep. 859. As to whether benefits accruing to the owner are to be considered in reduction of damages, see Guinn v. Ohio R. R. Co., 46 W. Va. 151, 76 Am. St. Rep. 806; Washington Ice Co. v. Chicago, 147 Ill. 327, 37 Am. St. Rep. 222; notes to Gainesville etc. Ry. Co. v. Hall, 22 Am. St. Rep. 50; Currie v. Waverly etc. R. R. Co., 19 Am. St. Rep. 459.

CASES
IN THE
SUPREME COURT
OF
SOUTH CAROLINA.

FORD v. PEOPLE'S BANK.

[74 S. C. 180, 54 S. E. 204.]

BANKING—Presumption of Knowledge of Signature.—That the drawer knows the signature of the drawee of a draft is conclusively presumed only when the person receiving the money has contributed in no way to the success of the fraud or the mistake of fact upon which payment is made. (pp. 988, 989.)

BANKING—Recovery of Money Paid on Forged Check.—To entitle the holder of a forged check to retain the money obtained thereon, he must be able to show that the whole responsibility of determining the validity of the signature was upon the drawee, and that the negligence of such drawee was not lessened by any disregard of duty on the part of the holder, or by failure of any precaution which, from his implied assertion, in presenting the check as a sufficient voucher, the drawee had the right to believe he had taken. (p. 989.)

BANKING.—Unrestricted Indorsement of a draft or check, and presentation thereof to the drawee, is a representation that the signature of the drawer is genuine. (p. 990.)

A. J. Green, for the plaintiff, appellant.

Glaze & Herbert, for the defendant, appellant.

¹⁸¹ JONES, J. The appeal in this case is from an order of Judge Dantzler sustaining a demurrer to the complaint with leave to amend. The complaint, omitting formal parts, states the following facts:

“3. That on 6th January, 1904, the defendant, through the usual channels in the course of banking, presented to plaintiff for payment a draft for fifty dollars, dated Neeces, S. C., January 4th, 1904, and purporting to be drawn by H. L. J. Blume on the plaintiffs, payable to the order of Joe Shanna-

han, indorsed Joe Shannahan and by the defendant, of the tenor following, to wit:

" 'Pay to the order of Joe Shannahan fifty dollars, value received and charge the same to account of

" 'H. L. J. BLUME.

" 'To B. B. Ford & Co., Columbia, S. C. No. 68.'

"4. That the plaintiff paid the said draft upon presentation, upon the faith and credit of the indorsement of the said defendant, supposing said draft to be a genuine draft of H. L. J. Blume, and the money therefor was received by the defendant.

"5. That the said draft was not the genuine draft of the said H. L. J. Blume, but on the contrary his name thereto is a forgery, and upon the discovery of the same, the plaintiffs, on 11th January, 1904, notified the defendant thereof, and demanded the return of the said fifty dollars so paid by the plaintiffs to defendants as aforesaid, but the said defendant refused and still refuses to pay the same."

Judge Dantzler in sustaining the demurrer for insufficiency assigned the following reasons:

"There is no authority in this state decisive of the question presented by the demurrer. The case cited by counsel for plaintiff (Glenn v. Shannon, 12 S. C. 570) is inapplicable.

"The rule, as settled by the great weight of authority in other states, is that, 'As between parties equally innocent, the loss must remain where the course of business has placed it': 5 Am. & Eng. Ency. of Law, 2d ed., 1072. That is to say, a drawee becomes chargeable with the knowledge of the signature of the drawer, where a check or draft, upon which the signature of the drawer has been forged, is paid by the drawee, the drawee must bear the loss unless the payee is negligent or at fault.

"The text-writers are not in accord with this doctrine, but it seems to be 'firmly rooted in the commercial law of the country': Germania Bank v. Boutell, 60 Minn. 189 (reported in 51 Am. St. Rep. 521).

"The rule in relation to forged indorsements is different: 5 Am. & Eng. Ency. of Law, 2d ed., 1079.

"The plaintiffs allege, inter alia, that the draft in question was presented to the plaintiffs by the defendants '*through the usual channels in the course of banking.*' (Italics mine.) The draft was placed in the usual course of business, with

the plaintiffs, and they, as drawees, paid the money to the defendant; the defendant is not liable, therefore, to the plaintiffs for the money so received, unless negligent or at fault.

"The demurrer must, therefore, be sustained, with leave to the plaintiffs to amend their complaint, if so advised, by incorporating therein, as they may be advised, any alleged act or acts of negligence or fault on the part of the defendant respecting the draft in question."

Both sides appeal. The plaintiff contends that the demurrer should not have been sustained, as the case should be governed by the principle announced in *Glenn v. Shannon*, 12 S. C. 570, which is: "Where money is paid under a mistake of fact to a person who has no ground in conscience to claim it, the person paying it may recover it back." The plaintiff also contends that if the question of defendant's negligence is involved, the complaint alleges such negligence by stating in effect that the defendant indorsed a forged draft on plaintiff and presented the same so indorsed through the usual channels of banking, and that said draft was paid by plaintiff upon the faith and credit of such indorsement, supposing the draft to be genuine.

¹⁸³ The defendant contends that the demurrer should have been sustained absolutely without leave to amend, under the commercial rule that the drawee of a bill of exchange or check is presumed to know the signature of the drawer and cannot recover back the money paid thereon to a bona fide holder. The defendant contends that such presumption is conclusive in this case, as the complaint shows that defendant was a bona fide holder.

The rule which protects a bona fide holder in his right to retain money paid by the drawee upon a bill or check to which the drawer's signature is afterward discovered to be forged, was first announced by Lord Mansfield in *Price v. Neal*, 3 Burr. 1354, decided in 1762, was followed by Justice Story in *Bank of the United States v. Bank of Georgia*, 10 Wheat. 333, 6 L. ed. 334, decided in 1825, and has received such recognition in this country, as will appear by reference to cases cited in 5 *Encyclopedia of Law*, 1071-1072, *Germania Bank v. Boutell*, 60 Minn. 189, 51 Am. St. Rep. 519, 27 L. R. A. 635, and note, and in note to *People's Bank v. Franklin*, 17 Am. St. Rep. 890. An examination of the case of *Price v. Neal*, 3 Burr. 1314, and of the best considered cases follow-

ing its doctrine, will show that the question of the holder's fault or negligence in acquiring possession or in his conduct in misleading the drawee into payment or throwing him off his guard, may affect the question whether in equity and good conscience he should be allowed to retain the money. In *Price v. Neal*, 3 Burr. 1354, Lord Mansfield remarked that the holder acquired the bill for value without suspicion of the forgery, was guilty of no fault or neglect, and that if there was any fault or negligence it was on the part of the drawee. We think the true rule is found stated in the case of *First National Bank v. Bangs*, 106 Mass. 441, 8 Am. Rep. 349, approved in *Bank of Danvers v. Bank of Salem*, 151 Mass. 280, 21 Am. St. Rep. 450, 24 N. E. 44. The language of the court in the last-cited case, after stating that the presumption is that the drawee bank knows the signature of its own customers, is as follows: "This presumption is conclusive only when the party receiving the money has in ¹⁸⁴ no way contributed to the success of the fraud, or the mistake of fact under which the payment has been made. In the absence of actual fault on the part of the drawee, his constructive fault in not knowing the signature of the drawer and detecting the forgery will not preclude his recovery from one who took the check under circumstances of suspicion without proper precaution, or whose conduct has been such as to mislead the drawee or induce him to pay the check without the usual security against fraud. Where a loss, which must be borne by one of two parties alike innocent of forgery, can be traced to the neglect or fault of either, it is reasonable that it should be borne by him, even if innocent of any intentional fraud, through whose means it has succeeded. To entitle the holder to retain money obtained by a forgery, he should be able to maintain that the whole responsibility of determining the validity of the signature was placed upon the drawee, and that the negligence of the drawee was not lessened and that he was not lulled into a false security by any disregard of duty on his [the holder's] own part, or by the failure of any precaution which from his implied assertion in presenting the check as a sufficient voucher the drawee had a right to believe he had taken."

In view of this statement of the rule, the question whether the demurrer was properly sustained depends upon the meaning to be attached to the alleged presentation and indorsement of the draft by the defendant. Does such presentation and

indorsement to the drawee represent that the signature of the drawer is genuine, or does it merely represent that the instrument is genuine, as it purports to be in all respects, except as to the signature of the drawer, which the drawee is presumed to know? Mr. Daniel, in his work on Negotiable Instruments, takes the view that an indorsement engages that the bill or note is genuine: 1 Daniel on Negotiable Instruments, secs. 672, 673; 2 Daniel on Negotiable Instruments, sec. 1361. The case of *Germania Bank v. Boutell*, 60 Minn. 189, also reported in 51 Am. St. Rep. 519, 27 L. R. A. 635, takes the view that an indorsement by a holder other than the original payee constitutes no representation¹⁸⁵ or guaranty to the drawee that the signature of the drawer is genuine, but we think that the weight of reason and authority is against that view, at least to the extent that an unrestricted indorsement is calculable to mislead the drawee into a belief that the paper was what it purported to be: *People's Bank v. Franklin Bank*, 88 Tenn. 299, 17 Am. St. Rep. 884, 12 S. W. 716, 6 L. R. A. 724; *First Bank of Danvers v. Bank of Salem*, 151 Mass. 280, 21 Am. St. Rep. 450, 24 N. E. 44; *First Nat. Bank v. First Nat. Bank*, 4 Ind. App. 355, 51 Am. St. Rep. 221, 30 N. E. 808; *Woods v. Colony Bank*, 114 Ga. 683, 40 S. E. 720, 56 L. R. A. 929. The case of *First Nat. Bank of Belmont v. First Nat. Bank of Barnesville*, 58 Ohio, 207, 65 Am. St. Rep. 748, 50 N. E. 723, 41 L. R. A. 584, while holding that a restricted indorsement as "for collection" has not that effect, apparently concedes that an unrestricted indorsement does have that effect.

From what has been said it must follow that the facts stated in the complaint constitute a cause of action and that the defendant's demurrer should have been overruled.

The judgment of the circuit court is reversed.

The Rights and Remedies of the Several Parties when a forged check has been paid are discussed in the note to *People's Bank v. Franklin Bank*, 17 Am. St. Rep. 889-899; and the liability of one who receives payment of a check on a forged indorsement is considered in the note to *First Nat. Bank v. City Nat. Bank*, 94 Am. St. Rep. 641-650. Consult, also, the recent cases of *Farmers' etc. Bank v. Bank of Rutherford*, 115 Tenn. 64, 112 Am. St. Rep. 817; *Land Title etc. Co. v. Northwestern Nat. Bank*, 211 Pa. 211, 107 Am. St. Rep. 565.

LOAN AND SAVINGS BANK v. FARMERS' AND MERCHANTS' BANK.

[74 S. C. 210, 54 S. E. 364.]

BANKS AND BANKING—Right of Bank to Refuse to Pay Check.—A bank has no right to refuse payment of a check in the hands of a bona fide indorsee, on the ground that the drawer of the check has notified such bank that the check was obtained by fraud, and that there was a failure of consideration. (p. 996.)

BANKS AND BANKING—Check as Assignment of Deposit.—A check on a bank operates as an assignment, pro tanto, of the drawer's deposit, account or fund, in the bank, and there is privity between the bank having the necessary fund on hand and the checkholder, on presentation of the check for payment, so as to give the holder a right of action against the bank for wrongfully refusing to pay it. (p. 999.)

BANKS AND BANKING—Checks—Countermanding Payment. The drawer of a check cannot countermand its payment, if the check has passed into the hands of a bona fide holder, by notifying the bank that the check was obtained by fraud and that there was a failure of consideration. (p. 999.)

BANKS AND BANKING—Refusal to Pay Check—Interpreter.—A bank on which a check has been drawn has no right to deposit the money in court, and demand that the drawer be made a party defendant and required to litigate with the holder the bona fides of the check. (p. 1000.)

BANKS AND BANKING—Countermand of Check—Remedy.—The drawer of a check contesting its payment must not only give notice to the bank, but must also take timely proceedings in court, by injunction or otherwise, to arrest the payment of the check, and the bank must be allowed a reasonable time, after such notice, to await the action of the drawer, and to decide whether it will risk suit by the holder or drawer of the check. (p. 1000.)

Sheppards, Grier & Park, for the appellant.

Witherspoon & Spencers, for the appellee.

²¹⁰ POPE, C. J. The plaintiff in its action in the court of common pleas of Greenwood sought to recover of the defendant bank the sum of \$84.45, with interest from the 30th of December, 1903, and also the sum of \$25, the expense of the action. By the agreement of the parties the case was heard before Judge Watts, who rendered his judgment ²¹¹ on April 7, 1905, for the sum of \$84.45, with interest thereon from the 30th of December, 1903, and the cost of this action.

In order to understand these issues, we will reproduce the complaint, the affidavit submitted by the defendant bank, the notice of the defendant bank and the order of Judge Watts and the defendant's grounds of appeal therefrom.

COMPLAINT.

"The plaintiff above named, complaining of the defendant herein, shows to this Court:

"I. That at the times hereinafter named the plaintiff was, and still is, a banking corporation, duly organized under the laws of said state to do, and actually doing business as such, at Yorkville, in the county of York, and state aforesaid.

"II. That at the said times the defendant was, and it still is, a banking corporation, duly organized under the laws of said state to do, and actually doing business as such, at Greenwood, in the county and state first above named, the residence of defendant.

"III. That on the 12th day of December, 1903, one Y. B. Trammell, a depositor of defendant, for value received, duly issued and delivered to one W. G. Stephenson said depositor's check in writing, drawn by the said Y. B. Trammell on the defendant, and made payable to the order of the said W. G. Stephenson, in the sum of \$84.45, the said check being in form as follows:

" 'Greenwood, S. C., Dec. 12, 1903. No. —.

" 'The Farmers' and Merchants' Bank pay to the order of W. G. Stephenson (\$84.45) eighty-four and forty-five cents.

" 'Y. B. TRAMMELL.'

"IV. That thereupon the said W. G. Stephenson, for value received, indorsed, transferred and delivered the said check to one R. T. Stephenson, secretary and treasurer, who in turn thereupon, and for full value received of the plaintiff, ²¹² indorsed, transferred and delivered the said check to plaintiff, who accordingly became, and it still continues to be, the bona fide owner and holder thereof, and of the said Y. B. Trammell's deposit in said bank to the extent of \$84.45. That thereafter between the date of said check and the 30th day of December, 1903, the plaintiff duly presented the check to the defendant, and demanded payment thereof, and of the sum of \$84.45, but the defendant refused payment, the said refusal being coupled with only one reason assigned, and with an admission made, as defendant's memorandum indorsed on the said check shows, to wit: 'Funds on hand to meet check, but party drawing check had ordered same held up'; and in this connection plaintiff charges the truth of said admission, the insufficiency of the reason assigned, and that there was and is

no sufficient reason for said refusal; and accordingly plaintiff has been forced to bring this action for the defendant's said refusal, plaintiff was and is damaged by the defendant in the sum of \$84.45, with interest thereon from the 30th day of December, 1903, and also the sum of \$25, the expenses of this action.

"Wherefore, plaintiff prays judgment against the defendant for said sums and interest, and for the costs of this action."

THE AFFIDAVIT AND THE NOTICE.

"Personally comes before me R. M. Hays, who on oath, says: That the Farmers' and Merchants' Bank, the defendant in the above-stated matter, is a banking corporation with its place of business at Greenwood, and this deponent is its president and an officer thereof and authorized to make this affidavit; that an action is pending in the Court of Common Pleas for Greenwood County against the said the Farmers' and Merchants' Bank, wherein Loan and Savings Bank is the plaintiff, in which said action a judgment is demanded against the said the Farmers' and Merchants' Bank, the defendant herein, the cause of action being that heretofore on December 12th, 1903, one Y. B. Trammell, ²¹³ who was a depositor in the defendant bank, issued a certain check to one Stephenson, payable to his order, who thereafter, it is alleged in the complaint, indorsed and transferred it to one R. T. Stephenson, who in turn, it is alleged, indorsed and transferred it to Loan and Savings Bank, who claims to be the owner thereof for value; that the said check was dated December 12th, 1903, and it was in the sum of \$84.45; that at the time of the making of the said check the said Y. B. Trammell had sufficient funds on deposit to meet the same; that before the check was presented for payment at defendant bank the said Y. B. Trammell notified the defendant in writing that it must not pay the same when presented; that upon the presentation of the said check, after the notice received from the said Y. B. Trammell to refuse to pay the check, defendant accordingly refused payment of the same, but indorsed thereon the statement that the depositor had sufficient funds on hand to meet the check but had ordered payment held up. These facts are set out in the complaint as going to make up the cause of action against this defendant. Deponent further says that at the

time the said Trammell gave notice to the bank to refuse payment of the check, he stated that there was an entire failure of consideration for the said check and that the procurement of the same by the payee amounted to a fraud on his rights. Deponent further says that it still has on hand funds with which to meet the payment of the check; that the said Y. B. Trammell claims to be entitled to the said funds and demands of the defendant bank that it pay the same to him, which defendant has also refused to do; that the said Y. B. Trammell is not a party to the action above stated against the defendant and without collusion makes against the defendant a demand for the same debt, to wit: the amount of the check by him drawn—\$84.45; that deponent is advised and upon such advice says: that the said Y. B. Trammell should be substituted as a party defendant to the said action and defendant be discharged from liability to either party on its depositing in the court the amount ²¹⁴ of the debt; that this deponent is simply a stakeholder, and the parties at interest should be required to litigate this matter among themselves.

"You will please take notice, that the defendant herein will apply to the Court of Common Pleas for Greenwood County on the first day of the next regular term thereof, in open court, at 10 o'clock A. M., or as soon thereafter as counsel can be heard, for an order to substitute, in the above-entitled action, Y. B. Trammell as defendant, and to discharge the defendant herein from further liability to either party on depositing in the court the amount of check in question, to wit: \$84.45, or as the court in its discretion directs."

Judge Watts, after stating the facts set out in the complaint and affidavit, in his decree says:

"It was agreed by the attorneys for the plaintiff and defendant that in the event I should refuse this motion, that I should dispose of the whole matter without a jury.

"After consideration I have reached the conclusion that the motion should be refused for the reason that in my opinion whenever a party gives a check he is powerless to stop the payment of the same, and the bank has nothing to do but pay the check on its being presented if it has in hands sufficient funds to meet the payment. I hold that to the extent of the amount of the check it is an appropriation of

so much of the funds as the drawer of the check has on deposit, and it makes no difference whether the check is in the hands of the original holder or of a third party; the plain duty of the bank on its being presented is to pay the same, and this without regard to any statement or notice which may be filed with it by the drawer of the check, and holding this view I refuse this motion of the interpleader.

"Under the agreement of the parties the only other question to be disposed of is the amount of the judgment to which plaintiff is entitled. I do not think in this action plaintiff is entitled to anything by way of damages, his relief being limited to the amount of the check and interest thereon ²¹⁵ at the rate of seven per cent per annum from the date it was presented for payment and payment refused.

"It is, therefore, ordered:

"1st. That the motion to require the defendant Trammell to be substituted as a party defendant for the reason hereinbefore stated, be and the same hereby is refused. 2d. That the plaintiff have judgment against the defendant for the sum of eighty-four dollars and forty-five cents with interest thereon from the 30th day of December, 1903, and the costs of this action."

EXCEPTIONS OF DEFENDANT.

"1st. It was error in his honor to overrule the defendant's motion herein to substitute the said Y. B. Trammell as the defendant because: (a) The affidavit of the defendant showed that before the check was presented for payment the bank was notified by the said Trammell, who drew the check, that it must not pay the same when presented, stating that there was an entire failure of consideration for the said check and that its procurement amounted to a fraud on his rights, the error being that a bank cannot make payment of a check when notified by the drawer that it is procured by fraud, or that there is a failure of consideration, if it receives notice of such before presentation or before actual payment, and his honor should have so held and required the parties hereto to litigate the matter between themselves.

"(b) The affidavit showed that the said Trammell is not a party to the action and without collusion makes against the defendant a demand for the same debt, and further that the bank had the funds in hand and was ready to deposit

the same in court; that it was simply a stakeholder; and his honor should, therefore, have substituted the said Trammell as a party defendant and relieved this defendant from further liability on its paying over the fund as required by the order of court.

"2d. It was error in his honor to hold that it was the plain duty of the bank to pay the check on its being presented ²¹⁶ and that without regard to any notice which might have been filed with it by the drawer of the check, the error being:

"(a) If a check is procured by fraud or if there is a failure of consideration and the bank received notice before presentation of the check or before making payment and it is required by the drawer on this account to refuse payment, if thereafter it makes payment it does so at its peril and would be required in law to respond to the drawer of the check for the amount thereof, and his honor should have so held and granted the motion of interpleader.

"(b) It is the duty of a bank upon being notified by the drawer of a check that same has been procured by fraud or that there is a failure of consideration, to refuse its payment when required so to do on this account by the drawer, and his honor should have so held and granted the motion of the interpleader.

"3d. It was error in his honor to hold that where a party gives a check he is powerless to stop its payment, it being submitted that payment can be stopped for fraud or failure of consideration and that in such a case the bank is merely a stakeholder and the parties should be required to interplead."

We will now examine the case.

This appeal does not present any question whatever about the right of the holder of the check to maintain suit on it against the bank. The cases of *Simmons H. Co. v. Bank of Greenwood*, 41 S. C. 177, 44 Am. St. Rep. 700, 19 S. E. 502, and *Fogarties & Stillman v. Bank*, 12 Rich. 518, 78 Am. Dec. 468, are conclusive of that question. The defendant bank presents its question in this shape: "Where a bank receives notice by the drawer of a check against funds on deposit in said bank sufficient to cover the check, on presentation must it refuse payment for the reason that there is a failure of consideration or that the same was procured by fraud, must it disregard the notice and pay the check?" Or, as the ap-

pellant puts it, this question is answered by asking another: "Has the drawer of a check the right to hold up its payment if, as a matter of fact, it has been procured by ²¹⁷ fraud, or if, as a matter of fact, there has been a failure of consideration?"

We do not know that questions like those propounded by the appellant can be viewed in any other light than as a matter of alarm by all commercial interests. The office of a check by a drawer upon funds on deposit in a bank is well understood in all commercial circles.

Checks on banks are made to take the place of the actual cash, although the check itself is the means of obtaining money of the drawer from the bank for the holder of the check. As is well said in 2 Daniel on Negotiable Instruments, section 1982: "A check, like any other instrument, must be issued before it is binding; and it is considered as issued as soon as it is in the hands of any person who can demand its payment." There is no contest here as to the fact that the check in question was issued to the assignor of the plaintiff bank before any notice to the defendant bank not to pay was given. If we were required to say, therefore, who was the innocent party here, we would unhesitatingly say that it was the plaintiff bank. It received this check for full value without any notice of any supposed vice therein.

We have no instance, so far as we can recall the history of checks in the courts of this state, of any such question as is now presented. The nearest we can come to such question is the instance presented in the case of McGahan v. Lockett, 54 S. C. 364, 71 Am. St. Rep. 796, 32 S. E. 429, and that was not a case where a bank was concerned, but it seems that one Griffin was indebted to McGahan, Lockett and others when he assigned to said McGahan an insurance policy for \$2,400 upon property destroyed by fire, with directions in said assignment to first pay from the proceeds thereof, when collected, the sum of \$724.77 to the said McGahan, and thereafter to the eight parties named in that case, to each of whom the said Griffin gave an assignment in writing of his said sum of money and directed McGahan to pay the same. McGahan never accepted these assignments, but before the proceeds of the said policy were collected by McGahan the ²¹⁸ said Griffin sought to prevent the said McGahan from making the payment to the said eight

holders. With all the parties before the court, brought there by the complaint of McGahan, this court held: "That it was beyond Griffin's power, except for fraud or want of value or similar grounds, to prevent the holders for value of his drafts recovering the same from McGahan." This court, in reasoning, suggested that the effect would have been the same if Griffin had deposited to his own credit the sum of \$1,475.73 in some bank and had given his codefendants checks upon said bank.

As was said by Mr. Justice Johnstone in the case of Fogarties & Stillman v. Bank: "This case [Weston v. Barker, 12 Johns. 276] stands upon a principle that, when fully understood and appreciated, is sufficient for the case before us, and it is this: that when one, in consideration of money to come into his hands, promises to disburse that money as he shall be ordered by him from whom he receives it, he thereby creates a contract, negotiable in its nature, which puts him in privity with whomsoever in the world he may be ordered to make payment to, so that the promise is, according to the law-merchant, made to that person, and he is bound by his promise to pay him."

The court gave judgment that the money should be paid to said eight defendants. It will be observed that there was no fraud or failure of consideration alleged in this case just cited, and, therefore, it is not direct authority for the proposition of the appellant and yet it is not without force.

We do not see why the plaintiff in the case at bar should be forced to bring this action. There is no good reason advanced herein why the plaintiff, in order to collect its check, which check the defendant admits he has the money of the drawer to pay, should be required to bring this suit. It is true the defendant bank made itself liable to pay this check as was held by the circuit judge.

If the contention of the defendant bank should be supported to the end that the drawer, Trammell, should be required to interplead, it must be upon terms such as these: ²¹⁹ There must be no delay, no waiting for a year nor for a few months, but the action must be speedy. Only time sufficient to prepare and serve the pleadings setting forth the grounds for action. A good and sufficient bond must be extended so that the interests of the persons affected shall be brought speedily before the court. And this must be a

condition precedent. Pleadings and not affidavits must be submitted. The circuit judge refused to allow the interpleader sought here. This could only be done in cases when the original payer of the check still holds the same, when the question was presented.

In the case at bar, the action of the circuit judge will be sustained, but this is without prejudice to the defendant bank in holding the drawer of this check responsible for this delay as far as this court can do so in the absence of such drawer as a party to the suit.

It is the judgment of this court that the judgment of the circuit court be affirmed.

Gary, J., concurs in the result.

JONES, J. I concur in affirming the judgment of the circuit court.

Whatever may be the rule in other jurisdictions, it is settled in this state that a check on a bank operates as an assignment pro tanto of the drawer's deposit account or fund in bank, and that there is privity between the bank having the necessary fund on hand and the check-holder, certainly upon presentation of the check for payment, so as to give the holder a right of action against the bank wrongfully refusing payment: *Fogarties & Stillman v. Bank*, 12 Rich. 518, 78 Am. Dec. 468; *Simmons v. Bank*, 41 S. C. 177, 19 S. E. 502; *Leaphart v. Bank*, 45 S. C. 569, 23 S. E. 939. Under this view it is not essential that the drawee bank shall accept or assent to the check in order to fix upon it liability to pay the check-holder. The bank's liability is fixed by its contract with the ²²⁰ depositor, the due presentation of the check, and the possession of sufficient funds of the depositor to pay.

It must follow that the drawer of a check cannot countermand its payment if the check has passed into the hands of a bona fide holder. Such is the ruling in Illinois and doubtless in other states which hold the doctrine established in this state that a check is an assignment pro tanto of the depositor's account: *Union Nat. Bank v. Oceana County*, 80 Ill. 212, 22 Am. Rep. 185; *National Bank v. Indiana Bank*, 114 Ill. 483, 2 N. E. 407; *Gage Hotel Co. v. Union Nat. Bank*, 171 Ill. 531, 63 Am. St. Rep. 270, 49 N. E. 420, 39 L. R. A. 479, and note in 30 L. R. A. 846. Such being the

liability of the bank to a bona fide holder presenting the check for payment, it is not all-incumbent on the bank to refuse payment, to suffer suit and seek to have the drawer made a party merely because the drawer has given notice of countermand, but, on the contrary, it is the duty of the drawer contesting the payment of the check not only to give notice to the bank but to take timely proceedings in court, by injunction or otherwise, to arrest payment of the check. To this end it would doubtless be fair to allow the drawee bank a reasonable time after such notice to await the prompt action in court of the drawer before being compelled to decide whether it will risk a suit by the holder for refusing to pay, or a suit by the depositor for paying after notice. The check in question was dated December 12, 1903, was presented to defendant bank for payment between that date and December 30, 1903, and suit thereon was brought February 9, 1905, a long indulgence by plaintiff, but the drawer in all that time took no proper steps to arrest payment of the check. The correct attitude of the drawee bank is to stand indifferent between the parties, except to perform its obligation to pay checks of depositors in bona fide hands when in funds. The bank cannot occupy the position of a mere stakeholder because of the said privity of contract between it and the holder of the presented check. If the bank chooses to stand by and suffer suit at the hands of a check-holder, it cannot shift the ²²¹ contest onto the shoulders of the drawer (who may not be able to respond in damages and costs), by a deposit of the money in court with the request to have the drawer interplead as a substitute, but must stand or fall by whatever defense it may have to plaintiff's cause of action. Ordinary prudence would suggest that the drawee bank either pay the check, or, if it chooses to risk refusal to pay, require of the drawer indemnity against loss in the event of a suit by the holder.

All that is now claimed in behalf of the defendant bank is that the drawer should be substituted to defend the action inasmuch as the drawer, before the check was presented, gave the defendant notice to refuse payment of the check on the ground that there was an entire failure of consideration, and that the procurement of the same by the payee amounted to a fraud on the drawer's rights. The payee was W. G. Stephenson, who indorsed to R. T. Stephenson, secretary

and treasurer, who in turn for value indorsed to plaintiff. The complaint alleges that plaintiff is a bona fide indorsee and owner of the check, and there is no suggestion to the contrary by anyone. The defendant is defenseless, and the circuit court could not have done otherwise than to render judgment for plaintiff.

Woods, J., concurs in this opinion.

The Authorities are divided on the question whether a bank is liable to the holder of a check for refusing to pay it: See the note to *J. M. James Co. v. Bank*, 80 Am. St. Rep. 870. Some courts hold that the bank upon which a check is drawn has no contract with the payee, and is under no legal obligation to him, and its refusal to pay the check gives him no right of action against it: *Pullen v. Placer County Bank*, 138 Cal. 169, 94 Am. St. Rep. 19; while other courts hold that when the check of a depositor is presented to a banker, there is an absolute appropriation of the amount thereof to the holder, and if payment is refused, the holder may maintain an action against the banker: *Jackson Paper Mfg. Co. v. Commercial Nat. Bank*, 199 Ill. 151, 93 Am. St. Rep. 113; *Turner v. Hot Springs Nat. Bank*, 18 S. Dak. 498, 112 Am. St. Rep. 804.

CAMPBELL v. HARRIS LITHIA SPRINGS COMPANY.

[74 S. C. 282, 54 S. E. 378.]

DOWER — Setting Aside — Renunciation of — Innocent Purchaser.—A complaint to set aside a renunciation of dower, alleging that such renunciation was made before a proper officer, and it was obtained by coercion of the doweress, and that she was not separately examined, but not alleging that the grantee participated in the fraud and coercion or had knowledge thereof, does not state a cause of action. (p. 1003.)

Action on the following complaint:

"I. That the plaintiff is the widow of the late Rev. Thomas A. Campbell, who departed this life at Anderson, South Carolina, on the — day of February, 1905, at which time and for many years prior thereto she was his lawful wife.

"II. That during the coverture of the plaintiff with the said Rev. Thomas A. Campbell, he was seised and possessed of one undivided half interest in all the tract of land, situate in the county and state aforesaid, now known as the Harris Lithia Spring, containing 229 1-10 acres, more or less, bounded by the lands of Chas. Madden, John Grant,

Frank Franklin, Willis Dendy and Joe Watts, and lying on the waters of Cane Creek, being the waters of Saluda River.

“III. That on the 24th day of March, 1891, and during the coverture of the plaintiff with the said Rev. Thomas A. Campbell, he, together with Mrs. Anna A. Carter, executed a deed of conveyance of the said tract of land to Mrs. Mamie B. Harris, and at the time of execution of said deed, the plaintiff appeared before M. T. Simpson, notary public, and without being privately and separately examined by him, and not acting freely and voluntarily, but with the compulsion, dread and fear of her said husband and of the members of his family, she signed an instrument in writing before the said notary, and in the presence of her husband and several persons in connection with, attached to or on the back of said deed of conveyance, purporting to be a relinquishment or renunciation of her dower in the real estate described in the said deed of conveyance, which the plaintiff is informed and believes was without her knowledge and consent, and against her will spread upon the records of the office of the clerk of court of said county and state; but that the plaintiff avers, that ever since the execution of the said renunciation or relinquishment of dower, she has expressed her unwillingness to be bound by the same, on the ground that the same was not obtained from her in accordance with the requirements of law, and she takes this as the first reasonable opportunity since the death of her husband to disavow and repudiate the said alleged renunciation or relinquishment of dower, as fraudulent, null and void.

“IV. That the defendant, the Harris Lithia Springs Company, is in possession of the said tract of land, and has taken to itself and continues to appropriate to its own use and benefit the income, issues, rents and profits of the said tract of land, and refuses to admeasure, set off and deliver or in any matter whatsoever to allow the plaintiff her reasonable dower in the said tract of land, and to allow her any part of the income, issues, rents or profits thereof.

“V. That the defendant, the Harris Lithia Springs Company, is a corporation duly created and organized under the laws of the state of Georgia, and own property in this county and state, and has an office and a prominent place of business, with agents representing it, at Harris Springs,

in the county of Laurens and state of South Carolina, at or near Waterloo, in Laurens county, S. C.

"VI. That the plaintiff is entitled to and to have admeasured to her as her reasonable dower, one-third of one undivided half in fee of the said tract of land, together with an accounting of the income, issues, rents and profits since the death of her husband.

"Wherefore, the plaintiff demands judgment that the alleged renunciation of dower be declared fraudulent, null and void, and that her dower be admeasured to her in the said tract of land, and in the income, issues, rents and profits thereof, and for the costs and disbursements of this action."

From an order overruling a demurrer to the complaint, the defendant appealed.

E. B. Baxter and Dial & Todd, for the appellant.

Burham & Watkins and F. P. McGowan, for the appellee.

²⁸⁴ JONES, J. We think the demurrer should have been sustained, in so far as it is based upon the ground that the complaint does not state a cause of action, in that it fails to allege that the grantee, Mrs. Harris, knew or had any reason to suspect the fraud and imposition alleged in ²⁸⁵ the taking of the renunciation. It is true, the complaint alleges the facts as to coverture, seisin and death of the husband of demandant in dower, which would, if stated alone, allege a cause of action, but the complaint goes further, and alleges a renunciation of dower by plaintiff before an officer qualified to take the same. This last fact is necessarily a complete bar to the action, unless the complaint should go further and allege facts which would in law destroy the renunciation. This the complaint fails to do. The certificate of the officer and the signature of the doweress is conclusive as to the truth of the recitals therein as to an innocent purchaser, relying upon the presumption that the officer has done his duty. It may be that the renunciation may be attacked for want of power: *McMorris v. Webb*, 17 S. C. 558, 43 Am. Rep. 629 (a hard case, the doctrine of which should not be extended); and it may also be attacked for fraud or imposition; but in such case it must appear that the grantee was a party to the fraud or took title with notice or knowledge of it: 2 *Scribner on Dower*, 371; *White v. Graves*, 107 Mass. 325, 9 Am. Rep. 38. It is true, our cases hold to a strict compliance with the

forms required by statute regulating renunciation of dower or inheritance—*Townsend v. Brown*, 16 S. C. 91; *Bratton v. Burris*, 51 S. C. 45, 28 S. E. 13; *Brown v. Pechman*, 53 S. C. 1, 30 S. E. 586—and while the stern enforcement of this rule seems hard at times, yet the grantee from a mere inspection may see whether the statutory method has been followed; but a very different question is presented when it is sought to contradict by evidence aliunde the truths of the recitals in the renunciation. The officer being charged by the law with the duty of ascertaining the facts recited, and he having certified thereto as required by statute, this should be held conclusive of the facts recited in the absence of fraud or imposition brought home to the grantee, in analogy to the well-settled general rule that to annul a deed for fraud it must appear that the grantee participated therein. To hold otherwise ²⁸⁶ would unsettle title to lands in the hands of innocent purchasers to an alarming extent.

The judgment of the circuit court is reversed and the demurrer sustained, without prejudice to the right of plaintiff to apply for leave to amend the complaint so as to allege, if so advised, that the grantee, Mrs. Harris, participated in or had knowledge of the alleged fraud when title was executed to her.

The Principal Case is supported by *White v. Graves*, 107 Mass. 325, 9 Am. Rep. 38. As to the estoppel of a married woman to impeach her release of dower, see the note to *Trimble v. State*, 57 Am. St. Rep. 172.

WARDLAW v. TROY OIL MILL.

[74 S. C. 368, 54 S. E. 658.]

MECHANICS' LIENS—Application of Payments.—If a manufacturer sells brick to be used in the construction of a building and, without notice to him, a part of the brick is sold by the buyer, the manufacturer has no right to a mechanic's lien for the part sold, but he has a right to apply payments made on account by the purchaser to the unsecured part of the purchase price. (p. 1006.)

A CHATTEL MORTGAGE not Recorded in Time is not a valid lien on the property covered as against a subsequent creditor before the mortgage is recorded, on the ground that such creditor did not extend credit on the faith of the property covered by the mortgage. (p. 1007.)

CHATTEL MORTGAGES—Notice of Lien.—The fact that an attorney of a corporation knew of a chattel mortgage on property purchased by the corporation does not show notice to a bank which made a loan to the corporation, although such attorney was president of the bank, and the fact that the president of such corporation knew of such lien does not constitute notice to the bank of which he was a director and officer. (p. 1008.)

CHATTEL MORTGAGES—Marshaling Assets.—A chattel mortgagee who fails to record his mortgage in time has no right to compel a subsequent creditor of the mortgagor to first resort to indorsements on such mortgagor's notes, and thus permit the mortgagee to have a large part of such mortgagor's property applied on the mortgage debt. (p. 1009.)

MARSHALING ASSETS—Procedure.—If a creditor makes application to marshal assets and call in creditors to have his claim increased after all of the parties have been heard, and a report made covering all claims without any exceptions being filed, he must make some showing of excusable neglect, inadvertence or surprise, giving an opportunity to all opposing creditors to be heard, or his application must be denied. (p. 1009.)

NEW TRIAL.—Newly Discovered Evidence as ground for a new trial must be such as clearly shows that it might affect the result. (p. 1010.)

Caldwell & Giles, W. P. Greene and McGhee & Richardson, for the appellants.

Sheppards, Greer & Park and E. G. Graydon, for the appellees.

³⁷⁰ **WOODS, J.** This action was brought against Troy Oil Mill Company, and its president and directors, alleging mismanagement and asking the court to take charge of the property of the corporation and administer it for the benefit of creditors and stockholders. Receivers were appointed and it was referred to the master to take proof of claims and to report upon all issues of law and fact. This report has been confirmed by the circuit court, and an order has been made for the sale of the property.

The issues in the appeal are raised by the D. A. Tompkins Company, First National Bank of Greenwood and Georgia-Carolina Brick Company, as to their respective rights as creditors. The Georgia-Carolina Brick Company sold to the Troy Oil Mill Company bricks to the value of two thousand and forty dollars, shipped at various dates from July 1 to October 18, 1904, to be used in the erection of its cotton-seed oil mill. All the bricks were not, however, used in the construction of the mill, but without notice to the brick company a considerable portion of them were sold by the officers of the oil mill com-

pany. On October 13, 1904, a payment of one thousand dollars was made without any direction as to the application by the debtor and credited by the creditor on the general account. The brick company filed a mechanic's lien for the balance of one thousand and forty dollars. The circuit court held the whole sum to be secured by the mechanic's lien, notwithstanding the objection made ³⁷¹ by First National Bank as a creditor that the lien was valid only for the bricks used in the construction of the mill. Our statute gives a lien only "for materials furnished and actually used in the erection, alteration or repair of any building or structure," etc., and there is no reason or authority which could warrant the court in extending the statute beyond its plain words. On this point the circuit court erred.

It was also contended by First National Bank that the credit should be applied to the first items in date on the current account for the bricks, the result of which would be the credit would to a considerable extent extinguish the debt for the bricks actually used, which is admitted to be secured by the lien, and leave the portion of the debt for the bricks furnished but not used unpaid. This position cannot be sustained. The debtor has the right to direct the application of credits, but if he fails to exercise this right, the creditor may make the application at any time before judgment or verdict: *Bell v. Bell*, 20 S. C. 34.

When neither debtor nor creditor makes the application, the court will make it according to its own notions of justice, usually to the unsecured debt or that for which the security is most precarious: *Bell v. Bell*, 20 S. C. 34; *Jones v. U. S.*, 7 How. 681, 12 L. ed. 870; *Field v. Holland*, 6 Cranch, 8, 3 L. ed. 136.

It is true that, as a general rule, credits entered on an account current will be applied to the oldest items first, but this rule is not inflexible, and will not be followed when it would be inequitable to do so. The cases in support of this exception will be found collated in the valuable note, 96 *Am. St. Rep.* 64.

It would be difficult to imagine a case where it would be more inequitable than in this instance to follow the general rule. The creditor kept a single current account, and made a general credit thereon of a payment received without directions from the debtor as to its application, supposing the

bricks furnished by him were all used as supplied in the erection of the oil mill according to the understanding when the contract of sale was made, and that the entire account ³⁷² would be secure under the provisions of the statute allowing the filing of a lien for materials used. The debtor, however, without notice to the creditor, by selling a portion of the bricks, divided the items of the account into two distinct classes—one secured by the lien, the other entirely unsecured. In these circumstances equity requires the application of the credit to the items not secured by the lien; especially as the creditor before judgment has signified his election that it should be so applied.

The D. A. Tompkins Company furnished the machinery for the Troy Mill under a contract which provided it should retain title to the machinery until payment of the purchase money. The date of the contract is May 17, 1904, but it was not recorded until December 9, 1904. It provided that shipments of power plant machinery were to begin July 1, 1904, and of oil mill machinery July 20, 1904. The only evidence of the actual date of delivery of machinery is the statement of the president of Troy Oil Mill that according to his recollection all the machinery was shipped and on the ground on August 24, 1904, on which date a note for five thousand dollars was given to First National Bank by the oil mill company, and the proceeds paid on the machinery. The question is whether a contract made with the D. A. Tompkins Company, being a contract in the nature of a mortgage, not recorded within forty days from the time of its execution or delivery, is a valid lien as against the bank claiming to be a subsequent creditor without notice of the terms of the contract.

It was held by the master and the circuit judge that the bank could not assail the validity of the mortgage contract for failure to record, because it did not extend credit on the faith of the property therein mentioned. As far as we can discover, there is no evidence that credit was not extended on the faith of the machinery; but even if it was not, this could not avail the seller of the machinery. Proof that a subsequent creditor did not even know of the existence of the property covered by an unrecorded mortgage would not ³⁷³ avail the mortgagee, for the reason that the statute makes no such exception in the protection afforded to subsequent creditors without notice. Secret liens ought not to be favored,

and we are not inclined to indulge in any attempts at refinement in the interpretation of the statute in order to protect those who from design or negligence fail to record their papers, and then when disaster comes set them up against subsequent unsecured creditors. But the master and the circuit judge further held that actual notice of the mortgage must be imputed to the bank from the fact that S. H. McGhee, the president of the bank, was also attorney of the Troy Oil Mill, and Dr. Neel, the president of the oil mill company, was a director and a member of the loan committee of the bank.

Mr. McGhee says that he had no notice of the mortgage contract, and did not even know from whom the machinery was bought, when he made the loan, and there is no evidence to the contrary. Dr. Neel says: "I don't remember making any statement about the mill to bank officers when the five thousand dollar note was given. When a loan is made to one individually, or when he is in any way interested or connected with the borrower on the loan board, that one has nothing to do with passing on that loan. Another is appointed in his stead. At the time this loan was made I did not acquaint the bank with any of the facts with reference to the Tompkins purchase." This is also uncontradicted.

In general, notice to an attorney is notice to his client, but obviously notice is not imputed to an attorney in all his personal, professional and official connections from the fact that one of his clients has notice. The bank could not be charged with notice through McGhee, its president, of a mortgage of another corporation of which McGhee was the attorney, when McGhee himself had no notice of such mortgage. Neel, the president of the oil mill company, when procuring a loan for it from the bank, was not acting as a director of the bank or a member of its loan committee, but, on the contrary, his relation and interest were those of ³⁷⁴ a borrower from the bank, and there is no presumption that he informed the bank of the mortgage. The rule imputing to the principal the agent's knowledge, it is said in *Knoblock v. Germania Sav. Bank*, 50 S. C. 290, 27 S. E. 962, is placed by majority of courts, including our own, "on the ground that it is the duty of the agent to communicate to his principal all knowledge which he possesses material to the principal's business, and the presumption that he has done that duty. Under the operation of this reason, what are

sometimes called exceptions or qualifications to the rule have grown up. For example, an agent is not presumed to have communicated to his principal professional confidences received in representing a third person (*Akers v. Rowan*, 33 S. C. 451, 12 S. E. 165), or knowledge acquired while acting for himself or for a third person and not for the principal (same authority), or where the knowledge is such that, according to human nature and experience, the agent is certain to conceal, or where the agent is acting in an adversary relation to the principal, or meditates a fraud against his principal or some third person in his own interest which would be defeated by disclosure." The knowledge of Neel as president of the oil mill company is not, therefore, to be imputed to the bank, though he was one of its directors and a member of its loan committee.

But it is insisted that the D. A. Tompkins Company, at all events, has an equity to require the bank to exhaust the sureties on the note it holds, they being directors of the oil mill company, before assailing the validity of the Tompkins Company's contract as a preferred claim on the machinery. This position is unsound. The true rule is thus stated in 19 *American and English Encyclopedia of Law*, 1264: "The doctrine of marshaling being a rule of equity, and having its foundation in principles of natural justice, its application will not be enforced when it would so operate as to work substantial injustice or injury to any party in interest. Thus, marshaling will not be applied to the detriment of a third person having an equity equal or superior to that of the ³⁷⁵ person seeking to invoke the rule." The Tompkins Company has no equity superior to the sureties. It is true these sureties were directors of the oil mill company, but being sureties they were not primarily liable for the debt. There is no evidence that they had any part in keeping the contract off the record, and it would not be equitable to require them to pay a debt to the exemption of the property of the principal for the benefit and protection of a creditor who had lost his preference by his own negligence.

This disposes of all the questions involved in the appeal except the controversy as to the allowance of a fee to the attorney of the Tompkins Company. Its contract contained a clause providing in case of default the mortgage creditor should have a right "to take possession of the machinery and

other property named, and sell it by private or public sale, after thirty days' advertising, and without process of law, and retain any balance that may be unpaid on all notes, together with interest, traveling expenses, attorney's and other fees connected with collection, and pay purchaser any surplus and collect from purchaser any deficiency."

No fee was claimed or proved before the master, and there was no exception to his report on this point. Upon the hearing of the cause, however, the circuit judge ordered "that the master take testimony and report what is a suitable fee for the attorney of the D. A. Tompkins Company's claim, and have same rank." The First National Bank submits the order was improper, because the amount of claim of the Tompkins Company had been fixed by the report of the master, to which there was no exception. The general rule is that a court of equity may, within its discretion, allow claims to be proved as long as the court has control of the funds from which it is to be paid: *Naylor v. Smith*, 11 Rich. Eq. 259, 78 Am. Dec. 457. But when all parties have been heard, a report has been made purporting to cover all claims, and no exceptions have been filed within the time required by law, a creditor who then makes application to have his claim ³⁷⁶ increased or amended should make some showing of excusable neglect, inadvertence or surprise, and the other parties to the cause whose interests are to be affected should be given full opportunity to be heard as to the propriety of allowing the matter to be reopened, and also as to the merits of the proposed increase or amendment of the claim. The record does not indicate that this showing was made by the Tompkins Company or that other parties in interest were given an opportunity to be heard, and we think the circuit judge erred in this particular. The claim for fees may still be brought before the court in the manner above indicated.

The judgment of this court is, that the cause be remanded to the circuit court for such further proceedings as may be necessary to carry out the views herein expressed.

Per CURIAM. Careful consideration of the petition for rehearing does not disclose any point of law or matter of fact overlooked by the court in the consideration and decision of this cause. The petition for rehearing is, therefore, dismissed.

The motion to further stay the remittitur in order that the D. A. Tompkins Company may move the circuit court for a new trial, on the ground of after-discovered evidence, must also be denied. It does not clearly appear that the new evidence would affect the result; but aside from that, the affidavit fails to satisfy the court that the D. A. Tompkins Company used due diligence to discover this evidence before trial.

The order staying the remittitur is, therefore, revoked.

A Lien for Materials furnished to erect a building ordinarily attaches only where the material furnished has actually been used in the building: *Hunter v. Blanchard*, 18 Ill. 318, 68 Am. Dec. 547; *McGarry v. Averill*, 50 Kan. 362, 34 Am. St. Rep. 120.

The Application of Payments is considered at length in the note to *McWhorter v. Bluthenthal*, 96 Am. St. Rep. 44-82.

EX PARTE PARKER.

[74 S. E. 466, 55 S. E. 122.]

CONTEMPT—Witness Before Legislative Committee—Power of Committee.—A committee appointed under resolution by a state legislature to investigate the affairs of a state dispensary, and empowered to send for persons and papers, and require answers to any questions relevant to such investigation, has power to commit a witness for contempt for refusing to answer a question as to whether another person stated to him that he had dealings with the state dispensary, and had given rebates, or graft, or money, or had improperly influenced the board of directors of the dispensary to give him business. (p. 1015.)

WITNESSES Before Legislative Committees—Evidence—Hearsay—Privileged Communications.—If a legislative committee is appointed to investigate the affairs of a state dispensary with power to compel witnesses to answer any questions relevant to such investigation, a question asked a witness at such investigation as to whether another person who had had dealings with such dispensary had said to the witness that he had given rebates, graft or money, or had improperly influenced the board of directors of the dispensary to give him business, does not call for hearsay evidence, nor can it be excluded on the ground that an answer would violate the implied confidence of a private conversation. (p. 1015.)

EVIDENCE.—Rules of Evidence are Subject to Legislative Control unless the changes go to the extent of the practical denial of a constitutional right. (p. 1017.)

H. J. Haynesworth, for the petitioner.

Frasier & Gaston, for the respondents.

466 WOODS, J. A committee appointed by the General Assembly to investigate the dispensary asked Lewis W. Parker,

a witness testifying before it, a question which he refused to answer, whereupon the committee held him to be in contempt, and ordered its marshal to hold him in custody until he would answer. The witness Parker then sought by habeas corpus proceedings to be released by this court from the custody of the marshal of the committee. Upon the hearing of the return an order was made adjudging the confinement of the petitioner to be lawful and remanding him to the custody of the marshal. We propose now to give the reasons for the court's conclusion that the committee did not transcend its powers in ordering the arrest.

It is necessary to understand, first, the object for which the committee was appointed and the extent of the authority ⁴⁶⁷ conferred upon it. The Senate and House of Representatives on January 31, 1905, passed a concurrent resolution providing for the appointment of three Senators and four members of the House "to investigate the affairs of the state dispensary." The second section of the resolution is important and is, therefore, set out in full: "That said committee be, and is hereby, empowered to send for papers and persons, to swear witnesses, to require the attendance of any parties whose presence shall be deemed necessary, to appoint an expert accountant and stenographer, and to investigate all transactions concerning said dispensary and its management, and to take testimony either within or without the state, and shall have access at all times during their service to all the books and vouchers and other papers of said institution, especially in investigating the following facts:

"(a) Whether or not it is a fact that houses represented by agents who are near relatives of the members of the board of directors receive large orders at each purchase.

"(b) Is it a fact that members of the board of directors are, or have been, agents for certain wholesale houses from which large purchases are made?

"(c) Is it a fact that parties to whom large orders are given are not wholesale dealers but brokers, and that the orders are filled by third persons, thus making the state pay the commissions of the middleman?

"(d) Was it necessary to purchase the large quantity of liquors ordered in December, 1904, to fill demands, and especially the new and fancy goods purchased which is unknown to the trade?

“(e) Are the extraordinary heavy purchases made necessary to the best interest of the dispensary system?

“(f) What is the financial standing of the business, and is it run on the best principles for the interest of the law as originally passed and amended?

“(g) Is it a fact that the state, through the dispensaries, is violating the constitution of 1895, in that it is selling whisky in less quantities than one-half of one pint?

408 “(h) Is it a fact that the state is selling 5's in case goods to its customers and charging them for one quart?

“(i) Is it a fact that certain agents are traveling over the state and offering special inducements to county dispensers to ‘push’ certain brands of liquors, and if so, is it a fact known to the members of the state board of directors?

“(j) Is it a fact that certain requirements of the law are dispensed with by the county dispensers by order of, or by the consent of, the members of the state board of directors?

“(k) Has the whisky which has been recently purchased been ordered out from the dealer, or is it held in reserve for future delivery?

“(l) What is the indebtedness of the dispensary for liquors which have been bought but not delivered?

“(m) And any and all other matters relating to the management of the state dispensary, and of any official or person in relation thereto.

“(n) Is it, or not, a fact that excessive freights have been paid to railroads for transporting liquors into the state, when said liquors could have been shipped into the state by water at less cost to the state?

“(nn) Whether there is any warrant of law or authority for the establishment and conduct of what is commonly known as ‘beer dispensaries,’ as they are now and have been conducted?”

After the committee had been appointed and entered upon the investigation, the General Assembly, on January 26, 1906, enacted a statute intended to enlarge its powers, and to remove any doubt as to its right to exercise the powers which the concurrent resolution had purported to confer. Only the preamble and the first and second sections of the statute are relevant to this inquiry: “Whereas, a committee has been appointed to investigate the state dispensary under the concurrent resolution of the General Assembly, dated the thir-

first day of January, 1905; and whereas, in the progress of the work of the said committee, some doubt has arisen as to the power of the said committee in the discharge of their ⁴⁶⁹ duties; and it being provided in section 5 of said concurrent resolution that the said committee should apply to the General Assembly for such other power and authority as the circumstances arising during this investigation may seem to require; therefore,

"Section 1. Be it enacted by the General Assembly of the State of South Carolina, That the Committee heretofore appointed under the terms of the concurrent resolution, dated the 31st day of January, 1905, or any other committee or committees that may be appointed, are hereby authorized and empowered to elect a marshal, who, upon being sworn, shall be and become a peace officer of the state and invested with all the power of sheriffs and constables in the service of any and all process issued by the committee aforesaid, and with the power to arrest and imprison upon the order of the said committee any and all persons who shall fail and refuse to obey any legal order of the said committee, or who shall be guilty of any disorderly conduct in the presence of said committee during any session thereof, or who shall be guilty of any contempt of said committee.

"Sec. 2. The said committee be, and are hereby, authorized and empowered to call before them by summons or notice, in such form as the committee may adopt, and to be served by the marshal of said committee, or such other officer of the state as may be by the committee required, such person or persons as the committee deem proper, and to require such person or persons to answer, upon oath, any and all questions that the committee may deem relevant and may propound to him or them; and upon the failure or refusal of such person or persons to obey such summons or notice, or to answer such question or questions, such person or persons shall be deemed to be in contempt of the authority of said committee, and may be imprisoned upon the order of the said committee in the common jail, to be there held until he or they shall comply with the order of the said committee: Provided, That no testimony given by said witnesses shall be used against them in a criminal prosecution."

⁴⁷⁰ Under the authority thus conferred, Lewis W. Parker was summoned by the committee of investigation and sworn as a witness. After testifying to the fact that he had con-

versed with a person who told the witness he had dealt with the dispensary, the witness refused to answer this question: "Mr. Parker, wasn't this statement that this party made to you to the effect or of the nature that he had given rebates or graft or money in some improper way or had improperly influenced this board of directors to give him business?" The witness earnestly contended before the committee, and in this court in the habeas corpus proceedings, that he should be excused from answering, (1) because he could not be required to violate the implied confidence of a private conversation, and (2) because the evidence sought to be adduced was hearsay and, therefore, not admissible. Clearly, neither of these reasons is sufficient.

The power of the General Assembly to obtain information on any subject upon which it has power to legislate, with a view to its enlightenment and guidance, is so obviously essential to the performance of legislative functions that it has always been exercised without question. After the decision of the supreme court of the United States in the case of *Kilbourn v. Thompson*, 103 U. S. 168, 26 L. ed. 377, some doubt seems to have arisen as to the right of the Congress or even of a state legislature in seeking such information to imprison contumacious witnesses. In that case, it is true, the right of a committee of the House of Representatives to imprison a witness for refusing to answer was denied, but the case presented peculiar features. The committee was not appointed and was not conducting its investigation under a statute or resolution of the Congress but of only one branch of the legislative department, which undertook to confer upon it the power to send for persons and papers. The investigation related to a particular claim of the federal government, the status of which, having been already fixed by a settlement, could not have been altered by legislation. And in the view of the court the question propounded to the witness involved⁴⁷¹ merely an inquiry into the private affairs of the citizen in a matter outside of the domain of the legislative department and within the jurisdiction of the judicial department; the court holding in this connection that the judicial power residing in the British house of commons was not conferred on the Congress by the constitution, and hence precedents from the English courts sustaining the power of a committee of the house of commons to punish for contempt were not applicable.

Distinguishing the case of *Kilbourn v. Thompson*, in some of the features above mentioned, the supreme court of the United States subsequently held that a committee of the Senate had the right under a resolution of that body to require a broker to answer whether any senator had employed the firm of which he was a member to buy or sell shares of stock the price of which might be affected by the Senate's action. The investigation having been instituted to inquire into charges made in newspapers of bribery of senators, the court held the subject matter of the inquiry was within the range of the constitutional powers of the Senate: *In re Chapman*, 166 U. S. 661, 17 Sup. Ct. Rep. 677, 41 L. ed. 1154.

The case now under consideration is much stronger than the *Chapman* case. In the first place, it is to be observed the Congress possesses no powers of legislation except those conferred by the constitution of the United States, while the General Assembly is invested with all the legislative power of the state except that denied by the constitution. The dispensary is a public institution, created by the General Assembly, through which it undertakes to control and conduct the sale of liquor in the entire state. The principal officers of the dispensary are elected by the General Assembly and directions for its management are laid down with particularity in the statutes. The business is so enormous and the problems it presents are so novel and difficult and vital to the public welfare that not only the fullest and widest information as to the practical operations of statutes enacted for its control, and as to the competency and honesty ⁴⁷² of its officers, is essential to wise legislative action, but it is also important that the General Assembly should be advised as to the methods used or attempted by those who deal with the dispensary by the sale of liquor or otherwise. Offering a bribe to a public officer is a criminal offense under the laws of the state; and it is difficult to see any support for the position that a statement of one engaged in selling or seeking to sell to the dispensary to the effect that he had given or even offered bribes to its board of directors would be beyond the legitimate scope of legislative inquiry. It concerns the General Assembly to know of the dishonest dealings, if they exist, of those who sell to the dispensary almost as much as to know of such dealings by those who buy for it. In this view the answer to the question here asked could not be objectionable as hearsay, even

applying the rules of evidence obtaining in strictly judicial tribunals.

But aside from this, rules of evidence are subject to legislative control unless the changes go to the extent of the practical denial of a constitutional right. Here the statute is very broad. It does not relate to the trial of a cause involving the life, liberty or property of an individual, but provides for legislative investigation of a great public enterprise, and it requires answer to any question the committee deems relevant to such investigation. This discretion of the committee was, of course, subject to the limitation that a witness could not be compelled to answer questions when such compulsion would be in derogation of a constitutional right; and it may be that a reasonable construction of the statute is that the committee's discretion was intended to be subject also to the rules of evidence as to the exclusion of privileged communications, and of evidence as to facts affecting the witness personally, falling under his ordinary privilege, but upon this last point we express no opinion. It is not pretended that the witness was required to disclose a privileged communication, or that any personal privilege or constitutional right of the witness himself was involved in requiring an answer to the question asked. As to the position ⁴⁷³ that the witness should not have been required to repeat a private conversation, it is hardly necessary to say that the law cannot take account of purely sentimental considerations as against the public interests or substantial rights. We conclude there is no ground for the interference of the court in behalf of the witness.

The conclusions reached as to the power of legislative committees are sustained by the following authorities: *Anderson v. Dunn*, 6 Wheat. 204, 5 L. ed. 242; *In re Chapman*, 166 U. S. 661, 17 Sup. Ct. Rep. 677, 41 L. ed. 1154; *Burnham v. Morrissey*, 14 Gray, 226, 74 Am. Dec. 676; *Keeler v. McDonald* (N. Y.), 2 N. E. 615; *People v. Sharp*, 101 N. Y. 427, 1 Am. St. Rep. 851, 14 N. E. 319; *In re Gunn*, 50 Kan. 155, 32 Pac. 470, 948, 19 L. R. A. 519.

Gary, J., did not sit in this cause.

A Witness Who Refuses to Testify before a legislative committee may be committed for contempt: People v. Sharp, 107 N. Y. 427, 1 Am. St. Rep. 851; *Burnham v. Morrissey*, 14 Gray, 226, 74 Am. Dec. 676.

INDEX TO THE NOTES.

Attorneys at Law, disbarment of, conviction, whether necessary to, 842, 843.

disbarment of, crimes committed in a nonprofessional capacity, 840-842.

disbarment of, crimes committed in a nonprofessional capacity, exception to the general rule, 842.

disbarment of, enumeration of grounds of does not limit the general powers of the court, 842.

disbarment of, for crimes committed in a professional capacity, 840.

disbarment of, power of is inherent in courts, 839.

disbarment of, statutes of limitation do not apply to proceedings for, 843.

disbarment of, statutes relating to and their construction, 840-842.

Constitutional Law, conditional statutes take effect upon the happening of some subsequent event, 317.

intoxicating liquors, local option laws relating to, when valid, 324.

legislative power, delegation of, to what extent permissible, 317.

local option laws, decisions declaring to be valid, 318, 319.

local option laws relating to bond issues, 323.

local option laws relating to intoxicating liquors, 324.

local option laws relating to municipal affairs, 321.

local option laws relating to schools, 319.

local option laws relating to stock and fence laws, 323.

local option laws relating to the division of counties, 320.

local option laws relating to the removal of county seats, 321.

local option laws, when valid, 317.

municipal corporations, local option laws in, validity of, 321-323.

statutes dependent upon the vote of the people, validity of, 318.

Corporations, expulsion of members of, classification of cases warranting, 25, 26.

expulsion of members of, for breaches of contract, 29.

expulsion of members of, for defamation of the corporation or its members, 28.

expulsion of members of, for disorderly conduct, 29.

expulsion of members of, for engaging in liquor business, 29.

expulsion of members of, for questionable business practices, 29.

expulsion of members of, grounds for, 27.

Corporations, expulsion of members of nonstock corporations formed for pecuniary profit, 25.

expulsion of members of, notice and hearing, right of members to, 27.

expulsion of members of, power of may be delegated to the board of directors, 26.

expulsion of members of, rules to govern, exercise of power of, 26.

expulsion of members of, source of power of, 25.

expulsion of members of, when corporation is formed for pecuniary profit, 25.

power of to expel members, 24.

Divorce, children, power of court after granting divorce to modify decrees as to provision for support of, 703.

duty of father to maintain children awarded to the mother, 700.

Evidence. See Photographs.

Intoxicating Liquors, control of traffic in belongs to the police power, 298.

control of traffic in was vested in the original states before the adoption of the constitution of the United States, 298.

delegation by a state of the power to regulate, 299.

license to deal in is not in contract, 302.

license to deal in may be revoked, 302.

municipal corporations, charter, provisions of respecting, 302.

municipal corporations, delegation to of the power to regulate traffic in, 298.

municipal corporations, general laws, when take away power of to regulate traffic in, 300.

municipal corporations, interpretation of charter provisions respecting, 302.

municipal corporations, judicial control of the power of to regulate traffic in, 300.

municipal corporations, license to retail, power of to refuse, 302.

municipal corporations, limits upon power of to regulate traffic in, 299.

municipal corporations, ordinances of forbidding the employment of women in places where sales of are made, 301.

municipal corporations, ordinances of regulating, invalid in part, when invalid as a whole, 303, 304.

municipal corporations, ordinances of regulating, method of enforcing, 303.

municipal corporations, ordinances of regulating, reasonableness of, 303.

municipal corporations, ordinances of regulating will be so construed as to sustain them, 304.

municipal corporations, ordinances of regulating traffic in, when do not conflict with the constitution, 301.

Intoxicating Liquors, municipal corporations, ordinances of regulating, when do not conflict with the general laws, 301.
 municipal corporations, power of to license, whether includes power to regulate, 301.
 municipal corporations, power of to pass ordinances respecting includes power to enforce them, 302.
 municipal corporations, power of to prohibit traffic in includes power to regulate, 302.
 municipal corporations, power of to regulate sales of, when implied, 299.
 municipal corporations, regulation of traffic in notwithstanding licenses authorizing sale of, 301.
 regulation of traffic in by the legislature, 298.
 regulation of traffic in is constitutional, 298.

See Constitutional Law.

Landlord and Tenant, abandonment, acceptance of, what amounts to, 718.
 abandonment, damages recoverable for by landlord after reletting the premises, 720.
 abandonment, landlord need not relet premises to reduce the amount of the damages, 719.
 abandonment, landlord's entering and caring for property is not an acceptance of, 718.
 abandonment, possession taken by landlord, when amounts to acceptance of, 718.
 abandonment, receiving and retaining the keys, when amounts to an acceptance of, 719.
 abandonment, reletting the premises to others may be for the account of the tenant, 719, 720.
 abandonment, reletting the premises, when amounts to an acceptance of, 720.
 abandonment, reletting the premises without an agreement of the tenant, 721.
 lessee cannot relieve himself from liability by abandonment of premises, 717.
 surrender of lease and premises, what amounts to, 722.
 surrender of premium by operation of law, effect of, 717, 718.
 surrender of premises may be by agreement or by operation of law, 717.
 surrender of premises, what amounts to, 717.

Local Option Laws. See Constitutional Law; Intoxicating Liquors; Municipal Corporations.

Municipal Corporations. See Intoxicating Liquors.

Parent and Child, divorce, duty of supporting children after, 700-703.
 divorce, power of court after to provide for support of children, 703.

- Parent and Child**, duty of supporting children awarded to mother in divorce, 700, 701.
support of children, death of father does not relieve his estate of duty of, 701.
support of children, duty of father after divorce, 700, 701.
support of children, duty of father who has obtained divorce from mother for her misconduct, 702.
support of children, second husband of mother, when cannot recover of father for, 702, 703.
- Partition**, by a grantee in severalty of a part only of the lands of the cotenancy, 81.
of a part only of the property of the cotenancy, 80.
parties to suits for, 81.
right to join two or more parcels in suits for, 81.
where one of the cotenants has conveyed a part of the property in severalty, 80, 81.
- Photographs**, care in taking, proof of, when necessary, 440, 441.
competency of persons to testify as to correctness of, 441.
evidence, admissibility of as in cases of homicide, 438, 439.
evidence, general admissibility of in, 438.
evidence, discretion of the trial court in admitting or excluding as, 441.
evidence, preliminary evidence, necessity for before admitting as, 439.
evidence, what preliminary testimony necessary to warrant the admission of as, 439, 440.
of documents, admissibility of in evidence, 438, 439.
of handwriting, admissibility of in evidence, 440.
of real property, admissibility of in evidence, 438.
of the scene of a wreck, admissibility of in evidence, 438, 439.
X-ray, admissibility as of evidence, 442.
- Police Power**, liquor, control over, authorized exercise of, 298.
- Remaindermen and Life Tenants**, duties of toward each other, distinction dependent upon whether the estates were acquired by purchase or devise, 450.
local assessments, respective duties of in the payment of, 450.
remedies of the former where the latter fail to pay the taxes, 451.
tax title, the latter cannot acquire as against the former, 449.
taxes, respective duties of in the payment of, 448, 449.
- Taxes**, curtesy, tenant by, duty of to pay, 450.
dower, tenant in, duty of to pay, 450.
life tenant cannot acquire tax title as against remainderman, 449.
life tenant, duty of to pay, 448.
life tenant, liability of to pay is restricted to the income of the property, 449.
remedies where the tenant for life fails to pay, 451.

- Voluntary Associations**, expulsion of members by, grounds for, 27.
 expulsion of members by, proceedings for, 27.
 power to expel members, 24.
 power to expel members, source or basis of, 27.
- Wills**, acknowledgment of need not be made by the witnesses at the same time, 213.
 acknowledgment of to the witnesses, form and sufficiency of, 214, 215.
 attestation and subscription, differences between, 210.
 attestation clause, absence of is not fatal, 231.
 attestation clause of, acknowledgment of deed, whether may be taken as a part of, 233.
 attestation clause of, effect of as evidence, 238, 239.
 attestation clause of, form of, 231.
 attestation of, absence of clause of, 231.
 attestation of, absence of clause of and its effect, 231, 232.
 attestation of, and subscription to, time of, 224.
 attestation of, at the foot of, what does not amount to, 223.
 attestation of, before the testator signs, 233, 234.
 attestation of, by witnesses knowing nothing of the testamentary capacity of the executor, 233.
 attestation of, effect of as evidence, 238, 239.
 attestation of, order of signing by the testator and witnesses, 234.
 attestation of, physical presence of the testator at, what amounts to, 226.
 attestation of, place where witness may sign, 223.
 attestation of, presence of testator at, necessity for, 224.
 attestation of, presence of testator at, what amounts to, 226.
 attestation of, presence of the testator at, where he is blind, 227.
 attestation of, publication as a part of, 235.
 attestation of, requests to the witnesses, 236.
 attestation of, subscription is involved in, 210.
 attestation of, testamentary capacity must exist at the time of, 225, 226.
 attestation of, testator must be aware of, 225.
 attestation of, testator must be conscious at the time, 225.
 attestation of, where testator cannot see the witnesses, 237, 238.
 attestation of, whether must be signed by the testator, 227.
 attesting and witnessing of, construction of statutes respecting, 212.
 attesting and witnessing of interlineations and alterations, 211.
 attesting and witnessing of must be by the number of witnesses required by the statute, 212.
 attesting and witnessing of, necessity for, 211.
 attesting and witnessing of, purposes of, 209, 210, 224, 225.

- Wills, attesting and witnessing of, substantial conformity to the law is all that is required, 212.**
- contents of need not be known to the witnesses, 231.**
- evidence of execution as against the testimony of the subscribing witnesses, 237.**
- evidence of execution, effect of testamentary clause as, 238.**
- evidence of execution of subscribing witnesses and its effect, 236, 237.**
- evidence of execution of subscribing witnesses, when may be dispensed with, 236, 237.**
- nuncupative need not be witnessed nor attested, 211.**
- object of requiring the attestation of, 224.**
- of personalty, attesting and witnessing, 211.**
- publication of by another at the request of the testator, 219.**
- publication of holographic, 220.**
- publication of, necessity for, 218.**
- publication of to the witnesses, sufficiency of, 216, 217.**
- publication of to the witnesses, where unnecessary, 220.**
- publication of, when complete, 219.**
- publication of where the testator cannot at the time speak, 218.**
- request to the witnesses, sufficiency of, 216.**
- signature to, witnesses, whether must see, 221.**
- signing of, whether must be in the presence of the witnesses, 213.**
- subscription of by the witnesses, necessity for, 221.**
- witnesses, absence or death of, entitles the proponent to offer other evidence of, 238, 239.**
- witnesses, acknowledgment by them of their signature made to the testator, 230.**
- witnesses, acknowledgment of to, sufficiency of, 214, 215.**
- witnesses, acts of, whether must be at the request of the testator, 217.**
- witnesses, contents of need not be known to, 231.**
- witnesses, declaration by a testator to that it is a fake will, 231.**
- witnesses, in a room other than that in which the testator is, 239.**
- witnesses, inability of the testator to see them, 228, 229.**
- witnesses must sign as such, 231.**
- witnesses, necessity of their action in each other's presence, 230, 231.**
- witnesses, necessity of their being where the testator can see them, 227, 228.**
- witnesses, necessity of their knowing the character of the instrument witnessed, 220.**
- witnesses need not all subscribe at the same time, 224.**
- witnesses need not know one another, 233.**
- witnesses out of the sight of the testator, 228, 229.**
- witnesses, opinions of as evidence, 238.**
- witnesses, place where may sign, 222.**

- Wills, witnesses, presence of at the signing of, 214, 215.**
- witnesses, presence of, burden of proof respecting, 230.
- witnesses, obstructions between and the testator which will prevent him from seeing them, 228.
- witnesses, presence of where the testator does not see them though he might do so, 228.
- witnesses, proving by the testimony of one only, 236.
- witnesses, publication of the will to and its sufficiency, 217-221.
- witnesses, request to act as such, by whom may be made, 215, 216.
- witnesses, subscribing by their mark, 222.
- witnesses, subscription by, mode of, 222.
- witnesses, subscription by must be in their own name, 222.
- witnesses of, testimony of, effect of as compared with that of other witnesses, 237.
- witnesses of, testimony of must be taken before calling other witnesses, 236.
- witnesses of, testimony of without the, 237.
- witnesses to, credible, who are, 211.
- witnesses to, number required, 211, 212.
- Am. St. Rep., Vol. 114—65

•

•

•

•

•

•

•

•

•

•

•

•

•

INDEX.

ACCORD AND SATISFACTION.

ACCORD AND SATISFACTION.—Where a Son has turned over to his mother all his earnings before and after his majority, a repayment to him of a portion of the fund, without an accounting or a severance of the family relations, at a time when he contemplates marrying and going into business for himself, does not amount to a satisfaction of his interest. (Iowa.) *Jacobs v. Jacobs*, 402.

ACCOUNTING.

EQUITY has no Jurisdiction of a Suit for an Accounting in the absence of an allegation that the account is long and complicated. (Or.) *Kaston v. Paxton*, 871.

ACCRETION.

See Waters and Watercourses, 1, 2.

ACTIONS.

See Election of Remedies.

ADVERSE POSSESSION.

1. **ADVERSE POSSESSION—Color of Title.**—Though Jurisdiction is not obtained over the person of the defendant in divorce proceedings, a sheriff's deed on a sale under execution based on a personal money judgment for alimony is color of title upon which adverse possession may be based. (Mo.) *Joplin Brewing Co. v. Payne*, 770.

2. **CONVEYANCES—Color of Title.**—Any instrument in writing which purports to convey a certain tract of land, describing it, constitutes color of title in the grantee. (Mo.) *Joplin Brewing Co. v. Payne*, 770.

3. **ADVERSE POSSESSION—Color of Title.**—If a person and those under whom he claims title were in actual, adverse, notorious and exclusive possession of a certain lot of land for ten consecutive years or more under color of title to the whole lot, or to part of the lot, claiming title to the whole, he becomes the absolute owner of the whole lot. (Mo.) *Joplin Brewing Co. v. Payne*, 770.

4. **ADVERSE POSSESSION—Homesteads.**—A statute providing that no action for the recovery of lands or the possession thereof shall be commenced by any person unless he was, or those under whom he claims were, seised or possessed, within ten years prior to the action, applies to lands claimed as a homestead. (Mo.) *Joplin Brewing Co. v. Payne*, 770.

See Dower, 2.

AGENCY.

See Principal and Agent.

ALIENATION OF AFFECTIONS.

See Husband and Wife, 3.

ALIMONY.

See Divorce.

APPEAL AND ERROR.

1. **APPEAL AND ERROR.**—The Propriety of an Order Appointing a Receiver will be reviewed only on an appeal from that order, and not on an appeal from the final judgment. (Wash.) *Jones v. North Pacific Fish etc. Co.*, 131.

2. **APPEAL AND ERROR.**—The Payment into Court of the Amount Required to set off one judgment against another does not prevent an appeal from the decree, where the court had not jurisdiction to enter it, because the defendant being solvent, there was an adequate remedy at law. (Or.) *Whelan v. McMahan*, 906.

3. **APPEAL AND ERROR.**—Question not Presented by the Record.—On an appeal in an action to enjoin an execution sale, the court cannot consider whether the plaintiff ought to be subrogated as against the defendant to the right of the mortgagee to have the property sold to satisfy his lien. (Or.) *Kaston v. Storey*, 912.

4. **APPEAL AND ERROR.**—Motion for a New Trial on the Ground that the Verdict was Contrary to Instructions is equivalent to a motion on the ground that the verdict is contrary to law, and need not be discussed where, for other reasons, the case must be tried over. (Ga.) *Seaboard Air Line Ry. v. Bradley*, 196.

5. **APPEAL AND ERROR.**—An Exception on the Ground that Evidence is Insufficient to support a finding, and that the same is contrary to the evidence, is sufficient where the finding relates to the amount allowed as interest on a promissory note, to raise the question that such interest should, under the laws of another state, where the note was executed, have been computed at a different rate. (Wash.) *Bank v. Doherty*, 123.

6. **APPEAL AND ERROR.**—Demurrer—Conclusions of Law.—A demurrer to the complaint and an exception to the conclusions of law present the same question when the facts found are the same as those alleged in the complaint. (Ind. App.) *Western Indiana Coal Co. v. Brown*, 367.

7. **APPEAL.**—Claim of Variance.—If a motion to direct a verdict on the ground that there is a material variance between the declaration and the proof is denied, the only question preserved for the consideration of the supreme court on appeal is whether the evidence, when considered together with all the reasonable inferences to be drawn therefrom, fairly supports the cause of action as set out in the declaration. (Ill.) *Chicago Union Traction Co. v. Bret-Hauer*, 352.

8. **APPEAL AND ERROR.**—Evidence Which is not Harmful.—The admission of evidence that there is a custom when money is lent to an individual to examine the records in the probate court or in the registries of death, to see whether the person who is to receive the money is dead, does the defendant no harm in an action against a bank for paying a check on the indorsement of the name of the payee

forged after his death. (Mass.) *Murphy v. Metropolitan National Bank*, 595.

9. APPEAL AND ERROR.—Evidence not Annexed to Any Bill of Exceptions will not be considered on appeal, though reduced to writing and appearing in the transcript. (La.) *City of New Orleans v. Smythe*, 566.

10. APPEAL AND ERROR.—Reversal, Order for Restitution Which may be Made Thereon.—If, on appeal from a judgment foreclosing a mortgage, it appears that the judgment was for a sum in excess of that due, and that a sale has been made thereunder pending an appeal, and a deficiency judgment has been entered, the appellate court may provide that the respondent satisfy the deficiency judgment and pay into court such an additional sum as will, when added to the amount of the deficiency judgment, equal the excess for which the recovery was permitted by the lower court, and that the sale may stand, but if the respondent does not comply with such order, then that the judgment appealed from be vacated and a new judgment be entered in harmony with the opinion expressed by the court and a new sale be made thereunder. (Wash.) *Bank v. Doherty*, 123.

ARGUMENT OF COUNSEL.

See Trial, 5.

ASSIGNMENT.

ASSIGNMENT.—A Cause of Action for a Personal Tort is not assignable before judgment. (Minn.) *Boogren v. St. Paul City Ry. Co.*, 691.

ATTACHMENT.

See Garnishment.

ATTORNEY AND CLIENT.

Lien of Attorney—Dismissal of Action by Client.

1. ATTORNEY'S LIEN on or Equitable Interest in Action for Tort.—Where a client agrees to pay his attorney a portion of his recovery in an action for personal injuries, in consideration of the attorney prosecuting the suit, and paying the expenses thereof, and on the trial the jury disagrees, and the case is continued and set for another time, the attorney does not acquire a lien on the cause of action nor become an equitable assignee of an interest therein. (Minn.) *Boogren v. St. Paul City Ry. Co.*, 691.

2. ATTORNEY AND CLIENT.—Dismissal of Action by Latter.—Where a client agrees to pay his attorney a portion of his recovery in an action for personal injuries, in consideration of the attorney prosecuting the suit and paying the expenses thereof, and on the trial the jury disagreed, and the case is continued and set for another time, the client may then, without the consent of the attorney, compromise the claim, and dismiss the action. (Minn.) *Boogren v. St. Paul City Ry. Co.*, 691.

Professional Misconduct.

3. ATTORNEYS AT LAW.—Preparing False Affidavit.—It is professional misconduct on the part of an attorney to prepare and

forward to his client for verification an affidavit showing the disqualification of the judge, he having no reason to believe such disqualification to exist and his real object being to procure a continuance of the cause. (Mont.) Carleton, In re, 826.

4. **ATTORNEYS AT LAW**—*Procuring an Allowance for Attorneys' Fees Notwithstanding an Agreement for a Division of Alimony.*—If an attorney representing a woman suing for divorce, and having an agreement with her to divide with him any alimony which may be awarded her, obtains an allowance for attorneys' fees and an award for alimony without disclosing such agreement, he is guilty of professional misconduct. (Mont.) Carleton, In re, 826.

Disbarment of Attorney.

5. **ATTORNEYS AT LAW**—*Disbarment for Acting for Both Parties.*—If a pregnant unmarried woman applies to an attorney stating the name of the man chargeable with her condition and her wish to compel such proceedings as will result in the legitimacy of her child when born, and the attorney advises that a marriage be brought about, to be followed by subsequent proceedings for its annulment, and thereupon brings about the marriage, with an agreement for its annulment and for the payment of certain sums to the woman, and thereafter, as attorney for the husband, commences suit for such annulment, obtaining from the wife a paper designating an attorney to appear in the suit for her, and the suit is prosecuted to judgment in favor of the husband, without informing the court of the agreement or the facts preceding the marriage, such attorney is guilty of acting for both parties and of professional misconduct. (Mont.) Carleton, In re, 826.

6. **ATTORNEYS AT LAW**—*Disbarment of for Criminal Acts in Advance of Prosecution and Conviction Thereof.*—If a crime alleged to have been committed by an attorney at law falls clearly without the sphere of official duty, it is discretionary with the court to hear and determine it on the merits prior to a criminal prosecution and conviction, and it will refuse to entertain the accusation in the absence of urgent reasons why it should do so; but if the misconduct charged as the ground for removal falls within the sphere of official duty, it is of no moment that it amounts to an offense against the criminal laws, nor whether criminal proceedings have been instituted and prosecuted to a conclusion. (Mont.) Thresher, In re, 834.

7. **ATTORNEYS AT LAW**—*A Proceeding for the Disbarment of an Attorney is in No Sense a Criminal Prosecution*, though the alleged causes therefor are criminal acts. Its purpose is to ascertain whether the accused is worthy of confidence and possessed of that good moral character which is a condition precedent to the privilege of practicing law and of continuing in the practice thereof. (Mont.) Thresher, In re, 934.

8. **ATTORNEYS AT LAW**—*Disbarment of for Forgery and Misappropriation of Money.*—If an attorney intrusted by a client with a check payable to a justice of the peace and intended to provide funds to perfect an appeal forges the name of the justice on such check and thereby draws the amount specified in the check, and appropriates the money to his own use, proceedings for his disbarment will be sustained though no criminal prosecution has been instituted against him. (Mont.) Thresher, In re, 834.

9. **ATTORNEY AT LAW**—*Disbarment of for Withdrawing His Client's Deposit in Court and Misappropriating It to His Own Use.*—

An attorney who, without the authority or knowledge of his client, obtains an order of court permitting the withdrawal of a deposit and appropriates it to his own use, should be disbarred though no criminal prosecution against him has been sustained or even commenced. (Mont.) *Thresher, In re*, 834.

Note.

Attorneys at Law, disbarment of, conviction, whether necessary to, 842, 843.

disbarment of, crimes committed in a nonprofessional capacity, 840-842.

disbarment of, crimes committed in a nonprofessional capacity, exception to the general rule, 842.

disbarment of, enumeration of grounds of does not limit the general powers of the court, 842.

disbarment of, for crimes committed in a professional capacity, 840.

disbarment of, power of is inherent in courts, 839.

disbarment of, statutes of limitation do not apply to proceedings for, 843.

disbarment of, statutes relating to and their construction, 840-842.

BANKS AND BANKING.

National Banks.

1. BANKS AND BANKING—National Banks—Penalties.—The power of a national bank to erect an office building and to let out offices therein can be questioned only by proceedings instituted by the United States government, and not by a tenant in such building. (Pa.) *Farmers' Deposit Nat. Bank v. Western etc. Co.*, 949.

Check as Assignment of Fund—Refusal to Pay.

2. BANKS AND BANKING—Right of Bank to Refuse to Pay Check.—A bank has no right to refuse payment of a check in the hands of a bona fide indorsee, on the ground that the drawer of the check has notified such bank that the check was obtained by fraud, and that there was a failure of consideration. (S. C.) *Loan and Savings Bank v. Farmers' etc. Bank*, 991.

3. BANKS AND BANKING—Check as Assignment of Deposit.—A check on a bank operates as an assignment, pro tanto, of the drawer's deposit, account or fund, in the bank, and there is privity between the bank having the necessary fund on hand and the check-holder, on presentation of the check for payment, so as to give the holder a right of action against the bank for wrongfully refusing to pay it. (S. C.) *Loan & Savings Bank v. Farmers' etc. Bank*, 991.

4. BANKS AND BANKING—Checks—Countermanding Payment. The drawer of a check cannot countermand its payment, if the check has passed into the hands of a bona fide holder, by notifying the bank that the check was obtained by fraud and that there was a failure of consideration. (S. C.) *Loan & Savings Bank v. Farmers' etc. Bank*, 991.

5. BANKS AND BANKING—Refusal to Pay Check—Interpleader.—A bank on which a check has been drawn has no right to deposit the money in court, and demand that the drawer be made a party defendant and required to litigate with the holder the bona

fides of the check. (S. C.) *Loan & Savings Bank v. Farmers' etc. Bank*, 991.

6. BANKS AND BANKING—Countermand of Check—Remedy.—The drawer of a check contesting its payment must not only give notice to the bank, but must also take timely proceedings in court, by injunction or otherwise, to arrest the payment of the check, and the bank must be allowed a reasonable time, after such notice, to await the action of the drawer, and to decide whether it will risk suit by the holder or drawer of the check. (S. C.) *Loan & Savings Bank v. Farmers' etc. Bank*, 991.

Forged Indorsement—Knowledge of Signature—Identification of Payee.

7. BANKING—Forged Indorsement—Recovery of Money Paid.—If an indorsement is forged on a check, and the check is paid by a bank which then indorses it and collects it from the drawee bank, and thereafter the payee recovers judgment against the drawee bank on account of the payment, the latter may recover from the other bank the amount of such judgment, together with the expenses and reasonable attorney fees incurred in defending the suit, it having notified such bank of the suit and requested it to come in and defend, which it neglected to do. (Kan.) *Wellington National Bank v. Robbins*, 523.

8. BANKING—Burden of Showing Payment of Check to Proper Person.—A Bank Paying the Check of a Depositor must assume the burden of proving that the payment was to the person named in the check, or that the drawer was guilty of such negligence in regard to the payment as precludes him from recovery. (Mass.) *Murphy v. Metropolitan National Bank*, 595.

9. BANKING—Payment of Check on False Indorsement, When does not Charge the Drawer.—If M., purporting to represent B., who is in fact dead, applies for a loan, and the lender draws his check in favor of B. and delivers it to M., who procures another person to represent B. and to indorse the check and present it for payment, the payment to him is entirely unauthorized, and if made and charged to the account of such lender, he may recover of the bank therefor. (Mass.) *Murphy v. Metropolitan National Bank*, 595.

10. BANKING.—The Death of the Drawee of a Check before it is drawn, not known to the drawer, does not enlarge the drawee's rights, nor justify its payment to another person on his forged indorsement of the drawee's name. (Mass.) *Murphy v. Metropolitan National Bank*, 595.

11. BANKING—Duty of Identifying Payee of Check.—A banker on whom a check is drawn must ascertain at his peril the identity of the person named as payee. (Mass.) *Murphy v. Metropolitan National Bank*, 595.

12. BANKING—Negligence, When not Attributable to Drawer of Check.—The fact that the drawer of a check names as payee a person then deceased, but whose death is unknown to such drawer, does not show the drawer to be guilty of such negligence as precludes his recovery of a bank paying such check on a forged indorsement to one personating the drawee. (Mass.) *Murphy v. Metropolitan National Bank*, 595.

13. BANKING.—The Drawer of a Check Has no Duty to Ascertain the Identity of the Person to Whom It Has Been Paid. The duty

rests on the bank on which the check is drawn. (Mass.) *Murphy v. Metropolitan National Bank*, 595.

14. **BANKING.**—The Duty of a Depositor, on the Return of His Pass-book, is to do what a reasonable person would be expected to do, to see whether his account is correct; but if there is nothing to put him on inquiry as to the identity of persons to whom payments of checks have been made, he has no duty to investigate that subject, or to see that the indorsement of checks in the names of the payees are not forgeries. (Mass.) *Murphy v. Metropolitan National Bank*, 595.

15. **BANKING.**—Delay in Notifying a Bank that a Check has been paid to a person other than the payee and on a forged indorsement does not impair the drawer's right to recover of the bank if there is no evidence that the bank was prejudiced by such delay. (Mass.) *Murphy v. Metropolitan National Bank*, 595.

16. **BANKING.**—Presumption of Knowledge of Signature.—That the drawer knows the signature of the drawee of a draft is conclusively presumed only when the person receiving the money has contributed in no way to the success of the fraud or the mistake of fact upon which payment is made. (S. C.) *Ford v. People's Bank*, 986.

17. **BANKING.**—Recovery of Money Paid on Forged Check.—To entitle the holder of a forged check to retain the money obtained thereon, he must be able to show that the whole responsibility of determining the validity of the signature was upon the drawee, and that the negligence of such drawee was not lessened by any disregard of duty on the part of the holder, or by failure of any precaution which, from his implied assertion, in presenting the check as a sufficient voucher, the drawee had the right to believe he had taken. (S. C.) *Ford v. People's Bank*, 986.

18. **BANKING.**—Unrestricted Indorsement of a draft or check, and presentation thereof to the drawee, is a representation that the signature of the drawer is genuine. (S. C.) *Ford v. People's Bank*, 986.

BASTARDS.

1. **CHILDREN, Legitimation of Need not Negative Disqualifications.**—If a statute declares that a natural father has power to legitimate his natural child by an act passed before a notary and two witnesses declaring his intention to legitimate such child, such declaration need not negative the existence of facts which would by the same statute preclude legitimation. (La.) *Davenport v. Davenport*, 575.

2. **CHILDREN, Legitimation of, Presumption in Support of.**—Where a declaration to legitimate a child has been made before a notary and in the presence of witnesses, the presumption is that no impediment to the legitimation existed. (La.) *Davenport v. Davenport*, 575.

3. **CHILDREN, Legitimation of, Otherwise Than by Marriage of Parents.**—Children may, in Louisiana, be legitimized otherwise than by the marriage of their parents, and it is not true that when legitimized in the manner prescribed by the code that they have no better status as heirs than children merely acknowledged. (La.) *Davenport v. Davenport*, 575.

4. **CHILDREN, Legitimation of, When Accomplished.**—A statement in writing made before a notary and witnesses that the appearers

declare that they do hereby make acknowledgment of said children, and do hereby legitimate them, accompanied by a will of the father declaring that he has legally acknowledged and legitimated such children, giving their names and bequeathing to them all his property, is sufficient to legitimate them, and is not a mere acknowledgment of their paternity. (La.) *Davenport v. Davenport*, 575.

BENEFICIAL ASSOCIATIONS.

1. **BENEFICIAL ASSOCIATION—Police Power.—The Power of Expulsion** in a corporation is included in what may be denominated its police power, which is derived from the law of self-preservation. It must have the power to relieve itself of its discordant elements in order that harmony may prevail. (R. I.) *Del Ponte v. Societa Italiana*, 17.

2. **BENEFICIAL ASSOCIATION—Expulsion of Member.**—A beneficial association has the right to establish by-laws providing for the expulsion of members, "for defaming the members of the directive council or any member whatsoever for reasons connected with the society, causing dissension and disorders in the midst of the association. (R. I.) *Del Ponte v. Societa Italiana*, 17.

3. **BENEFIT ASSOCIATIONS—Venue of Action on Certificate of Membership.**—The venue of a cause of action on a certificate of membership of a fraternal benefit association is the county of the member's residence at the time of his death. (Or.) *Hildebrand v. United Artisans*, 852.

BILLS AND NOTES.

Joint Makers.

1. **BILLS AND NOTES—Joint Makers—Position of Signature.**—One may become liable as a joint maker of a note without reference to the position of his signature, whether upon the face or back of the note, when it is shown by satisfactory evidence that the parties signing did so as joint makers. (Ill.) *Kistner v. Peters*, 362.

Indorsement and Guaranty.

2. **BILLS AND NOTES.—Legal Effect of Indorsement** upon the back of a note includes a transfer of the title of the instrument indorsed, and, unless otherwise limited, an additional promise to pay it. (Ill.) *Kistner v. Peters*, 362.

3. **BILLS AND NOTES—Indorsement in Blank—What Constitutes.**—The name of the payee indorsed upon the back of a note transfers the legal title, and must be treated as an indorsement in blank, although there is written over such name the words, "I hereby acknowledge myself a principal maker of this note with" another named, "and my liability as such principal jointly with him. (Ill.) *Kistner v. Peters*, 362.

4. **BILLS AND NOTES—Effect of Indorsement.**—The name of the payee upon the back of a negotiable note transfers the legal title, and it makes no difference that there is written above it language enlarging the liability of the indorser, such as a guaranty of the payment of the note. (Ill.) *Kistner v. Peters*, 362.

5. BILLS AND NOTES—Indorsement in Blank—Additional Contract.—If a note is indorsed in blank, the assignee has a legal right to write any words over the signature consistent with the contract of indorsement at any time before or at the time of the trial in an action on the note. (Ill.) *Kistner v. Peters*, 362.

6. BILLS AND NOTES—Distinction Between Indorsement and Guaranty.—The liability of an unconditional guarantor of commercial paper becomes independent and fixed upon the failure of the principal to pay the money or perform the act guaranteed, while that of an indorser is conditional until the statutory diligence has been shown. (Ill.) *Lloyd v. Matthews*, 346.

7. BILLS AND NOTES—Blank Indorsement—Authority to Convert into Guaranty.—The holder of a note indorsed in blank by the payee is not authorized to write out a special guaranty over the signature of the indorser and rely upon parol proof to establish that such was the agreement and understanding at the time of the indorsement. (Ill.) *Lloyd v. Matthews*, 346.

8. BILLS AND NOTES—Contract of Guaranty—Ratification.—Whether a special contract of guaranty was written at the time the signature thereto was signed or afterward is immaterial, when there was an express subsequent ratification of the contract of guaranty by the indorser. (Ill.) *Lloyd v. Matthews*, 346.

Indorsement for Collection.

9. BILLS AND NOTES—Indorsement for Collection.—The indorsement of a negotiable note by the payee with the words "for collection," or the like, is not strictly a contract of indorsement, but rather the creation of a power, the indorsee being the mere agent of the indorser to receive and enforce payment for his use. The title to the note and the proceeds thereof remain in the payee, and he may maintain suitable actions and proceedings to enforce his right. (Or.) *Smith v. Bayer*, 858.

10. BILLS AND NOTES—Indorsement for Collection—Right to Sue.—The indorsee of a negotiable note for collection may maintain an action thereon in his own name. (Or.) *Smith v. Bayer*, 858.

11. BILLS AND NOTES—Indorsement for Collection.—Although an indorsee of a negotiable note for collection may maintain an action thereon in his own name, yet it is open, as against him, to all defenses which could have been made against it, if it had remained in the hands of the indorser. (Or.) *Smith v. Bayer*, 858.

12. BILLS AND NOTES—Indorsement for Collection—Evidence to Vary.—Parol evidence in favor of an indorsee of a negotiable note for collection, that in fact he is an actual part owner of such note, is not admissible. The contract of indorsement cannot be contradicted or varied by. (Or.) *Smith v. Bayer*, 858.

13. BILLS AND NOTES—Indorsement for Collection—Defenses. In an action by an indorsee of a negotiable note for collection to collect it, payment by the maker to the indorser after the assignment of the note is good defense as against any claim of ownership by the indorsee, who is a mere agent for collection. (Or.) *Smith v. Bayer*, 858.

Bona Fide Holders.

14. NEGOTIABLE INSTRUMENTS, Purchase of With Notice of Facts Sufficient to Put a Prudent Man on Inquiry.—One purchasing

a check for value and having no notice of the fact that it was obtained without consideration, cannot be charged with such notice though the facts and circumstances attending the purchase were such as to put a reasonably prudent man on inquiry, and such inquiry was not made, unless it further appears, to the satisfaction of the jury, that the purchase was not made in good faith. (Mont.) *Harrington v. Butte & Boston Mining Co.*, 821.

15. NEGOTIABLE INSTRUMENTS.—Bad Faith is Necessary to Destroy the Title of the Indorsee of a negotiable instrument in due course, though it was purchased under circumstances which would excite suspicion in the mind of a prudent man or put him on inquiry. (Mont.) *Harrington v. Butte & Boston Mining Co.*, 821.

16. NEGOTIABLE INSTRUMENTS.—Suspicious Circumstances Attending the Purchase of a negotiable instrument are admissible against the indorsee, but are not sufficient to overthrow his title unless the jury are able to find him chargeable with bad faith. The question of good or bad faith cannot be withdrawn from the jury, and any instruction having that result is prejudicially erroneous. (Mont.) *Harrington v. Butte & Boston Mining Co.*, 821.

BOUNDARIES.

1. BOUNDARIES—Land Bordering on Lake.—The owner of land bordering on a non-navigable meandered lake has no title to the bed thereof covered with water. (Iowa.) *Wright v. Council Bluffs*, 412.

2. BOUNDARIES.—A Meander Line is not a boundary line, if it substantially represents a water line, and the land actually abuts on a body of water proper to be meandered; but if there is no body of water proper to be meandered, the meander line constitutes a boundary, and the owner of land described by means of such line acquires no title beyond it. (Iowa.) *Wright v. Council Bluffs*, 412.

BREACH OF MARRIAGE PROMISE.

1. BREACH OF MARRIAGE CONTRACT.—Evidence of Seduction is not admissible in aggravation of damages in an action for breach of promise to marry. (R. I.) *Wrynn v. Downey*, 63.

2. BREACH OF PROMISE to Marry—Allegation of Antecedent Facts.—A complaint in an action for the breach of a promise to marry may allege facts antecedent to the promise and tending to show the state of the defendant's feelings toward plaintiff when the promise is alleged to have been made, and it is error to sustain a demurrer to paragraphs of the complaint containing such allegations. (Ga.) *Anderson v. Kirby*, 185.

3. PROMISE TO MARRY, When not Conditional, but Absolute.—The Promise of a Man to Marry a Woman as Soon as His Mother Recovers from an illness then existing is not a conditional promise to marry, but an unconditional promise, to be performed at an uncertain time in the future. (Ga.) *Anderson v. Kirby*, 185.

4. PROMISE TO MARRY, Breach of by Absolute Renunciation.—If a man promises to marry a woman at some uncertain date in the future, and, without waiting for such date, absolutely renounces all intention to marry her, she may at once sustain an action for the breach of his promise. (Ga.) *Anderson v. Kirby*, 185.

5. BREACH OF PROMISE to Marry, Seduction in Aggravation of.—Where the common-law rule prevails that a woman cannot maintain an action for her own seduction, seduction under promise of marriage may be alleged and proved in aggravation of the damages consequent upon such breach. (Ga.) *Anderson v. Kirby*, 185.

6. BREACH OF PROMISE to Marry—Complaint, When Does not State Two Causes of Action.—A complaint in an action for a breach of promise to marry, which, in addition to alleging the promise and its breach, further avers the seduction of the plaintiff by the defendant under such promise, does not state two causes of action. The allegations respecting seduction are to be regarded merely as disclosing facts aggravating the damages resulting from the breach of the contract to marry. (Ga.) *Anderson v. Kirby*, 185.

CARRIERS.

Carrier of Goods.

1. CARRIER.—To Constitute One a Carrier It is not Necessary that he own the means of transportation. (Iowa) *Cownie Glove Co. v. Merchants' Dispatch etc. Co.*, 419.

2. CARRIER—Nature of Liability.—A Common Carrier is an insurer, except for a loss occasioned by the inherent quality of or a defect in the goods, or by the act of God, of the owner, or of the public enemy; and the law casts upon the carrier the burden of proving that a loss resulted from one or more of these causes. (Iowa) *Cownie Glove Co. v. Merchants' Dispatch etc. Co.*, 419.

3. CARRIER—Importation in Bond—Clearance Papers.—A carrier who undertakes to transport goods from a foreign country and deliver them in bond at an internal port of entry is liable for injury to them while detained at the original port of entry because of his failure to procure clearance papers. (Iowa) *Cownie Glove Co. v. Merchants' Dispatch etc. Co.*, 419.

4. CARRIERS—Bill of Lading—Estoppel to Dispute.—A carrier is not estopped, notwithstanding the issuing of a bill of lading by its agent, from showing that no goods were received or shipped by it, though such bill of lading has been transferred to an innocent third person for value in due course of business. This rule of law has not been abrogated by article No. 150 of the year 1868, making bills of lading negotiable by indorsement, and making answerable, both civilly and criminally, any person issuing a bill of lading unless the property specified therein has been actually shipped. (La.) *Henderson v. Louisville & N. R. Co.*, 582.

5. CARRIERS—Construction of Statute Making Bills of Lading Negotiable.—The statute making bills of lading negotiable means genuine bills of lading, and hence does not apply to those issued where no property has been shipped or received by the carrier. (La.) *Henderson v. Louisville & N. R. Co.*, 582.

6. CARRIERS, Condition, When a Part of the Contract of.—If a shipper accepts a receipt which states that its conditions are to be found on the back, he accepts and is bound by the conditions there to be found. (Mass.) *Singer v. Merchants' Despatch etc. Co.*, 635.

7. CARRIERS—Delivery of Goods Without Surrender of Bill of Lading.—If a condition printed on a receipt for goods provides that if the word "order" is not inserted before or after the name of the consignee, the property may be delivered without requiring the pro-

duction or surrender of the bill of lading, such condition is valid and excuses the surrender of the goods without the bill. (Mass.) *Singer v. Merchants' Despatch etc. Co.*, 635.

8. **CARRIERS—Delivery of Goods to Person of the Same Name as the Consignee.**—If one L. S., residing and doing business in Boston ships goods to Illinois, consigning them to "L. S.," intending thereby himself, and the carrier, having no notice of this, delivers them to another "L. S.," who is and long has been doing business by that name at the point to which the goods are shipped, such delivery is authorized and discharges the carrier, though its agent in Boston had notice that the name of the consignor and consignee as stated in the receipt was the same, and the consignor had been in the habit for many years of shipping goods to the same point in the same manner, and had never had any trouble, and they had always been intended to be received, and in fact were received by one G. (Mass.) *Singer v. Merchants' Despatch etc. Co.*, 635.

9. **CARRIERS.—Negligence in the Delivery of Goods** cannot be imputed to a carrier, where, under the circumstances known to it, the instructions are not doubtful and have been followed. (Mass.) *Singer v. Merchants' Despatch etc. Co.*, 635.

10. **CARRIERS.—One Intending to Make Goods Shipped by Him Security for a Draft** for the unpaid purchase price must have them billed to his own order and then indorse the bill of lading to the bank, discounting the draft. If he bills the goods "straight," and they are delivered by the carrier to the consignee, or a person of the same name, the carrier is not answerable. (Mass.) *Singer v. Merchants' Despatch etc. Co.*, 635.

11. **RAILROADS—Seizure of Goods in Custody of by Officer.**—A railroad company is excused from liability for not transporting and delivering property, when, without fault or collusion on its part, the property is seized by legal process and taken out of its possession. (Ind. App.) *Pittsburg etc. R. R. Co. v. Cox*, 377.

Carrier of Passengers.

12. **RAILWAYS—Jury Trial—Question for Jury.**—Whether it is the duty of the conductor of a passenger train to see that the platform of the coaches is clear of persons before moving the train from the station is a question for the jury. (Ga.) *Seaboard Air Line Ry. v. Bradley*, 196.

13. **CARRIERS—Passengers—Relation How Created.**—The relation of carrier and passenger arises out of a contract, express or implied, and it must be a contract between the individual and the carrier, and not between the individual and the carrier's agent, although the carrier may contract through its agent, but the contract must be the carrier's not the agent's. (Mo.) *O'Donnell v. Kansas City etc. R. R. Co.*, 753.

Statute Requiring Water to be Furnished Passengers.

14. **CORPORATIONS, Constitutionality of Statute for the Punishing of.**—A statute making railway corporations guilty of a misdemeanor if they fail to furnish drinking water for their passengers is constitutional, although the only punishment which can be inflicted is by fine, whereas natural persons guilty of misdemeanor may be punished by fine or imprisonment, or by both. (Ga.) *Southern Ry. Co. v. State*, 203.

15. RAILWAYS, Duty of Providing Drinking Water for Passengers.—The legislature may require railway corporations to furnish drinking water for passengers, and provide for the punishment of corporations which fail to do so. (Ga.) *Southern Ry. Co. v. State*, 203.

Passengers at Depot—Condition of Premises.

16. CARRIER—Intending Passenger.—When a Person Enters a Railroad Station and purchases a ticket with the intention of taking a train soon to arrive, he acquires the status of a passenger, and it becomes the duty of the railroad company to provide him a safe approach to the train and a reasonable time and opportunity to get on board. (Kan.) *Atchison etc. Ry. Co. v. Holloway*, 462.

17. RAILROADS—Duty to Passengers at Stations.—A railroad company, engaged in carrying passengers for hire, must exercise reasonable care in keeping its platforms, approaches thereto, and station grounds, as far as passengers would naturally resort to them, properly lighted at night for a reasonable time next prior to the arrival or immediately following the departure of a train which its time cards specify will stop at night to take on or put off passengers. (Or.) *Abbot v. Oregon R. R. Co.*, 885.

18. RAILROADS—Lighting of Stations and Approaches.—What constitutes a reasonable time in which railroad stations and their approaches must be kept lighted at night for the accommodation and safety of passengers, is determined by the circumstances of each particular case, and depends upon the size and importance of the station, and the number of persons who lawfully visit it at night for the purpose of transacting business with the railroad company. (Or.) *Abbot v. Oregon R. R. Co.*, 885.

19. RAILROADS—Passengers at Stations.—A person who has completed his journey on a railroad train and alighted therefrom at a station provided for the accommodation of the general public is allowed a reasonable time in which to leave the premises, and one who lawfully intends to secure passage on the cars is permitted to occupy the waiting-room of a depot a reasonable time preceding the arrival of the train, which he intends to take, and during such time such persons sustain toward the railroad company a relation analogous to that of a passenger, to whom the company owes a duty commensurate with the degree of danger to which such persons may be exposed. (Or.) *Abbot v. Oregon R. R. Co.*, 885.

20. RAILROADS—Depots—Duty to Persons Waiting for Trains.—If a railroad company permits a person to remain in its station or in its cars while waiting for a train not due for some time, and which he intends to take, the company owes him the same protection and care that it owes any other passenger. (Or.) *Abbot v. Oregon R. R. Co.*, 885.

21. RAILROADS—Depots—Duty as to Lighting.—The knowledge of a train dispatcher that a passenger arriving over another line of railroad, at night, intends to take a train on his line of road does not bind the company owning the last-named road to light its depot and its approaches until a reasonable time prior to the arrival of its train. (Or.) *Abbot v. Oregon R. R. Co.*, 885.

22. RAILROADS—Duty to Light Stations—Reasonable Time—Question of Fact.—Whether a railway passenger depot was kept lighted a reasonable time prior to the arrival of a night passenger train is a question of fact to be determined by the jury. (Or.) *Abbot v. Oregon R. R. Co.*, 885.

Passengers Boarding Train.

23. **CARRIER**—Interference with Opportunity to Board Train.—The running of a freight train between a station and a passenger train, thereby blocking the access of passengers to the latter train during its stop, is negligence. (Kan.) *Atchison etc. Ry. Co. v. Holloway*, 462.

24. **CARRIER**—Boarding a Moving Train is not, under all circumstances, contributory negligence. Whether or not it is depends upon the speed of the train, the physical condition of the passenger, the apparent danger of the course, and other surrounding circumstances. (Kan.) *Atchison etc. Ry. Co. v. Holloway*, 462.

Passengers Leaving Cars.

25. **RAILROADS**—Right of Passengers to Leave Cars.—A passenger by rail may, before reaching his destination, leave his car to transact his own private business, at any intermediate station where a stop is made for any reasonable time to receive or discharge passengers, and if, without his fault, he is injured in consequence of the carrier's negligence on any part of its premises set apart by it for the use of the public, or used with its consent, he may recover the damages sustained. (Or.) *Abbot v. Oregon R. R. Co.*, 885.

26. **RAILROADS**—Right of Passenger to Leave Car for Exercise. A passenger by rail has a right, before reaching his destination, to leave his car to walk on a depot platform for exercise when the train is stopped a reasonable time in daylight, to receive or discharge passengers, and he has the same right, even at night, when the platform or walk is sufficiently lighted; and if, while so doing, he is injured without his fault, in consequence of the railroad company's negligence, he may recover damages for the injury sustained. (Or.) *Abbot v. Oregon R. R. Co.*, 885.

27. **RAILROADS**—Right of Passenger to Leave Car for Exercise—Contributory Negligence.—A passenger, before reaching his destination, or while waiting for his train at night, has no right to leave a well-lighted car or a well-lighted depot, provided with necessary accommodations, and, for the mere purpose of exercise, go in the darkness upon a walk surrounding the depot, and recover damages for an injury sustained in consequence of the carrier's failure to maintain a railing or its omission to light such platform or walk. His own contributory negligence precludes his recovery. (Or.) *Abbot v. Oregon R. R. Co.*, 885.

Persons Assisting Passengers.

28. **RAILWAYS**, Duty of to Persons Assisting Passengers.—A railroad company owes to one who boards its train for the purpose of assisting a prospective passenger and then disembarking from the train, with the knowledge of the conductor of his presence and purpose, the duty to observe ordinary care for his safety. This requires the delay of the train a reasonable time for him to get off, and if the conductor, without such delay, signals for the train to start, and because of a violent and unusual jerk in starting the train, the passenger's escort is thrown while alighting, and injured, the company is liable. (Ga.) *Seaboard Air Line Ry. v. Bradley*, 196.

29. **RAILWAYS**—Duty to Persons Assisting Passengers, but Whose Purpose is not Known to Conductor.—If one assists a passenger to board a train, not intending himself to become a passenger, no duty arises to hold the train a reasonable time to permit his

departure therefrom, unless knowledge of his purpose has been given the company's servants. (Ga.) Seaboard Air Line Ry. v. Bradley, 196.

30. RAILWAYS—Duty of Ascertaining Purpose of Person Entering Car.—A railway company does not owe to a person entering a train to assist another taking passage thereon the duty of ascertaining his purpose. It may assume, until informed to the contrary, that he intends becoming a passenger, and may therefore start the train without giving him an opportunity to alight therefrom. (Ga.) Seaboard Air Line Ry. v. Bradley, 196.

Persons on Freight Trains.

31. CARRIERS—Passengers—Contract with Freight Brakeman.—A contract made by a person with a freight brakeman to allow such person to ride on his train in consideration of his rendering assistance in loading and unloading freight along the way is outside the scope of the brakeman's authority, not binding on the railroad company, and renders such person a trespasser, and not a passenger. (Mo.) O'Donnell v. Kansas City etc. R. R. Co., 753.

32. RAILROADS—Passengers—Freight Trains—Burden of Proof. A person who claims to have been a passenger and to have been injured by the failure of the railroad company to exercise in his behalf that high degree of care which the law in such case prescribes, and in his proof shows that he was riding in a boxcar on a freight train having a caboose attached thereto, into which he never presumed to enter, he has the burden of proof to explain before he can be adjudged to have been a passenger. (Mo.) O'Donnell v. Kansas City etc. R. R. Co., 753.

33. RAILROADS—Passengers—Contract with Freight Brakeman.—The giving, by a person, of a small sum to a freight brakeman to induce him to allow such person to ride on his train, is for the benefit of the brakeman alone, and of no advantage to the railroad company. Such arrangement is beyond the scope of the authority of such brakeman, in violation of the known rights of the company, and constitutes such person a trespasser on the train, and not a passenger nor a licensee. (Mo.) O'Donnell v. Kansas City etc. R. R. Co., 753.

34. RAILROADS—Passengers on Freight Trains.—There is nothing in the fact of seeing a man handling freight from a freight train to justify a jury in drawing the inference that the conductor on such train knew that he had made a contract with the brakeman to ride on such train in consideration of handling freight at way stations. (Mo.) O'Donnell v. Kansas City etc. R. R. Co., 753.

35. RAILROADS—Passengers on Freight Trains—Tacit Agreement.—The law will not imply a tacit agreement on the part of a conductor of a freight train to constitute a person riding thereon a passenger in the absence of any circumstances, either that he considered himself a passenger, or that the conductor so considered him, and it will not imply such agreement from the mere fact that the conductor saw him on top of a freight-car in the train, where no passenger had a right to be, and when there is a caboose on the train provided for passengers. (Mo.) O'Donnell v. Kansas City etc. R. R. Co., 753.

36. RAILROADS—Trespassers on Freight Trains.—A person who pays the brakeman of a freight train a trifling sum to be allowed to ride on such train, and by that means is received thereon, is not a

passenger or a licensee, but a trespasser, even if he is received with the knowledge of the conductor, and the railroad company owes him no duty, except not to injure him, if, in the exercise of ordinary care, injury can be avoided after his peril is discovered. (Mo.) *O'Donnell v. Kansas City etc. R. R. Co.*, 753.

Street Railway Passengers.

37. **STREET RAILWAY—Injury to Passenger—Evidence.**—If, in an action against a street railway company by a passenger thrown to the ground while alighting from a car, the defendant has been permitted, without objection, to put in evidence a plan of the street where the accident happened, showing the location of "white poles," evidence is admissible to show the meaning of such poles and their relation to the rules of the company in operating and stopping its cars. (R. I.) *Moore v. Woonsocket Street Ry. Co.*, 59.

38. **STREET RAILWAY—Starting Car on Signal or Unauthorized Person.**—If a street-car comes to a stop, and then, upon the signal of an unauthorized person, starts as a passenger is alighting, the carrier is not answerable for the accident which follows, if not preventable by the exercise of due care on its part after the giving of the signal. (R. I.) *Moore v. Woonsocket Street Ry. Co.*, 59.

39. **STREET RAILWAY—Riding on Running-board.**—It is not negligence per se to ride on the running-board of an electric car, when there is no vacant seat in the car nor standing-room between the seats. (R. I.) *Verrone v. Rhode Island etc. Ry. Co.*, 41.

40. **STREET RAILWAY—Riding on Running-board.**—If a railroad company accepts passengers whom it cannot accommodate inside its car, it must do all that human care and vigilance reasonably can to prevent accidents happening to them. (R. I.) *Verrone v. Rhode Island etc. Ry. Co.*, 41.

41. **STREET RAILWAY—Riding on Running-board.**—A passenger on an electric car who rides on the running-board because there is no room inside assumes such risks as ordinarily attend the position he takes, but not such as are due to violent movements of the car. He has a right to suppose that the car will be run with due care, and this requires greater precaution when passengers are occupying the running-board than when all are safely seated. (R. I.) *Verrone v. Rhode Island etc. Ry. Co.*, 41.

42. **STREET RAILWAY—Riding on Running-board.**—Evidence that a strong man, holding on with both hands while riding on the running-board of a car, received a shock sufficient to throw him to the ground, makes out a prima facie case that the car was improperly managed, and should be allowed to go to the jury. (R. I.) *Verrone v. Rhode Island etc. Ry. Co.*, 41.

43. **STREET RAILWAYS—Transfers Voluntarily Given, When are not Gratuities.**—Though no law or ordinance requires a street railway to give a transfer from one line to another, yet if the company adopts the custom of issuing such transfers for the consideration paid to the conductor of the first car, the transfer is not a gratuity, but binds the company to transport the passenger from the point where he first enters a car to a point on any line to which, under the custom of the company, it is usual to issue transfers. (Ga.) *Georgia Railway etc. Co. v. Baker*, 246.

44. **STREET RAILWAYS—Transfer Slips, Mistakes in.**—If, by the mistake or negligence of the conductor in issuing a transfer, it is inaccurate and does not correctly express the contract between

the carrier and passenger, he has the right to rely upon the acts and statement of such conductor in issuing the transfer, and if expelled from the second car on account of a mistake or defect in the transfer, the passenger having acted in good faith and offered a reasonable explanation, the carrier is liable to him for the damages suffered. (Ga.) Georgia Ry. etc. Co. v. Baker, 246.

45. STREET RAILWAYS.—A Condition on a Transfer Slip that if There is Any Controversy in Reference Thereto, the holder will pay fare and call on the company for correction, is unreasonable. (Ga.) Georgia Railway etc. Co. v. Baker, 246.

46. STREET RAILROADS.—A Threat to Eject the Holder of a Transfer Slip, Though Made in a Gentlemanly Manner, and without anything insulting in word or conduct, by a conductor of a street-car, may entitle such holder to recover of the company, if he was in fact entitled to ride and gave the conductor a reasonable explanation of the mistake in the transfer. (Ga.) Georgia Ry. etc. Co. v. Baker, 246.

47. STREET RAILWAYS. Amount Recoverable from for Threat of Expulsion Followed by and Inducing a Second Payment of Fare.—Where, owing to a mistake in a transfer slip due to the conductor who gave it out, the holder is threatened with expulsion in the presence of other passengers, to avoid which she pays a second fare, her right of recovery against the company is not limited to the fare paid, though there is no other insult or aggravating circumstance, but may include substantial damages, as for an inexcusable trespass. (Ga.) Georgia Ry. etc. Co. v. Baker, 246.

48. STREET RAILWAYS.—Negligent Expulsion of Passenger—Rate of Speed.—If a passenger on a street-car is wrongfully and forcibly ejected therefrom, the speed of the car need not be proved as alleged in order for plaintiff to recover damages. The rate of speed is important only as bearing upon the dangers which would attend a violent expulsion from the car, and thereby characterize the act of ejection and the motive of the conductor at the time. (Ill.) Chicago Union Traction Co. v. Brethauer, 352.

49. STREET RAILWAYS.—Refusal to Accept Transfer—Evidence. If the validity of a municipal ordinance relating to transfers on street-car lines is being contested in the courts at the time plaintiff is forcibly ejected from a car on the conductor's refusal to accept a regular transfer, and the validity of such ordinance is afterward sustained, testimony is admissible that when plaintiff obtained the transfer from another conductor the latter stated that it was good on the car from which plaintiff was ejected. (Ill.) Chicago Union Traction Co. v. Brethauer, 352.

50, 51. STREET RAILWAYS.—Violation of Law by a street-car company cannot be excused on the ground that the violator believes the law unconstitutional, and if the validity of the law is established by judicial decision, the duty of the company and its servants, and their relation to passengers, must be determined by such law, and not by the instructions given by the company to its servants. The law in such case must be taken to be valid from the time of its passage, and not merely from the time it was adjudged to be valid. (Ill.) Chicago Union Traction Co. v. Brethauer, 352.

52. STREET RAILWAYS.—Duty as to Transfers.—It is the duty of a street-car conductor in issuing transfers to other lines to comply with the ordinances governing his line of duty in that respect, without regard to the instructions of his company to the contrary,

and in so acting he acts for the company. (Ill.) *Chicago Union Traction Co. v. Brethauer*, 352.

53. STREET RAILWAYS—Issuance of Transfers—Relation of Conductor to Passenger.—A street-car conductor, supplied with blank transfers and authorized to punch and deliver them to passengers upon request in consideration of a cash fare previously paid, stands in the same relation to the street-car company and its passengers as one of its ticket sellers. He is the direct representative of the company, and what he says to passengers in relation to the transfer given them and the privileges conferred thereby is admissible as part of the *res gestae* and as characterizing the subsequent conduct of the transfer holder. (Ill.) *Chicago Union Traction Co. v. Brethauer*, 352.

54. STREET RAILWAYS—Forcible Expulsion of Passenger—Damages—Evidence.—In an action by a passenger to recover for injuries in being forcibly ejected from a street-car, under a declaration alleging that plaintiff, by reason of his injuries thus received, was prevented from carrying on his business and was deprived of the profits therefrom which he otherwise would have received, where it appears that he was a jewelry jobber practically without capital, it is proper to permit him to testify as to the amount he realized out of his business per month prior to his injury, and as to the amount realized by him per month in his business since that time. (Ill.) *Chicago Union Traction Co. v. Brethauer*, 352.

55. STREET RAILWAYS—Forcible Expulsion of Passenger—Evidence.—If a passenger is forcibly ejected from a street-car on the refusal of the conductor to honor a transfer from another line, a municipal ordinance showing the validity of the transfer is admissible in evidence to establish notice to the street-car company and as bearing upon the animus of the conductor in ejecting the passenger from the car. (Ill.) *Chicago Union Traction Co. v. Brethauer*, 352.

Passenger Elevator.

56. PASSENGER ELEVATOR.—A Landlord Who Maintains a passenger elevator in his private building is not a common carrier, and is required to exercise only reasonable care for the safety of persons using it, such as employes of a tenant, who enter the premises by implied invitation. (R. I.) *Edwards v. Manufacturers' Building Co.*, 37.

57. PASSENGER ELEVATOR—Presumption of Negligence.—The fall of a loaded passenger elevator affords *prima facie* evidence of negligence in the person charged with the duty of operating it. (R. I.) *Edwards v. Manufacturers' Building Co.*, 37.

See Shipping.

CHAMPERTY.

1. CHAMPERTY—Evidence of.—In a case where a common right is involved, the participation of any party having an interest in the result of the litigation is not evidence of champerty or maintenance. (Ill.) *Elser v. Village of Gross Point*, 326.

2. CHAMPERTY—Collateral Attack.—The fact that litigation grows out of a champertous contract is no defense in a collateral proceeding, and the question can only be raised between the parties to the alleged champertous contract and their privies. (Ill.) *Elser v. Village of Gross Point*, 326.

CHARTER-PARTY.

See Shipping.

CHATTEL MORTGAGES.

1. **A CHATTEL MORTGAGE not Recorded in Time is not a valid lien on the property covered as against a subsequent creditor before the mortgage is recorded, on the ground that such creditor did not extend credit on the faith of the property covered by the mortgage.** (S. C.) *Wardlaw v. Troy Oil Mill*, 1004.

2. **CHATTEL MORTGAGES—Notice of Lien.**—The fact that an attorney of a corporation knew of a chattel mortgage on property purchased by the corporation does not show notice to a bank which made a loan to the corporation, although such attorney was president of the bank, and the fact that the president of such corporation knew of such lien does not constitute notice to the bank of which he was a director and officer. (S. C.) *Wardlaw v. Troy Oil Mill*, 1004.

3. **CHATTEL MORTGAGES—Marshaling Assets.**—A chattel mortgagee who fails to record his mortgage in time has no right to compel a subsequent creditor of the mortgagor to first resort to indorsements on such mortgagor's notes, and thus permit the mortgagee to have a large part of such mortgagor's property applied on the mortgage debt. (S. C.) *Wardlaw v. Troy Oil Mill*, 1004.

4. **CHATTEL MORTGAGE—Removal of Property to Another State or Country with the Consent of the Mortgagee.**—The rule that a mortgage duly executed and recorded in one state is given effect in another by virtue of comity between the states applies only where the removal is made without the consent of the mortgagee. Consent by the mortgagee that the property be taken from the state is a waiver of his mortgage as against every person except the mortgagor. (Wash.) *Jones v. North Pacific Fish etc. Co.*, 131.

5. **CHATTEL MORTGAGE—Possession of Property, When does not Aid the Mortgagee.**—The possession of the mortgaged property acquired by the mortgagee through the unauthorized acts of officers of the mortgagor amounts to a trespass, and not to a lawful seizure, and cannot give the mortgagee any preference over other creditors, where his mortgage has become nonenforceable by the removal of the property with his consent from the state or territory in which it was situated, and wherein the mortgage was executed and recorded. (Wash.) *Jones v. North Pacific Fish etc. Co.*, 131.

6. **CHATTEL MORTGAGES—Conversion—Seizure and Sale.**—If mortgaged logs are so mingled with those of another that they cannot be sorted at the place of seizure, the mortgagee is not guilty of conversion in removing them to another place in the direction of a market, for the purpose of sorting and selling them. (Mich.) *Croze v. St. Mary's Canal Mineral Land Co.*, 677.

7. **CHATTEL MORTGAGES—Seizure and Sale.**—A mortgagee is not bound to sell mortgaged chattels at the place of seizure. (Mich.) *Crode v. St. Mary's Canal Mineral Land Co.*, 677.

8. **CHATTEL MORTGAGES—Sale on Credit—Conversion.**—A sale of mortgaged personalty by the mortgagee in possession on credit does not constitute a conversion, but renders him accountable to the mortgagor on the same basis as if he had received each. (Mich.) *Croze v. St. Mary's Canal Mineral Land Co.*, 677.

9. **CHATTEL MORTGAGES—Negligence—Sale—Conversion.**—If a mortgagee of personalty is rightfully in possession upon default of

the mortgagor, his act in negligently removing the mortgaged property at an improper time and manner, and his negligent act in waiting an unreasonable time in which to sell after taking possession, do not amount to a conversion, but merely render him liable for resulting damages. (Mich.) *Croze v. St. Mary's Canal Mineral Land Co.*, 677.

CHECKS.

See Banks and Banking.

COLOR OF TITLE.

See Adverse Possession.

COMMUNITY PROPERTY.

See Husband and Wife, 11, 12.

CONFLICT OF LAWS.

See Contracts, 3; Death, 3, 4; Interest, 2.

CONSTITUTIONAL LAW.

Miscellaneous Constitutional Questions.

1. **CONSTITUTIONAL LAW**.—The Construction of the United States is the Supreme Law of the Land, and state courts and legislatures are bound by it as well as by the interpretations put upon its provisions by the federal court of last resort. (Mont.) *State v. Cudahy Packing Co.*, 804.

2. **CONSTITUTIONAL LAW**.—Local and Special Laws.—When Classification on the basis of population has reasonable relation to the purposes and objects of the legislation, the statute providing for such classification is not within the constitutional prohibition against special or local laws. (Ill.) *Chicago Terminal etc. Ry. Co. v. Greer*, 313.

3. **CONSTITUTIONAL LAW**.—Unconstitutional Part, When may not be Eliminated or Disregarded.—If a statute prohibits and penalizes trusts or combinations to fix the price or regulate the production of articles of commerce, but excepts from its provisions all persons engaged in agriculture or horticulture, such exception, though unconstitutional, cannot be eliminated by the court, and the statute construed and enforced as if it contained no exception. (Mont.) *State v. Cudahy Packing Co.*, 804.

4. **CONSTITUTIONAL LAW**.—Statute Enacting Conditions and Qualifications for entering into a business and not imposing such conditions and qualifications on persons previously engaged therein are not on that account unconstitutional. (La.) *City of New Orleans v. Smythe*, 566.

5. **CONSTITUTIONAL LAW**.—Statute Forbidding the Herding of Sheep Within Two Miles of a Dwelling.—A statute making it unlawful for any person to herd sheep, or permit them to be herded, on the land or possessory claim of any other person or within two miles of his dwelling-house is not unconstitutional. (Idaho.) *Walker v. Bacon*, 262.

6. **CONSTITUTIONAL LAW**.—Trusts—Exceptions of Classes of Persons from Statutes Making Unlawful and Criminal.—A statute purporting to prohibit the formation of trusts for the purpose of fixing

the price or regulating the production of articles of commerce, but exempting from its provisions all persons engaged in agriculture or horticulture, is, because of such exception, in conflict with the fourteenth amendment to the constitution of the United States, and therefore void. (Mont.) *State v. Cudahy Packing Co.*, 804.

7. CONSTITUTIONAL LAW—Statutes Validating Judicial Sales. Unless prohibited by the constitution, the legislature may validate or legalize retroactively judicial or execution sales, though the defects or irregularities therein are of so gross a character as to render them inoperative, so long as it does not undertake to infuse life into proceedings void for want of jurisdiction. (Or.) *Fuller v. Hager*, 916.

Local Option Laws.

8. LOCAL OPTION LAWS.—A provision in a statute that the final operation thereof may be made to depend upon some contingency, as the vote of the electors of a given territory within which the law is to operate, or some like contingency, is not the delegation of legislative functions to electors or to corporate officials of the territory or municipality. (Ill.) *Chicago Terminal etc. Ry. Co. v. Greer*, 313.

9. CONSTITUTIONAL LAW—Local Option Laws—Delegation of Legislative Power.—A statute providing that city courts may be organized and established in any city which contains at least three thousand inhabitants whenever the city council shall adopt an ordinance or resolution to submit the question whether such court shall be established to the qualified voters of such city, and two-thirds of the votes cast at such election shall be in favor of the establishment of such court, is not unconstitutional as an illegal delegation to city councils of legislative power, nor is it invalid as local or special legislation. (Ill.) *Chicago Terminal etc. Ry. Co. v. Greer*, 313.

Statutes Pertaining to the Judiciary.

10. CONSTITUTIONAL LAW—Appellate Jurisdiction.—If a case involving the constitutionality of a statute has been decided by the state supreme court and is pending in the United States supreme court on writ of error, the constitutionality of such statute is still an open question, and the state court will take jurisdiction of an appeal in a subsequent case involving the same question. (Mo.) *O'Donnell v. Kansas City etc. R. R. Co.*, 753.

11. CONSTITUTIONAL LAW—Power to Create City Courts.—Constitutional provisions that all judicial powers shall be vested in one supreme court, circuit courts, county courts, justices of the peace, police magistrates, and such courts as may be created by law in and for cities and incorporated towns, confer ample power upon the legislature to provide for the establishment of city courts. (Ill.) *Chicago Terminal etc. Ry. Co. v. Greer*, 313.

See Statutes; License, 1.

Note.

Constitutional Law, conditional statutes take effect upon the happening of some subsequent event, 317.

intoxicating liquors, local option laws relating to, when valid, 324.
legislative power, delegation of, to what extent permissible, 317.

the mortgagor, his act in negligently removing the mortgaged property at an improper time and manner, and his negligent act in waiting an unreasonable time in which to sell after taking possession, do not amount to a conversion, but merely render him liable for resulting damages. (Mich.) *Croze v. St. Mary's Canal Mineral Land Co.*, 677.

CHECKS.

See Banks and Banking.

COLOR OF TITLE.

See Adverse Possession.

COMMUNITY PROPERTY.

See Husband and Wife, 11, 12.

CONFLICT OF LAWS.

See Contracts, 3; Death, 3, 4; Interest, 2.

CONSTITUTIONAL LAW.

Miscellaneous Constitutional Questions.

1. **CONSTITUTIONAL LAW.**—The Construction of the United States is the Supreme Law of the Land, and state courts and legislatures are bound by it as well as by the interpretations put upon its provisions by the federal court of last resort. (Mont.) *State v. Cudahy Packing Co.*, 804.

2. **CONSTITUTIONAL LAW.**—Local and Special Laws.—When Classification on the basis of population has reasonable relation to the purposes and objects of the legislation, the statute providing for such classification is not within the constitutional prohibition against special or local laws. (Ill.) *Chicago Terminal etc. Ry. Co. v. Greer*, 313.

3. **CONSTITUTIONAL LAW.**—Unconstitutional Part, When may not be Eliminated or Disregarded.—If a statute prohibits and penalizes trusts or combinations to fix the price or regulate the production of articles of commerce, but excepts from its provisions all persons engaged in agriculture or horticulture, such exception, though unconstitutional, cannot be eliminated by the court, and the statute construed and enforced as if it contained no exception. (Mont.) *State v. Cudahy Packing Co.*, 804.

4. **CONSTITUTIONAL LAW.**—Statute Enacting Conditions and Qualifications for entering into a business and not imposing such conditions and qualifications on persons previously engaged therein are not on that account unconstitutional. (La.) *City of New Orleans v. Smythe*, 566.

5. **CONSTITUTIONAL LAW.**—Statute Forbidding the Herding of Sheep Within Two Miles of a Dwelling.—A statute making it unlawful for any person to herd sheep, or permit them to be herded on the land or possessory claim of any other person or within two miles of his dwelling-house is not unconstitutional. (Idaho.) *Walker v. Bacon*, 262.

6. **CONSTITUTIONAL LAW.**—Trusts—Exceptions of Classes of Persons from Statutes Making Unlawful and Criminal.—A statute purporting to prohibit the formation of trusts for the purpose of fixing

the price or regulating the production of articles of commerce, but exempting from its provisions all persons engaged in agriculture or horticulture, is, because of such exception, in conflict with the fourteenth amendment to the constitution of the United States, and therefore void. (Mont.) *State v. Cudahy Packing Co.*, 804.

7. CONSTITUTIONAL LAW—Statutes Validating Judicial Sales. Unless prohibited by the constitution, the legislature may validate or legalize retroactively judicial or execution sales, though the defects or irregularities therein are of so gross a character as to render them inoperative, so long as it does not undertake to infuse life into proceedings void for want of jurisdiction. (Or.) *Fuller v. Hager*, 916.

Local Option Laws.

8. LOCAL OPTION LAWS.—A provision in a statute that the final operation thereof may be made to depend upon some contingency, as the vote of the electors of a given territory within which the law is to operate, or some like contingency, is not the delegation of legislative functions to electors or to corporate officials of the territory or municipality. (Ill.) *Chicago Terminal etc. Ry. Co. v. Greer*, 313.

9. CONSTITUTIONAL LAW—Local Option Laws—Delegation of Legislative Power.—A statute providing that city courts may be organized and established in any city which contains at least three thousand inhabitants whenever the city council shall adopt an ordinance or resolution to submit the question whether such court shall be established to the qualified voters of such city, and two-thirds of the votes cast at such election shall be in favor of the establishment of such court, is not unconstitutional as an illegal delegation to city councils of legislative power, nor is it invalid as local or special legislation. (Ill.) *Chicago Terminal etc. Ry. Co. v. Greer*, 313.

Statutes Pertaining to the Judiciary.

10. CONSTITUTIONAL LAW—Appellate Jurisdiction.—If a case involving the constitutionality of a statute has been decided by the state supreme court and is pending in the United States supreme court on writ of error, the constitutionality of such statute is still an open question, and the state court will take jurisdiction of an appeal in a subsequent case involving the same question. (Mo.) *O'Donnell v. Kansas City etc. R. R. Co.*, 753.

11. CONSTITUTIONAL LAW—Power to Create City Courts.—Constitutional provisions that all judicial powers shall be vested in one supreme court, circuit courts, county courts, justices of the peace, police magistrates, and such courts as may be created by law in and for cities and incorporated towns, confer ample power upon the legislature to provide for the establishment of city courts. (Ill.) *Chicago Terminal etc. Ry. Co. v. Greer*, 313.

See Statutes; License, 1.

Note.

Constitutional Law, conditional statutes take effect upon the happening of some subsequent event, 317.

intoxicating liquors, local option laws relating to, when valid, 324.

legislative power, delegation of, to what extent permissible, 317.

Constitutional Law, local option laws, decisions declaring to be valid, 318, 319.

- local option laws relating to bond issues, 323.
- local option laws relating to intoxicating liquors, 324.
- local option laws relating to municipal affairs, 321.
- local option laws relating to schools, 319.
- local option laws relating to stock and fence laws, 323.
- local option laws relating to the division of counties, 320.
- local option laws relating to the removal of county seats, 321.
- local option laws, when valid, 317.
- municipal corporations, local option laws in, validity of, 321-323.
- statutes dependent upon the vote of the people, validity of, 318.

CONTEMPT.

1. CONTEMPT—Witness Before Legislative Committee—Power of Committee.—A committee appointed under resolution by a state legislature to investigate the affairs of a state dispensary, and empowered to send for persons and papers, and require answers to any questions relevant to such investigation, has power to commit a witness for contempt for refusing to answer a question as to whether another person stated to him that he had dealings with the state dispensary, and had given rebates, or graft, or money, or had improperly influenced the board of directors of the dispensary to give him business. (S. C.) *Parker, Ex parte*, 1011.

2. CONTEMPT—Disregard of Judgment Pending Appeal.—If a claimant to an office brings suit by quo warranto to oust the incumbent, and upon judgment being rendered against him in the trial court takes an appeal to the supreme court, and, pending such appeal, takes possession of such office and proceeds to act as such officer, he is guilty of contempt of the supreme court. (Colo.) *People v. Horan*, 163.

3. CONTEMPT—Civil Remedy.—Where execution may issue to collect a decree for the payment of money, the proceeding by contempt to enforce a civil remedy cannot be resorted to. (Mich.) *Carnahan v. Carnahan*, 660.

4. JUDGMENTS—Enforcement Against Women by Proceedings in Contempt.—A statute forbidding imprisonment of women on any process in any civil action does not prohibit the enforcement of equity decrees or orders against a female by contempt proceedings. (Mich.) *Carnahan v. Carnahan*, 660.

5. JUDGMENT—Enforcement Against Women by Proceedings in Contempt—Evidence.—If, in contempt proceedings against a divorced wife to enforce an order in the divorce proceedings requiring her to pay a certain part of a trust fund to her husband, his trustee in bankruptcy is made a party to the proceedings in contempt and his relation to the case is alleged and admitted, such relationship may be proved on the trial of the application for an order in contempt. (Mich.) *Carnahan v. Carnahan*, 660.

6. CONTEMPT—Term of Imprisonment.—An order for the imprisonment of a woman for contempt of court until the further order of the court, for disobedience of the order of the court, is not indefinite when the statute provides that a person shall be imprisoned only until the order of the court shall have been performed. (Mich.) *Carnahan v. Carnahan*, 660.

CONTRACTS.

1. **CONTRACTS—Consideration.**—A promise to do a thing which the promisor is legally bound to do is not generally a sufficient consideration to support a reciprocal undertaking by the promisee, but such promise may be enforced against the promisor, although its enforcement compels the performance of that which is already a legal obligation. (Colo.) *Ward v. Goodrich*, 167.

2. **PUBLIC POLICY.**—Agreements Tending to Injure the Public Service are against the policy of the law and will not be enforced by the courts. Instances of such agreements include those to use one's influence to secure the selection of another for a public office and those restricting the exercise of a discretion vested in a public officer. (La.) *Schneider Local Union No. 60*, 549.

3. **CONFLICT OF LAWS.**—Though the Law of the Place of the Contract Controls the interpretation and validity of a note, the law of the forum governs as to the remedy for its enforcement. (Wash.) *Bank v. Doherty*, 123.

4. **RESCISSION.**—Where Equity Requires the Restoration of what has been received under a contract as a condition to its rescission, it is sufficient to make the offer of restoration in the petition, and not necessarily before the bringing of suit. (Kan.) *Allen v. Riley*, 481.

CORPORATIONS.

Contracts by Officer—Authority to Make.

1. **CORPORATIONS—Contracts of—Power of Officer.**—The President of a corporation, as its agent and corporate representative, has the power, in the ordinary course of business and in furtherance of the corporate interests, to execute contracts binding on the corporation. (Ill.) *Lloyd v. Matthews*, 346.

2. **CORPORATIONS—Contracts of—Presumed Authority of Officers.**—Any contract pertaining to the corporate affairs and within the general powers of the corporation, executed by its president on behalf of the corporation, is presumed to have been executed by authority of the corporation. (Ill.) *Lloyd v. Matthews*, 346.

3. **CORPORATIONS—Contracts of—Power of President.**—If a contract is properly executed for a corporation by its president, and is such a contract as the corporation may lawfully make, proof of its execution by such president is all that is required to show his authority to make it, in the absence of evidence showing that the contract was not made by authority of the corporation. (Ill.) *Lloyd v. Matthews*, 346.

4. **CORPORATIONS—Contracts of—Power of President.**—The powers of the president of a corporation to bind it by contracts executed by him are limited to those matters concerning which the charter, by-laws and statutes authorize it to make contracts. (Ill.) *Lloyd v. Matthews*, 346.

5. **CORPORATIONS—Contract of Guaranty of—Power of President.**—A contract of guaranty executed for a corporation by its president upon a note payable to its order, discounted for its benefit and the proceeds received by it, is valid and binding upon the corporation without proof of special authority delegated to such president. (Ill.) *Lloyd v. Matthews*, 346.

Ratification or Acceptance of Sale.

6. **CORPORATION, Acceptance of Terms of Sale by, When Should be Inferred.**—If an oral contract for the sale of real prop-

erty has been made by all the officers and chief stockholders of the purchasing and selling corporations, and thereafter the latter, at a meeting of its board of directors, adopts a resolution authorizing the sale, and the purchasing corporation does various acts for the purpose of complying with the terms of the sale, after which the selling corporation, being offered a higher price, rescinds its resolution, the trial court should find that the purchasing corporation accepted the terms of the sale and is entitled to specific performance of the contract. (Wash.) *Western Timber Co. v. Kalama River Lumber Co.*, 137.

7. CORPORATION, Officer, Want of Authority of, Effect of Subsequent Ratification.—Where the principal stockholder of a corporation arranges and agrees upon the terms of the purchase of real estate by it, but is not an officer of, nor previously authorized to act for, it, the subsequent execution by the officers and stockholders of such corporation of promissory notes for the purchase price, and the readiness of the corporation to deliver such notes and make the requisite cash payments, and otherwise perform the contract of purchase, constitute a ratification of the acts of such stockholder and an acceptance by his corporation of the contract of purchase. (Wash.) *Western Timber Co. v. Kalama River Lumber Co.*, 137.

Power to Act as Trustee.

8. CORPORATION—Power to Act as Trustee.—A corporation, authorized by its charter to act as a trustee, may hold its own stocks in trust for beneficiaries designated by the donor. (Iowa) *State v. Higby Co.*, 409.

Criminal Liability.

9. A CORPORATION may be Indicted and Fined for offenses consisting of mere nonfeasance, as where it neglects to perform duties which it owes to the public. (Ga.) *Southern Ry. Co. v. State*, 203.

Service of Process on Agent.

10. CORPORATION—Service of Process on Agent.—Under a statute providing for service of process on a resident agent of a corporation in certain cases, service on a nonresident fraternal benefit association to whom the statute applies may be valid if made on the secretary of the local assembly of such association, whose duty it is, among others, to notify the supreme secretary when the death of a member occurs, to collect members' assessments, and to make reports to the supreme assembly of the money received and of the membership. (Or.) *Hildebrand v. United Artisans*, 852.

11. CORPORATIONS—Service of Process—Return.—If an action is commenced against a corporation in the county where the cause of action arose, and not in the county where the corporation has its principal place of business and office, the return of the officer upon the process must show the reason for making the service in the manner pursued. (Or.) *Hildebrand v. United Artisans*, 852.

12. CORPORATIONS—Service of Process on Agent—Return.—In an action against a corporation, the delivery of certified copies of the summons and complaint to an inferior agent of the corporation outside the county of its principal office and place of business is a substituted service of process, and the return of the officer must show the facts necessary to confer jurisdiction and the reason for

making the service in the manner pursued. (Or.) Hildebrand v. United Artisans, 852.

13. CORPORATIONS—Service of Process on Agent.—To enable a court to render a valid personal judgment against a foreign corporation by the service of process on its agent, it must appear somewhere in the record that the corporation was engaged in business within the state. (Or.) Hildebrand v. United Artisans, 852.

14. CORPORATIONS—Service of Process on Agent.—Under a statute requiring an action to be brought in the county of the defendant's residence and permitting an action against a corporation in the county in which the action accrued, if service can be had on an agent of the corporation in that county, the record must somewhere show that the cause of action arose in the county in which the action is brought. (Or.) Hildebrand v. United Artisans, 852.

See Libel and Slander, 16-18.

Note.

Corporations, expulsion of members of, classification of cases warranting, 25, 26.

expulsion of members of, for breaches of contract, 29.

expulsion of members of, for defamation of the corporation or its members, 28.

expulsion of members of, for disorderly conduct, 29.

expulsion of members of, for engaging in liquor business, 29.

expulsion of members of, for questionable business practices, 29.

expulsion of members of, grounds for, 27.

expulsion of members of nonstock corporations formed for pecuniary profit, 25.

expulsion of members of, notice and hearing, right of members to, 27.

expulsion of members of, power of may be delegated to the board of directors, 26.

expulsion of members of, rules to govern, exercise of power of, 26.

expulsion of members of, source of power of, 25.

expulsion of members of, when corporation is formed for pecuniary profit, 25.

power of to expel members, 24.

COSTS.

COSTS.—No Portion of the Costs Should be Taxed to an intervener who is successful on all the issues of his petition, save one as to which no costs were incurred beyond those necessarily incurred in the trial of the other issues. (Iowa) Jacobs v. Jacobs, 402.

COURTS.

COURTS OF PROBATE—Jurisdiction.—A probate court has original jurisdiction to declare a person a drunkard and spendthrift and to appoint a conservator for him, although the statute provides that where there has been a trial in the county court of an issue as to whether a person is a lunatic, drunkard or spendthrift, the record of the verdict and judgment shall be certified to the probate court, and the issues need not be tried again. (Ill.) Ure v. Ure, 336.

CRIMINAL LAW.

1. CRIMINAL LAW.—Insanity, to Excuse Crime must be such as dethrones reason and renders the subject incapable of discerning

between right and wrong, or of understanding or appreciating the extent, nature, consequences, or effect of his wrongful act. (Or.) *State v. Lauth*, 873.

2. **CRIMINAL LAW—Frenzy as Insanity—Sudden Brainstorm not Defense.**—A paroxysm of jealousy, or sudden anger or frenzy of temper, provoked or superinduced by the intelligence that the accused had been abandoned by his mistress, he being otherwise in possession of his mental faculties, unimpaired by disease or unbalanced by heredity, will not relieve him of criminal responsibility for having killed her. (Or.) *State v. Lauth*, 873.

3. **CRIMINAL LAW—Jeopardy—Waiver.**—The accused waives the constitutional safeguard against being twice put in jeopardy, and may be tried again for murder, when he procures a new trial on his own motion, on a conviction of manslaughter under an indictment for murder. (S. C.) *State v. Gillis*, 95.

4. **EVIDENCE.**—The Flight of One Accused of Crime is a circumstance *prima facie* indicative of guilt. (Iowa.) *State v. Matheson*, 427.

CURATIVE STATUTES.

See Constitutional Law, 7.

CURTESY.

1. **HUSBAND AND WIFE—Contract Between, as to Estate by Curtesy.**—A contract between husband and wife for the relinquishment by him of his curtesy estate or interest in her property is void as against public policy. (Or.) *McCrary v. Biggers*, 882.

2. **HUSBAND AND WIFE—Estoppel to Claim Estate by Curtesy.** If a husband agrees with his wife not to claim his estate by curtesy in her lands, and, as a result, she does not convey her lands by deed, but devises them by will, such contract is void, and the husband is not estopped from claiming an estate by curtesy in such lands, although he has allowed the persons to whom the land was devised to take possession of it. (Or.) *McCrary v. Biggers*, 882.

DAMAGES.

NEGLIGENCE—Damages for Mental Anguish.—In actions to recover for mental anguish it is generally proper to instruct the jury that to warrant a verdict for damages, it must find not only that the plaintiff suffered mental anguish from defendant's breach of duty as a proximate cause, but that such breach of duty would have brought suffering to a reasonable human being in the situation of plaintiff. (S. C.) *Roberts v. Western Union Tel. Co.*, 100.

See Death; Eminent Domain.

DEATH.

1. **NEGLIGENCE Causing Death—Damages—Instructions.**—In an action by children to recover for the death of their father caused by the negligence of a telephone company, if the court instructs the jury that if they can recover, the amount of the verdict must be limited to compensation to them for loss of what they could have expected from him for their support and education during their minority, a remark of the court that one of the plaintiffs, being a deaf mute, the father might have been liable to contribute more to

such child's support than he ordinarily would, is not ground for reversal. (Pa.) *Delahunt v. United Tel. & Tel. Co.*, 958.

2. LIMITATION OF ACTIONS for Negligent Homicide.—An action for a negligent homicide, brought by a widow to recover for the death of her late husband, must be regarded as an action for "injury done to the person," and hence, in Georgia, must be brought within two years after his death. (Ga.) *Atlantic etc. R. R. Co. v. McDilda*, 240.

3. CONFLICT OF LAWS.—The Fund Recovered for a Wrongful Death should be distributed according to the law of the state where the death was occasioned, and not according to the law of the decedent's domicile. (Iowa) *Estate of Coe*, 416.

4. CONFLICT OF LAWS.—Damages Recovered for a wrongful act committed in Iowa and resulting in the death of a resident of Kansas are to be distributed according to the law of the domicile of the deceased, the Iowa statutes providing that "when a wrongful act produces death, damages recovered therefor shall be disposed of as personal property belonging to the estate of the deceased." (Kan.) *Hartley v. Hartley*, 519.

DEEDS.

1. DEEDS—Effect of Redelivery.—The delivery back by the grantee to the grantor of an unrecorded deed does not affect the legal title to the land, but when done with the intention that the deed be destroyed for the purpose of revesting title in the grantor, passes an equitable title. (Ill.) *Crossman v. Keister*, 305.

2. DEEDS—Conveyance by Spendthrift.—A deed made by a vendor after he has been adjudged a spendthrift by the probate court and a conservator appointed for him is void, and his grantee is chargeable with notice, by the record, of such fact and is not entitled to be repaid money expended for taxes, as a condition precedent to setting aside such deed. (Ill.) *Ure v. Ure*, 336.

3. DEEDS.—In Construing a Doubtful Description in a conveyance, the court must keep in mind the position of the contracting parties and the circumstances under which they acted, and interpret the instrument in the light thereof. (Kan.) *Abercrombie v. Simmons*, 509.

4. DEEDS—Indefiniteness of Description.—A Deed to a Right of Way to a railroad company describing the land as all of a specified quarter section "lying within fifty feet of the center line of the main track of said railroad," is not void for indefiniteness of description, if the railroad had been surveyed and staked out prior to the conveyance, though it was never constructed, and a few days after the conveyance a map and profile of the road were made by the company and subsequently filed with the county clerk. (Kan.) *Abercrombie v. Simmons*, 509.

5. DEEDS—Registration of as Mortgages.—If the statute provides that deeds and mortgages shall be recorded in separate books kept for that purpose, a deed absolute in form, though intended as security for a loan of money, and accompanied by an unrecorded defeasance, is void as to a bona fide purchaser, if recorded in the book of deeds instead of mortgages. (Mich.) *Grand Rapids National Bank v. Ford*, 668.

DECEASED PERSON.

See Evidence 3; Witnesses, 1, 2.

DEPOTS.

See Carriers, 16-24.

DESCENT AND DISTRIBUTION.

1. **DESCENT AND DISTRIBUTION.**—The primary source from which advancements should be equalized is the decedent's personal estate. (Ind. App.) Barnett v. Thomas, 385.

2. **PARENT AND CHILD—Contracts as to Inheritance.**—The parol promise of an heir to accept a certain amount of property in lieu of his expected interest in his parent's estate, when followed by the execution and delivery of a deed and the possession of the property conveyed, is valid. (Ill.) Crossman v. Keister, 305.

See Death, 3, 4.

DIVORCE.*In General.*

1. **DIVORCE—Attorneys for Wife, When have no Right to Intervene to Prevent the Dismissal of the Action.**—Though a statute of the state provides that the court, in an action brought by a wife for divorce, may require the husband to pay the reasonable expenses of the wife in the prosecution or defense of the action, when such judgment is granted or refused, or give judgment therefor, she may enter into a stipulation for the dismissal of the action without the consent of her attorneys, and the court cannot allow them to intervene in the action and thereupon enter a judgment in their favor for their fees and for the costs advanced by them. (Wash.) Hillman v. Hillman, 135.

2. **JUDGMENTS in Divorce—Conclusiveness.**—Equity has jurisdiction to grant divorces and enforce a trust, and if the parties join in the trial of both questions in one suit they are bound by the decree when neither appeals therefrom. (Mich.) Carnahan v. Carnahan, 660.

Division of Property—Enforcement of Judgment Against Wife.

3. **DIVORCE—Jurisdiction—Division of Property.**—Under a statute authorizing a division of certain classes of property in divorce cases, the court has jurisdiction to determine what property belongs to the husband and to divide it between him and his wife. (Mich.) Carnahan v. Carnahan, 660.

4. **DIVORCE—Execution Against Wife.**—Execution cannot issue against a wife in favor of her husband to enforce an order in a decree of divorce requiring her to pay over to him certain money which the court finds she holds in trust for him, although in such case execution might issue against the husband to enforce an order for alimony against him. (Mich.) Carnahan v. Carnahan, 660.

5. **JUDGMENTS in Divorce—Enforcement Against Wife by Proceedings in Contempt.**—An order in a divorce proceeding that the wife pay over to her husband a portion of a trust fund which she has on deposit beyond the jurisdiction of the court, is not a decree for the payment of money in the ordinary sense, to be enforced by an execu-

tion, and is therefore enforceable against her by proceedings in contempt. (Mich.) Carnahan v. Carnahan, 660.

6. JUDGMENTS in Divorce—Enforcement Against Wife by Proceedings in Contempt.—Although a void execution has been issued and a void levy made against a wife, this does not affect the maintenance of subsequent proceedings in contempt against her to enforce an order in divorce proceedings that she pay over to her husband a certain portion of a trust fund. (Mich.) Carnahan v. Carnahan, 660.

7. JUDGMENTS in Divorce—Enforcement Against Wife by Contempt Proceedings.—A trustee in bankruptcy and the bankrupt may join in proceedings in contempt to compel the bankrupt's divorced wife to pay over a certain portion of a trust fund which was determined in the divorce proceedings to be held by her as a trustee for her husband, and which she was ordered therein to pay over to him. (Mich.) Carnahan v. Carnahan, 660.

8. DIVORCE—Decree Against Wife—Bankruptcy of Husband—Effect of.—If a wife is directed by a decree in divorce to deliver to her husband a certain portion of a trust fund, the assignment of the decree to the husband's assignee in bankruptcy does not change the nature of the wife's obligation to a debt enforceable by execution. (Mich.) Carnahan v. Carnahan, 660.

Alimony and Maintenance.

9. DIVORCE—Alimony After Death of Husband.—A provision in a decree of divorce against a husband for the payment of a certain sum monthly, until the further order of the court, for the support of his infant child, is not discharged by the death of the husband. (Mich.) Creyts v. Creyts, 656.

10. DIVORCE—Alimony After Death of Husband—Commutation of Payments.—Under statutory authority the court has power to make a decree against a husband in an action for divorce for the support of his child a charge upon his property, and alter it from time to time in the interest of justice, and the court may, upon his death, fix the time for which the payments must continue, calculate their present value, and make the sum a lien upon his unappropriated property with priority over all other claims of the widow, heirs and next of kin, except rights of dower. (Mich.) Creyts v. Creyts, 656.

11. DIVORCE—Alimony.—The Authority to Allow Alimony and Decree the Dissolution of the Marriage must be found in some statute expressly conferring the right. (Or.) Huffman v. Huffman, 943.

12. DIVORCE—Maintenance and Permanent Alimony are Synonymous Terms, and mean an allowance in money to be recovered on decree of divorce from the party in fault for the support of the innocent. (Or.) Huffman v. Huffman, 943.

13. DIVORCE—Alimony, Power to Award Wife Possession of Land.—The court, in a suit for divorce, has no power to award a wife possession of land upon which the husband has entered and acquired a residence for the purpose of obtaining title thereto under the homestead laws of the United States, and that portion of the decree making such allowance is void and hence vulnerable to collateral attack. (Or.) Huffman v. Huffman, 943.

Support of Children.

14. DIVORCE—Support of Child Awarded to Mother.—The legal obligation of a father for the support of his minor children is not impaired by a decree of divorce at the suit of his wife for his mis-

conduct, which gives the custody of the children to her, but is silent as to their support. If he refuses or neglects to support them, under such circumstances, the mother may recover from him, in an original action, a reasonable sum for necessities furnished for their support, after such decree. The law implies a promise, on his part, to pay for such necessities. (Minn.) *Spencer v. Spencer*, 695.

See Attorney and Client, 3, 4.

Note.

Divorce, children, power of court after granting divorce to modify decree as to provision for support of, 703.
duty of father to maintain children awarded to the mother, 700.

DOWER.

1. **DOWER—Setting Aside—Renunciation of—Innocent Purchaser.**—A complaint to set aside a renunciation of dower, alleging that such renunciation was made before a proper officer, and it was obtained by coercion of the doweress, and that she was not separately examined, but not alleging that the grantee participated in the fraud and coercion or had knowledge thereof, does not state a cause of action. (S. C.) *Campbell v. Harris Lithia Springs Co.*, 1001.

2. **DOWER—Adverse Possession as Bar.**—A widow's right of action for the assignment of her dower accrues immediately upon the death of her husband, and is barred by ten years' adverse possession next thereafter. (Mo.) *Joplin Brewing Co. v. Payne*, 770.

DURESS.

See Husband and Wife, 5.

EASEMENTS.

1. **AN EASEMENT** is an Estate or Interest in real property, and subject to the statute of frauds. (Idaho) *Howes v. Barmon*, 255.

2. **EASEMENTS—Increase of Burden of.**—An owner of an easement of drainage over the lands of another cannot materially increase the burden of it upon the servient estate. (Ill.) *Elsner v. Village of Gross Point*, 326.

ELECTION OF REMEDIES.

1. **ELECTION OF REMEDIES—Absence of Prejudice.**—An election of remedies is final and conclusive, although no injury has been done by the choice or would result from setting it aside. (Iowa) *Seeley v. Seeley-Howe-Le Van Co.*, 452.

2. **ACTIONS—Inconsistent Remedies.**—If an administrator sues to recover funds as belonging to the estate, but subsequently intervenes, claiming the funds as his own, there is no such inconsistency in the remedies pursued as to preclude a recovery in the intervention, the court having dismissed the action brought in the name of the administrator and there being no other claimant to the fund. (Iowa) *Jacobs v. Jacobs*, 402.

ELECTIONS.

1. **ELECTIONS—Power to Limit the Persons Who may Vote.**—Any person not disqualified by the provisions of the constitution of the state is entitled to vote, and it is not within the power of the legis-

lature to deny, abridge, extend or change the qualifications so prescribed. (Or.) *Livesley v. Litchfield*, 920.

2. ELECTIONS—Municipal Corporations—Power to Limit the Right to Vote.—Though the legislature is given authority by the constitution to provide the time and manner in which municipal officers may be elected or appointed, it cannot determine what shall constitute a legal voter, and hence may not prohibit persons from voting who have not paid their poll taxes, where the constitution of the state purports to prescribe the qualifications of voters at all elections prescribed by law. (Or.) *Livesley v. Litchfield*, 920.

ELECTRICITY.

See Telegraphs and Telephones, 1-6.

ELEVATORS.

See Carriers, 56, 57.

EMINENT DOMAIN.

Exercise by Railroads.

1. EMINENT DOMAIN—Exercise by Railroads.—The power given to railroad companies to condemn private property for use is to be exercised within strict limits. The law does not authorize the incorporating of a company with a roving commission, to go to any point in the state at will and condemn land in spots. (Mo.) *Kansas City etc. Ry. Co. v. Davis*, 790.

2. EMINENT DOMAIN—Exercise by Railroads—Meanders.—Under a charter authorizing a railroad company to build from one certain point to another, the company is not compelled to condemn land and build in a straight line between such points, but it must condemn and build with only reasonable meanders and reasonably approximating the length of line named in the charter, and it has no authority under such a charter to condemn land and build a line of road from one point named therein to a much more distant point than the other point named in the charter. (Mo.) *Kansas City etc. Ry. Co. v. Davis*, 790.

3. EMINENT DOMAIN—Exercise of by Railroads—Maps.—A statute requiring a railroad company to file a profile map of the route intended to be adopted in the county for the purpose of the exercise of the right of eminent domain, is not satisfied with a map of a part or section of such route. (Mo.) *Kansas City etc. Ry. Co. v. Davis*, 790.

4. EMINENT DOMAIN—Exercise by Railroads—Abandonment of Route.—A railroad corporation has no right to willfully abandon any portion of its chartered route, and if, in proceedings to condemn land for its road, it clearly appears that its intention is to construct only a part of the road called for by its charter, it will not be permitted to condemn the property. (Mo.) *Kansas City etc. Ry. Co. v. Davis*, 790.

5. EMINENT DOMAIN—Exercise of Right by Railroad.—If a railroad corporation claiming the power to take private property for its use invokes the aid of a court, the court, before it will lend such aid, will require the corporation to show, without equivocation, that it is seeking to exercise such extraordinary power within the strict boundaries of the law. (Mo.) *Kansas City etc. Ry. Co. v. Davis*, 790.

Am. St. Rep., Vol. 114—67

Damages and How Determined.

6. **EMINENT DOMAIN—Division of Land Damages.**—If the owner of an entire tract of land divides part of it into town lots, and a railroad company afterward condemns a right of way through the latter part, the whole tract being used for agricultural purposes, the owner is not entitled to assess his damages as for injury done to the latter tract alone, as being the only part of the tract affected by the condemnation proceedings. In estimating the damages the whole tract must be considered as one body of land. (Pa.) *Gorgas v. Philadelphia etc. R. R. Co.*, 974.

7. **EMINENT DOMAIN—Railroad Right of Way—Measure of Damages.**—The measure of damages for land taken under the right of eminent domain for a railroad right of way is the difference in the market value of the tract as a whole immediately before and immediately after the taking. In estimating the damages, the land owner is entitled to have considered the value of his property for any and every purpose or use to which it may be adapted, and to have the damages assessed upon a basis of the most valuable use to which the property may be adapted, and the railroad company is entitled to offset any benefits or advantages which may accrue to the part of the tract of land not taken or injured. (Pa.) *Gorgas v. Philadelphia etc. R. R. Co.*, 974.

8. **EMINENT DOMAIN—Division of Land—Damages.**—If the owner of an entire tract of land divides a part thereof into town lots, and a railroad company afterward condemns a right of way through the latter part, but while the whole tract is used for agricultural purposes, the owner is not entitled to show, to enhance his damages, the number of lots that would be taken, according to his plan of the lots, nor can he show the average value thereof. (Pa.) *Gorgas v. Philadelphia etc. R. R. Co.*, 974.

9. **EMINENT DOMAIN—Evidence of Value of Land.**—In condemnation proceedings under the right of eminent domain a witness as to land values cannot testify in his examination in chief as to the money value of land similar to that under consideration. (Pa.) *Gorgas v. Philadelphia etc. R. R. Co.*, 974.

10. **EMINENT DOMAIN—Plan of Town Lots as Evidence.**—An unrecorded plan of town lots which were not marked on the ground, made several years prior to condemnation proceedings, and not including all of the land on which damages are to be assessed, is not admissible in evidence. (Pa.) *Gorgas v. Philadelphia etc. R. R. Co.*, 974.

11. **EMINENT DOMAIN—Measure of Damages** for land taken or injured by a railroad company under the right of eminent domain is the difference in the market value of the tract as a whole immediately before and immediately after the taking, and in assessing the damages, the land owner is entitled to have considered the value of his land for any and every purpose or use to which it may be adapted, and to have the damages assessed upon the basis of the most valuable use to which the property may be adapted, while the railroad company is entitled to offset any benefits or advantages which may accrue to the part of the tract of land not taken or injured. (Pa.) *Cox v. Philadelphia etc. R. R. Co.*, 979.

12. **EMINENT DOMAIN—Damages—Business Profits.**—In eminent domain proceedings, the land owner is not entitled to have the profits of his business considered in determining the value of the property

as affected or injured by the taking. (Pa.) *Cox v. Philadelphia etc. R. R. Co.*, 979.

13. **EMINENT DOMAIN—Damages—Evidence.**—In eminent domain proceedings the land owner is not limited to any particular use to which his property may be available, and he is entitled to have its value considered for any and all purposes for which it may be used. He may show, by any competent testimony, expert or otherwise, that his property is especially valuable for a particular purpose or business, but he cannot show the profits which would arise if the property were actually used for such purpose or business. (Pa.) *Cox v. Philadelphia etc. R. R. Co.*, 979.

14. **EMINENT DOMAIN—Map as Evidence.**—In eminent domain proceedings, a map which is shown to be an incorrect representation of the land, and to have been made by a person who did not have data from which to make an accurate map, is not admissible in evidence. (Pa.) *Cox v. Philadelphia etc. R. R. Co.*, 979.

15. **EMINENT DOMAIN—Damages—Evidence.**—In eminent domain proceedings to condemn a railroad right of way, the railroad company cannot show that the use of the land to which the owner claims it is peculiarly adapted would pollute a stream passing through it. Such evidence would raise a collateral issue, which could not be determined in the case as to matters between such owner and lower riparian proprietors. (Pa.) *Cox v. Philadelphia etc. R. R. Co.*, 979.

Parties to Proceedings.

16. **EMINENT DOMAIN—Parties.**—If all nonagreeing land owners of a county whose land is sought to be taken are not made parties defendant in condemnation proceedings for a railroad right of way, the petition therein is fatally defective, and when such fact is made to appear the petition should be dismissed. (Mo.) *Kansas City etc. Ry. Co. v. Davis*, 790.

17. **EMINENT DOMAIN—Parties—Appeal.**—If all parties to condemnation proceedings for a railway right of way try the case on the theory that one of the issues is that all nonagreeing land owners affected by such proceedings have not been joined as defendants, the point that such issue was not raised by demurrer or answer cannot be raised on appeal. (Mo.) *Kansas City etc. Ry. Co. v. Davis*, 790.

EMPLOYER'S LIABILITY.

See Master and Servant.

ESTATES OF DECEDENTS.

See Descent and Distribution; Treaties.

EVIDENCE.

In General.

1. **EVIDENCE.**—Rules of Evidence are Subject to Legislative Control unless the changes go to the extent of the practical denial of a constitutional right. (S. C.) *Ex parte Parker*, 1011.

2. **EVIDENCE—Admission—Harmless Error.**—The admission of testimony which, though irrelevant and hearsay, can have no possible bearing on the issues, is harmless error. (S. C.) *Roberts v. Western Union Tel. Co.*, 100.

Declarations of Decedent.

3. **EVIDENCE—Declarations of Deceased Person.**—Where an administrator sues to recover a fund transferred by his decedent without consideration, and the son of the deceased intervenes, claiming that the money belongs to him, his brothers and sisters may testify that in her lifetime the deceased stated to third persons that she held the fund for the son. (Iowa) *Jacobs v. Jacobs*, 402.

Photographs and X-ray Pictures.

4. **EVIDENCE.**—A Photograph is Admissible in evidence, not merely as a map or diagram representing things to which a witness testifies from his independent observation, but as direct evidence of things which have not been directly described by a witness as having come within his observation. (Iowa) *State v. Matheson*, 427.

5. **EVIDENCE.**—An X-Ray Photograph showing the presence of a dark substance in a human body is admissible in a prosecution for an assault to murder, after proof that it was taken by a competent person, to show the course and location of a bullet. (Iowa) *State v. Matheson*, 427.

Memoranda to Refresh Memory.

6. **EVIDENCE—Memorandum to Refresh Memory.**—In Oregon, a witness may refresh his memory by a writing only when it was written by the witness himself, or under his direction, at the time when the fact occurred, or immediately thereafter, or at another time when the fact was fresh in his memory, and he knew that it was correctly stated in the writing. (Or.) *Manchester Assurance Co. v. Oregon R. R. Co.*, 863.

7. **EVIDENCE.**—Memoranda are but secondary evidence, and are not admissible if the witness is able to testify as to the facts mentioned therein, or if he is enabled to testify from present recollection after having had his mind refreshed by the memoranda. (Or.) *Manchester Assurance Co. v. Oregon R. R. Co.*, 863.

8. **EVIDENCE—Memoranda.**—To enable a witness to testify in any event from memoranda, they must be the originals unless they be lost, or their absence excused. (Or.) *Manchester Assurance Co. v. Oregon R. R. Co.*, 863.

9. **EVIDENCE—Memoranda.**—If original memoranda are produced, and it appears that they were made in the usual course of business, they may be introduced and received in evidence along with the testimony of the witness who made them and is enabled to say that the facts stated were correctly minuted at the time, and that he is unable to speak concerning such facts without the aid of the memoranda. (Or.) *Manchester Assurance Co. v. Oregon R. R. Co.*, 863.

Opinion Evidence.

10. **EVIDENCE—Memoranda.**—If original memoranda of locomotive engineers or inspectors are shown to be lost, other memoranda made from original slips by a clerk whose duty it was to make them, and shown by the evidence of such person to be correct, are admissible in evidence. (Or.) *Manchester Assurance Co. v. Oregon R. R. Co.*, 863.

11. **EVIDENCE—Nonexperts—Opinion as to Cause of Death.**—An intelligent nonexpert witness of mature years who has seen many

cases is competent to testify that a certain person died of consumption. (Mich.) *Krapp v. Metropolitan Life Ins. Co.*, 651.

12. EVIDENCE, Expert, When Admissible.—A conductor of a railway train should, as an expert, be permitted to testify as to the time it would ordinarily take a passenger to board or to get off of a train, or as to what would be ample time for a man to go into a train, deposit baggage, come out again and get off the train. (Ga.) *Seaboard Air Line Railway v. Bradley*, 196.

13. EVIDENCE.—The Speed of a Train is not a Question of Science, but may be shown by an ordinary witness who has given attention to the running of trains and possesses a knowledge of time and distance. The inexperience of a witness in timing the speed of trains, or the fact that he has given the matter little attention, goes to the weight, rather than the admissibility, of his testimony. (Kan.) *Atchison etc. Ry. Co. v. Holloway*, 462.

See Criminal Law; Homicide; Witnesses.

Note.

Evidence. See Photographs.

EXECUTION.

1. EXECUTION SALE.—The Redemption of the Property Sold Under a Foreclosure Sale Defeats the Inchoate Right of the Purchaser and restores the property to the same condition as if no sale had been attempted. (Or.) *Kaston v. Storey*, 912.

2. EXECUTION Against the Person Where the Judgment Does not Provide for Its Issuing.—If the action in which the judgment has been recovered is one in which the defendant might have been arrested, and the other conditions provided by statute existed, an execution against his person may properly issue without any order to that effect in the judgment. (Or.) *Banning v. Roy*, 908.

3. EXECUTION Against the Person.—The Neglect of the Sheriff to Return a Writ of Arrest Before Judgment is a mere irregularity with which the plaintiff is not chargeable, and does not render improper an execution issued on such judgment against the person of the defendant. (Or.) *Banning v. Roy*, 908.

4. EXECUTION AGAINST THE PERSON—Liability of Bail.—The fact that the defendant was in attendance upon the court during the term at which the judgment against him was rendered and remained thereafter within its jurisdiction for some days does not relieve from liability the sureties giving bail for his appearance. It is a condition of their undertaking that he at all times render himself amenable to such process as may be issued to enforce the judgment. (Or.) *Banning v. Roy*, 908.

5. EXECUTION SALE.—Mere Inadequacy of Price is not ground for setting aside a sheriff's sale. (Iowa.) *State Savings Bank v. Shinn*, 424.

EXECUTORS AND ADMINISTRATORS.

See Treaties.

EXEMPTIONS.

THE EXEMPTION from Execution of Two Work Horses Includes Mules. (La.) *McElveen v. Goings*, 574.

See Homesteads.

EXPECTANCY.

See Descent and Distribution, 2.

EXPERT EVIDENCE.

See Evidence, 11-15.

FIRES.

See Railroads, 18.

FORGERY.

See Banks and Banking.

FRAUD.

FRAUD—Insufficient Pleading—How Reached.—If a pleader has attempted to set out the facts of an alleged fraud, an objection that the pleading is not sufficiently specific must be reached by motion. (Iowa) Seeley v. Seeley-Howe-Le Van Co., 452.

FRAUDS, STATUTE OF.

1. **THE STATUTE OF FRAUDS** does not Render Void the verbal contracts to which it refers; they are valid for all purposes except that of suit. (Kan.) Weld v. Weld, 517.

2. **STATUTE OF FRAUDS.**—If a Woman Marries a man in consideration of his parol agreement that the marriage shall operate as a satisfaction of her debt to him, the agreement is fully performed when the marriage takes place and is not thereafter affected by the statute of frauds. (Kan.) Weld v. Weld, 517.

3. **FRAUDS, STATUTE OF.**—The Part Performance which will support an agreement for a license or easement must have been founded upon, and be referable solely to, the specific terms of such agreement. (Idaho) Howes v. Barmon, 255.

4. **FRAUDS, STATUTE OF—Easement Part Performance not Sufficient to Support Claim of.**—If A, when engaged in erecting a building, agrees with B, the owner of an adjacent building, to erect a stairway which may serve as an entrance to both buildings, if the latter will allow a porch to be erected and used on his lot along the line of the former's building, and such porch and stairway are erected and for a time used in pursuance of such agreement, this is not such part performance as takes the agreement out of the statute of frauds and entitles B. to specific performance. (Idaho) Howes v. Barmon, 255.

5. **FRAUDS, STATUTE OF.**—Memorandum, Resolution of a Corporation may Constitute.—The resolution of a corporation adopted at a meeting of its board of directors containing a full description of property intended to be sold and also a statement of the terms of the sale, and purporting to authorize it to be made, a copy of which resolution, signed by the president and secretary of the selling corporation, is delivered to the purchaser, constitutes a full compliance with the requirements of the statute of frauds as being a memorandum in writing, signed by the parties to be charged. (Wash.) Western Timber Co. v. Kalama River Lumber Co., 137.

6. **FRAUDS, STATUTE OF, Acceptance of Contract, When not Prevented by Asking for Further Resolutions.**—If a corporation at a

meeting of its board of directors adopts a resolution authorizing the sale of its real property, the fact that the purchaser out of abundance of caution, desires the adoption of other resolutions, and that further steps be taken toward the completion or transfer of the title, does not show a refusal on its part to accept the contract of sale as authorized by such resolution. (Wash.) *Western Timber Co. v. Kalamazoo River Lumber Co.*, 137.

See Trusts, 3-6.

GARNISHMENT.

Of Verdict.

1. **GARNISHMENT.**—A Verdict on Which Judgment has not been entered cannot be made the subject of garnishment. (R. I.) *Cappelli v. Wood*, 54.

Of Railroads.

2. **GARNISHMENT—Railroads—Defenses.**—A railroad corporation is subject to garnishment, and if a judgment is rendered against it in such proceeding, it may successfully defend an action by the principal debtor in another state by setting up the judgment in the garnishment proceedings. (Ind. App.) *Pittsburgh etc. R. R. Co. v. Cox*, 377.

3. **GARNISHMENT—Railroads.**—If property is in the possession of a railroad company, and the transit has either not begun, or has been completed, and such property is held by the company, either at the place of shipment or the place of delivery, and is within the jurisdiction of the court issuing the process, the company is subject to garnishment the same as other individuals or corporations. (Ind. App.) *Pittsburgh etc. R. R. Co. v. Cox*, 377.

4. **GARNISHMENT of Railroads—Goods in Transit.**—A railroad company is not subject to garnishment as to goods in its custody in transit, not actually seized by an officer, and outside the jurisdiction of the court issuing the process. (Ind. App.) *Pittsburgh etc. R. R. Co. v. Cox*, 377.

5. **GARNISHMENT of Railroads—Goods in Transit—Collusion.**—If shippers of goods by railroad consign them to themselves under assumed names in order to evade legal proceedings, the railroad company, with no knowledge save that derived from the shipment and not guilty of any fraud or collusion, is not liable as a garnishee to the shipper's creditors under a writ of garnishment served while the goods are in transit. (Ind. App.) *Pittsburgh etc. R. R. Co. v. Cox*, 377.

GAS COMPANIES.

See Highways.

GIFTS

EQUITABLE GIFT of Real Property.—A conveyance of land, to be good at law, must be by deed under seal; but in equity a good title may be conveyed by a writing not under seal, or without any writing whatever. (Ill.) *Barnes v. Banks*, 331.

See Parent and Child, 6-7.

GOODWILL OF BUSINESS.

See Trade Names.

GUARDIAN AND WARD.

1. **JUDICIAL SALE.**—The Failure of a Guardian to Take the Oath Prescribed by Law before fixing the time and place of sale is fatal to the purchaser's title. (Or.) Fuller v. Hager, 916.

2. **JUDICIAL SALES—Curative Statutes, Construction of.**—A statute providing that all sales by guardians of their wards' real property to purchasers for a valuable consideration, which has been paid by them to such guardians in good faith, which have not been set aside by the court, shall be sufficient to sustain the guardians' deed to such purchasers, and all irregularities in obtaining the order of sale or in making or conducting the sale shall be disregarded, makes valid a sale by a guardian without taking the oath prescribed by statute for fixing the time and place of the sale. (Or.) Fuller v. Hager, 916.

HERDING SHEEP.

See Constitutional Law, 5.

HIGHWAYS.

HIGHWAYS—Use for Pipe-lines by Gas Company.—A corporation organized to transport and distribute natural gas for fuel, light, and power may, as against the state, bury its pipe-lines in the public highways, if public travel is not thereby interfered with. (Kan.) State v. Kansas Natural Gas etc. Co., 507.

HOMESTEADS.

1. **HOMESTEADS—Exemption in Favor of Heirs.**—A homestead purchased with pension money, though exempt from antecedent debts of the pensioner during his lifetime, does not descend to his heirs free from such debts. (Iowa) Beatty v. Wardell, 457.

2. **HOMESTEADS—Right to, When Vests in Wife.**—A homestead right does not vest in a wife and her children at the time her husband abandons them and the homestead, but such right vests in them only upon his death. (Mo.) Joplin Brewing Co. v. Payne, 770.

3. **HOMESTEADS—Interest of Wife—Conveyance.**—The interest of a wife in a homestead cannot be sold nor conveyed during the lifetime of her husband, and nothing passes by her quitclaim deed during such lifetime. (Mo.) Joplin Brewing Co. v. Payne, 770.

4. **HOMESTEAD—Exemption of Proceeds of Sale.**—The proceeds of the sale of a homestead intended for use in the purchase of another homestead may be reached by garnishment. (Minn.) Fred v. Brannen, 740.

5. **HOMESTEAD, Exemption of Surplus Proceeds of Judicial Sale of.**—If a homestead is sold under a judgment foreclosing a vendor's lien, the proceeds of the sale after satisfying such judgment and lien are exempt from execution. (La.) Johnson v. Agurs, 562.

6. **HOMESTEAD.—Mortgages of Homestead Property Where the Mortgages do not Amount to a Waiver of the Homestead Right** are not entitled to the surplus arising under a sale of the homestead to satisfy a vendor's lien. (La.) Johnson v. Agurs, 562.

7. **HOMESTEAD.—The Claim of the Surplus Resulting from the Sale of a Homestead to Satisfy a Vendor's Lien is in Time if interposed before the purchaser or sheriff has paid out the proceeds of the sale.** (La.) Johnson v. Agurs, 562.

See Adverse Possession; Public Lands, 4-5.

HOMICIDE.

1. **ASSAULT TO MURDER—Accidental Shooting.**—If the defense in a prosecution for assault to murder is that the shooting was accidental and without wrongful intent, it is error to instruct the jury, in effect, that unless they find affirmatively that the shooting was accidental, they are to disregard the evidence as to an accident, but are to apply the rule as to presumption of intent from a wrongful act. (Iowa) *State v. Matheson*, 427.

2. **HOMICIDE—Self-defense.**—The law of self-defense is founded in necessity, so that if it be not necessary to take human life at the time it is taken, or if it does not appear to be necessary to take such life at such time, the law of self-defense falls to the ground, but it does not make any difference, whether the danger was real or not, for if the person doing the killing actually believed at the time that he was in danger, he may be said to have acted in self-defense. (S. C.) *State v. Miller*, 82.

3. **HOMICIDE—Corpus Delicti—Circumstantial Evidence.**—All the elements constituting the corpus delicti on a trial for murder or manslaughter may be established by circumstantial evidence. (S. C.) *State v. Gillis*, 95.

4. **HOMICIDE—Evidence—Res Gestae.**—Evidence of the conduct, actions, and general behavior of the accused immediately before the killing with which he is charged, and that he was armed and in a vicious humor, is admissible as tending to show the state of mind of the defendant shortly before the homicide. (S. C.) *State v. Miller*, 82.

5. **HOMICIDE—Admission as Evidence.**—The admission by a person charged with a homicide, made five or ten minutes thereafter, that he had shot a man, is admissible to show that he did the killing. (S. C.) *State v. Miller*, 82.

6. **HOMICIDE—Reputation.**—In a criminal case, an instruction that testimony that, as far as the witness knew, the reputation of the deceased was good, must be taken in connection with what the witness stated other persons had said on the subject, is proper. (S. C.) *State v. Miller*, 82.

7. **HOMICIDE—Malice—Instructions.**—An instruction in a homicide case that malice has been defined to be a term of art importing wickedness, and excluding just cause and excuse, is not erroneous as having a tendency to impress the jury that mere wickedness is malice. (S. C.) *State v. Miller*, 82.

8. **HOMICIDE—Benefit of Evidence—Instructions.**—In a homicide case, an instruction that under a plea of not guilty, the accused is entitled to the benefit of all the testimony in the case that may inure to his benefit, is not erroneous as depriving the accused of any benefit arising from failure or lack of proof. (S. C.) *State v. Miller*, 82.

HUSBAND AND WIFE.*In General.*

1. **HUSBAND AND WIFE, Mutual Obligations of.**—Each Spouse is Entitled to the Conjugal Society and Comfort of the Other, and this right is as valuable and important to her as to him. (Mass.) *Nolin v. Pearson*, 605.

2. HUSBAND AND WIFE.—The Absolute Privilege of Each to the Conjugal Society of the Other must be considered as embracing the persons of both, with no distinction in favor of one as against the other. (Mass.) *Nolin v. Pearson*, 605.

3. HUSBAND AND WIFE.—An Action by a Wife Against Another Woman for purposely debauching and carnally knowing the former's husband, whereby his affection for plaintiff was alienated and she deprived of his society and aid, may be sustained wherever the statute gives to married women the right to recover for injury in any form done to her person or her property. (Mass.) *Nolin v. Pearson*, 605.

4. HUSBAND AND WIFE.—Damages for Mental Suffering and Death of Wife.—The father of minor children cannot recover for mental suffering and consequent death of his wife due to the malicious prosecution and arrest of their minor child. (La.) *Sperier v. Ott*, 587.

5. HUSBAND AND WIFE.—Conveyances Between—Setting Aside.—If a wife conveys her real estate to her husband under a deed obtained by him of her under threats on his part of a permanent separation, and by such persistent importunities that the peace of the wife is destroyed, a court of equity will set such conveyance aside, at the suit of the wife. (Pa.) *Heckman v. Heckman*, 953.

Suit against Husband.

6. MARRIED WOMAN.—Suit Against Husband.—A statute declaring that a married woman shall own and enjoy her separate property secures to her the title and right of possession thereto, which a court of equity will recognize and protect. Hence a married woman may maintain a bill in equity against her husband for the protection of her separate estate against his fraud or wrongdoing. (Pa.) *Heckman v. Heckman*, 953.

7. MARRIED WOMEN.—Suit Against Husband.—A statute simply prohibiting a married woman from suing her husband is applicable only to actions at law, and does not deprive her of any right which she theretofore possessed of invoking the aid of a court of equity against her husband. (Pa.) *Heckman v. Heckman*, 953.

Contract for Support of Child.

8. HUSBAND AND WIFE.—Contracts for Support of Child.—A contract between husband and wife by which he is to pay her a certain sum per week for the support of their minor child is not without consideration, by reason that a divorce suit is pending between the parties when the agreement is made, and that, as the custody of the child is involved in such suit, the court has discretionary authority as to the disposition of the custody of such child. (Colo.) *Ward v. Goodrich*, 167.

9. HUSBAND AND WIFE.—Contracts for the Support of Child—Divorce—Public Policy.—A contract between husband and wife, made pending a suit for divorce, by which he agrees to pay her a certain sum per week for the support of their minor child, is not contrary to public policy, when the contract does not, and is not intended to, facilitate the granting of the divorce. (Colo.) *Ward v. Goodrich*, 167.

10. HUSBAND AND WIFE.—Contract for Support of Child—Consideration—Divorce.—A contract between husband and wife, made pending a suit for divorce, by which he agrees to pay her a certain sum per week for the support of their minor child, in consideration that she discharge him from an order of court directing him to pay

a certain sum weekly for the support of herself and such child during the pendency of the action, and from all claims for alimony, is supported by a sufficient consideration, and may be enforced after the termination of the suit for divorce. (Colo.) *Ward v. Goodrich*, 167.

Community Property.

11. **COMMUNITY PROPERTY.**—Property Bought Before Marriage Under a Suspensive Condition remains the property of the spouse who bought it, though the condition is realized after the marriage. (La.) *Crochet v. McCamant*, 538.

12. **COMMUNITY PROPERTY.**—Federal Homestead.—As soon as a husband enters upon land to acquire a homestead under the laws of the United States, he acquires a conditional ownership, and when he performs all the conditions, the title relates to the date of such entry, and it becomes community property, though, in the meantime his wife dies before he makes final proofs or becomes entitled to a patent. (La.) *Crochet v. McCamant*, 538.

See *Curtesy*; *Dower*; *Witnesses*, 3.

ILLEGITIMATES.

See *Bastards*.

INCEST.

1. **INCEST, What is.**—Adultery or fornication committed by persons who are prohibited by law from marrying on account of their being related within certain degrees of affinity or consanguinity is incestuous. (Ga.) *Lipham v. State*, 181.

2. **INCEST—Stepdaughter, Who is Within the Meaning of the Law of.**—An Illegitimate Daughter of a man's wife, born before his marriage to her, is his stepdaughter within the meaning of the law declaring a marriage between a man and his daughter incestuous. (Ga.) *Lipham v. State*, 181.

3. **INCEST—Evidence of Other Crimes.**—On the trial of an indictment charging incest, evidence tending to show that the accused and his stepdaughter, about a year anterior to the time charged in the indictment, and in another county, slept together on different nights, is relevant for the purpose of throwing light on the relations existing between the parties. (Ga.) *Lipham v. State*, 181.

INDICTMENT.

INDICTMENT.—The Name Given an Offense in an Indictment is Immaterial, if its averments are such as to describe an offense against the laws of the state. (Ga.) *Lipham v. State*, 181.

See *Corporations*, 9.

INFANTS.

1. **A MINOR Procuring a Contract by False Representations as to Her Age, for the Sale of Her Real Property, and the Payment to Her of a Part of the Purchase Price,** is not liable in an action of tort for such false representations, nor for the money received on account of such sale. (Mass.) *Brooks v. Sawyer*, 594.

2. INFANCY—Loan to Minor—Lien on Land to Protect.—A court of equity will not impose a lien on a minor's interest in land to secure the payment of money advanced at his request to redeem the premises from a sale thereof under a decree of foreclosure, although the minor has agreed that the lender should be subrogated to the rights of the mortgagee. Such redemption is not a necessary for which the minor is liable. (Or.) *Burton v. Anthony*, 847.

See Husband and Wife; Parent and Child.

INJUNCTION.

1. INJUNCTION—Dissolution of.—If, upon the fact of a bill for injunction and no other relief, no sufficient ground for equitable relief is shown, the court may, on motion, dissolve the injunction and dismiss the bill. (Ill.) *Elser v. Village of Gross Point*, 326.

2. INJUNCTION—Threatened Appropriation of Property.—Though a court of equity will not entertain jurisdiction at the suit of a person whose property is not actually taken, to enjoin the making of a public improvement, yet, if the threatened act involves an actual taking, the expropriation will be enjoined until the damages are ascertained and paid in the manner provided by law. (Ill.) *Elser v. Village of Gross Point*, 326.

INNKEEPERS.

1. INNKEEPERS—Liability.—The first requisite of the extraordinary liability imposed upon an innkeeper is that the relation of innkeeper and guest should have existed at the time the loss or injury occurred, or shortly preceding it. After the relation ceases the guest has a reasonable time within which to remove his property from the inn, and thereafter the innkeeper is liable only as a bailee, gratuitous or otherwise, in the absence of an express contract to the contrary. A complaint against an innkeeper for a loss must allege the existence of the relation of innkeeper and guest at the time of the loss, or within a reasonable time preceding. (Colo.) *Clark v. Ball*, 154.

2. INNKEEPERS—Partnership—Liability for Money Deposited. If persons are conducting a hotel as partners, the receipt of a deposit of money by one of them from a guest is within the scope of his authority as a member of the partnership, and imposes a liability upon the members thereof to return such money upon demand, regardless of whether the relation of innkeeper and guest exists at the time of such demand. (Colo.) *Clark v. Ball*, 154.

3. INNKEEPERS—Partnership—Authority.—Any act of a member of a partnership within the scope of his authority is binding upon all of the members of the firm, and one member of a firm of hotelkeepers is authorized to receive from a guest of the hotel a deposit of money, valuables, or other property, for safekeeping. (Colo.) *Clark v. Ball*, 154.

4. INNKEEPERS—Partnership—Liability.—If a person deposits money with one of the members of a partnership running a hotel, while such person is a guest thereof, he can recover against the firm for the loss of such money by the partner with whom it was deposited, regardless of the relation of innkeeper and guest at the time of the loss. (Colo.) *Clark v. Ball*, 154.

INSANITY.

See Criminal Law, 1-4.

INSTRUCTIONS.

See Trial.

INSURANCE.

1. **LIFE INSURANCE—Misrepresentations by Insured.**—The Statutes of Rhode Island providing that “no misstatement made in procuring a policy of life insurance shall be deemed material or render the policy void unless the matter thus represented shall have actually contributed to the contingency or event on which the policy is to become payable; and whether the matter so represented contributed to said contingency or event, in any case, shall be a question for the jury,” does not apply to contracts in existence at the time of its enactment. (R. I.) *Leonard v. State Mutual etc. Co.*, 30.

2. **LIFE INSURANCE—Misrepresentation by Insured.**—The Statutes of Massachusetts providing that no misrepresentation made in the negotiation of a contract of insurance, by the insured, shall be deemed material or defeat the policy, unless made with the actual intent to deceive, or unless the matter represented or warranted increased the risk, applies to a policy written in Massachusetts by a Massachusetts company and sued upon in the courts of Rhode Island. (R. I.) *Leonard v. State Mutual etc. Co.*, 30.

3. **INSURANCE, LIFE—Proof of Death.**—If a life insurance policy provides that the proof of death shall be evidence of the facts therein stated in behalf of, but not against, the company, it is admissible in evidence as an admission, though not conclusive. (Mich.) *Krapp v. Metropolitan Life Ins. Co.*, 651.

4. **INSURANCE, LIFE—Evidence—Physicians—Privilege.**—A physician is incompetent to testify to facts concerning the health of the deceased insured's relatives acquired by him through his employment by them as their physician. Such facts are privileged. (Mich.) *Krapp v. Metropolitan Life Ins. Co.*, 651.

5. **INSURANCE, LIFE—Evidence.—Death Certificates** are admissible as to the cause of death of the insured persons to whom they relate, though the physicians making them are prohibited by statute from testifying to the facts stated in them because acquired in their professional capacity. (Mich.) *Krapp v. Metropolitan Life Ins. Co.*, 651.

INTEREST.

1. **INTEREST, Rate of After Maturity.**—If a note is payable three years after its date, with interest at the rate of two per cent per month, and a statute of the state provides that unless there is no express contract in writing fixing a different rate, interest is payable on all moneys at the rate of eight per cent per annum after they become due on any instrument in writing, interest after the maturity of such note cannot be allowed at the rate specified therein, but only at the rate designated in such statute. (Wash.) *Bank v. Doherty*, 123.

2. **CONFLICT OF LAWS—Interest After Maturity.**—If the statutes of the state provide the rate of interest allowable on contracts where no other rate is specified therein, such statute controls in a proceeding in another state to foreclose a mortgage given on lands therein to secure the payment of one of such contracts. (Wash.) *Bank v. Doherty*, 123.

See Usury.

INTOXICATING LIQUORS.

1. INTOXICATING LIQUORS—Licenses Dependent on Consent of Property Holders.—A municipal ordinance authorizing the granting of licenses for saloons and dance-halls, but forbidding such granting unless the petition therefor is accompanied by the written consent of a majority of the property holders within three hundred feet of the proposed location is constitutional, and is not illegal as conferring arbitrary powers on the property holders. (La.) *New Orleans v. Smythe*, 566.

2. INTOXICATING LIQUORS.—No Person has a Vested Right to Retail intoxicating liquors, and the power of the lawmaker to prohibit or regulate such an occupation is practically unlimited. (La.) *New Orleans v. Smythe*, 566.

3. INTOXICATING LIQUORS—Mandamus.—The Arbitrary Refusal by a City Council of a license to sell intoxicating liquors by retail to one who has complied with all the provisions of the ordinance controlling the subject may be redressed by mandamus. (La.) *New Orleans v. Smythe*, 566.

4. MUNICIPAL CORPORATIONS, Power of to Regulate Liquor Saloons.—A municipal corporation authorized by statute to "license, tax, regulate and restrain bar-keepers, saloon-keepers, dealers in spirituous, vinous, or malt liquors, and places where such liquors are kept for sale or in any manner disposed of," may regulate the persons and business referred to, and prescribe the hours when such places must be closed. (Idaho) *State v. Calloway*, 285.

5. MUNICIPAL CORPORATIONS.—An Ordinance Forbidding a Saloon-keeper from permitting any person, other than himself and members of his family, from entering the room or place where intoxicating liquors are sold during the hours when the sale of liquor is prohibited, is valid, when the time during which the place is permitted to be open amounts to eighteen hours every day except Sundays. (Idaho) *State v. Calloway*, 285.

6. A MUNICIPAL ORDINANCE Requiring Saloons to be Closed Every Day from midnight until 6 o'clock A. M. following, and from 12 o'clock Saturday night until 6 o'clock A. M. of the Monday following, and making it unlawful for the proprietor to permit any person other than himself or a member of his family to enter such saloon during such closing hours, is valid. (Idaho) *State v. Calloway*, 285.

7. CONSTITUTIONAL LAW—Class Legislation, What is not Forbidden as.—A Municipal Ordinance Requiring All Places for the Sale of Liquors to be Closed at midnight of each day and kept closed for six hours thereafter, and all day Sunday, is not forbidden class legislation. (Idaho) *State v. Calloway*, 285.

8. MUNICIPAL CORPORATIONS.—Wholesale as Well as Retail Liquor Dealers may by municipal ordinance be required to close their places of business on Sunday, and until 6 o'clock A. M. of each week day, and not permit the entry of any person, except themselves and members of their families, into any room where liquor is sold during such closed periods. (Idaho) *State v. Calloway*, 285.

9. MUNICIPAL CORPORATIONS—Regulation of Liquor Traffic, When not a Prohibition.—An ordinance requiring all places where liquor is sold to be closed until 6 o'clock A. M. of every day, and all day Sunday, is a regulation and not a prohibition of the liquor business. (Idaho) *State v. Calloway*, 285.

Nota.

- Intoxicating Liquors**, control of traffic in belongs to the police power, 298.
 control of traffic in was vested in the original states before the adoption of the constitution of the United States, 298.
 delegation by a state of the power to regulate, 299.
 license to deal in is not in contract, 302.
 license to deal in may be revoked, 302.
 municipal corporations, charter, provisions of respecting, 302.
 municipal corporations, delegation to of the power to regulate traffic in, 298.
 municipal corporations, general laws, when take away power of to regulate traffic in, 300.
 municipal corporations, interpretation of charter provisions respecting, 302.
 municipal corporations, judicial control of the power of to regulate traffic in, 300.
 municipal corporations, license to retail, power of to refuse, 302.
 municipal corporations, limits upon power of to regulate traffic in, 299.
 municipal corporations, ordinances of forbidding the employment of women in places where sales of are made, 301.
 municipal corporations, ordinances of regulating, invalid in part, when invalid as a whole, 303, 304.
 municipal corporations, ordinances of regulating, method of enforcing, 303.
 municipal corporations, ordinances of regulating, reasonableness of, 303.
 municipal corporations, ordinances of regulating will be so construed as to sustain them, 304.
 municipal corporations, ordinances of regulating traffic in, when do not conflict with the constitution, 301.
 municipal corporations, ordinances of regulating, when do not conflict with the general laws, 301.
 municipal corporations, power of to license, whether includes power to regulate, 301.
 municipal corporations, power of to pass ordinances respecting includes power to enforce them, 302.
 municipal corporations, power of to prohibit traffic in includes power to regulate, 302.
 municipal corporations, power of to regulate sales of, when implied, 299.
 municipal corporations, regulation of traffic in notwithstanding licenses authorizing sale of, 301.
 regulation of traffic in by the legislature, 298.
 regulation of traffic in is constitutional, 298.

See Constitutional Law.

JOINT TORTS.

See Torts.

JUDGMENTS.

In General.

1. **A JUDGMENT** Need not Specify the Kind of Execution Which may Issue for Its Enforcement. When the judgment is rendered, the law, and not the court, determines that question. (*Or. Banning v. Roy*, 908.

2. **JUDGMENT, Collateral Attack Upon.**—In an Action Against Ball, where the judgment is enforceable by an execution against the person the sufficiency of the complaint in the original action cannot be questioned. (Or.) Banning v. Roy, 908.

3. **JUDGMENT, Vacating, Irrespective of the Lapse of Time.**—Superior courts possess the power at all times to vacate void judgments, decrees and orders. (Or.) Huffman v. Huffman, 943.

Entry and Indexing.

4. **JUDGMENTS Prematurely Entered.**—A judgment for the sale of land for taxes founded on service by publication is not void because rendered prior to the elapsing of five days, as provided by statute, when the court remains in session sufficiently long thereafter to afford opportunity for objection to such premature rendition of the judgment. (Mich.) Goodell v. Auditor General, 646.

5. **JUDGMENT LIEN—Notice—Mistake in Names.**—A judgment entered and indexed against "Mrs. G. B. Smith" may be a lien on property in the name of "Kate L. Smith," as against a purchaser who knows that the judgment exists and that they are one and the same person. (Iowa) State Savings Bank v. Shinn, 424.

6. **JUDGMENTS—Record of—Indexing Christian Names.**—When it is commonly known that certain first or Christian names are interchangeably used, and the initial and dominant letters of each are identical, indicating to the eye that they are the same, and giving the same sound and substance to each, a prospective purchaser of property, examining the judgment index for the existence of liens must look for each name. (Pa.) Burns v. Ross, 963.

Lien of Judgment.

7. **A JUDGMENT LIEN Attaches to the Interest of a Judgment Debtor After the Sale of His Property Under a Judgment Foreclosing a Mortgage,** subject to be defeated only by the consummation of the sale by the execution of a sheriff's deed. (Or.) Kaston v. Storey, 912.

8. **JUDGMENT LIEN.**—A Judgment Obtained After the Sale of Property Under Execution is not cut off by the sale if a redemption therefrom is effected within the time prescribed by law. (Or.) Kaston v. Storey, 912.

9. **JUDGMENT LIEN—Equitable Interests.**—A judgment is not a lien on a mere right or interest which can only be asserted or enforced in a court of equity, nor can such interest be sold under an execution at law. (Or.) Pogue v. Simon, 903.

10. **JUDGMENT LIEN, Attachment of, to Property of Which the Judgment Debtor is Entitled to a Sheriff's Deed.**—One who has purchased property at an execution sale has, after the time for redemption has expired, and he has become entitled to a sheriff's deed, an interest in such property which is subject to a judgment lien and to a sale under execution. (Or.) Pogue v. Simon, 903.

Effect of Reversal.

11. **JUDGMENTS—Effect of Reversal.**—A reversal of a decree or judgment abrogates it, and, in effect, expunges it from the records, and the parties to the litigation are restored to their original rights. (Ill.) Ure v. Ure, 336.

12. **JUDGMENTS—Effect of Reversal.**—A party to a suit is presumed to know of all errors in the record, and cannot acquire any

rights under the erroneous decree that will not be abrogated by a subsequent reversal thereof; and if such party has received benefits from such decree or judgment, he must, after reversal, make restitution, and if he has sold property erroneously adjudged to belong to him, he must account to the true owner for its value. (Ill.) *Ure v. Ure*, 336.

13. JUDGMENTS—Effect of Reversal.—Innocent third persons have a right to rely upon the judgment or decree of a court having jurisdiction both as to the subject matter and the parties, and interests acquired by them under it will be protected notwithstanding its subsequent reversal. (Ill.) *Ure v. Ure*, 336.

14. JUDGMENTS—Effect of Reversal—Partition.—Upon reversal of a decree in partition a sale between the parties to the suit covering property involved therein must be annulled and the grantor must restore to the grantee the net proceeds of the sale. (Ill.) *Ure v. Ure*, 336.

15. JUDGMENT—Effect of Reversal—Partition.—A party to a partition suit who sells the property set off to him to an innocent third person must, upon the reversal of the partition decree, account to the other interested parties for the value of the property at the time that a new partition is had, excluding improvements made by the purchaser. (Ill.) *Ure v. Ure*, 336.

16. JUDGMENTS—Effect of Reversal—Partition—Innocent Purchasers.—A third person taking a mortgage upon land to which the mortgagor has an apparent valid title under a partition decree is protected as an innocent purchaser upon the reversal of such decree, if it was rendered by a court having jurisdiction of the parties and of the subject matter, and such mortgagee is entitled to have the property sold to satisfy his mortgage. (Ill.) *Ure v. Ure*, 336.

17. JUDGMENTS—Effect of Reversal—Partition—Claim for Purchase Money.—If a judgment decreeing that a will devises land to heirs in fee is reversed after they have partitioned the land and one of them has conveyed the portion allotted to him to a third person whose vendor is adjudged to have but a life interest, the claim of such vendee against his vendor for the purchase money paid is not a lien on the interest of the latter in the land so as to make it superior to a lien of the mortgagee in a mortgage executed by such vendor after the land was awarded to him in partition. (Ill.) *Ure v. Ure*, 336.

See Setoff.

JUDICIAL SALE.

JUDICIAL SALES—Constitutional Law.—A Statute Having the Effect of Validating Guardians' Sales made without giving the oath prescribed by statute before fixing the time and place of sale is constitutional. (Or.) *Fuller v. Hager*, 916.

See Executions; Guardian and Ward.

JURORS.

1. JURORS—Waiver of Incompetency.—An objection to a juror because his name was not on the jury list is waived by a failure to make inquiry as to his competency on his preliminary examination. (Iowa) *State v. Matheson*, 427.

Am. St. Rep., Vol 114—63

2. **TRIAL—Qualification of Jurors.**—The trial court's conclusion as to the qualifications of a juror, when attacked after verdict for bias or prejudice rendering the juror unfit to sit in the case, will be set aside only upon a showing by clear and palpable proof that the court has abused his discretion. (Or.) *State v. Lauth*, 873.

3. **TRIAL—Qualifications of Jurors—Review of.**—If the qualifications of a juror are attacked after verdict for bias or prejudice rendering him unfit to sit in the case, and affidavits and proofs are produced for and against, which are conflicting and contradictory, or of somewhat even balance, so that it requires a precise estimate to determine as to the greater weight or preponderance, the trial court's conclusions will not be disturbed, unless they may result in manifest injustice. (Or.) *State v. Lauth*, 873.

4. **TRIAL—Qualifications of Jurors—Setting Aside Verdict.**—If a venireman on his voir dire falsely states his interest or position, or misstates or conceals a material, relevant fact, and is then accepted as a juror, he is guilty of prejudicial misconduct, and the verdict must be set aside. (Or.) *State v. Lauth*, 873.

LABOR UNIONS.

See Trade Unions.

LANDLORD AND TENANT.

In General.

1. **LANDLORD AND TENANT.**—A Notice to Quit may be served on the wife of a tenant at their domicile in his absence. (R. I.) *Cranston Print Works v. Whalen*, 56.

2. **LANDLORD AND TENANT.**—The Abandonment of Leased Premises by the tenant, and the re-entry and reletting thereof by the landlord, operate to rescind a lease which contains no provision authorizing a re-entry upon default without working a forfeiture. (Minn.) *Haycock v. Johnston*, 715.

3. **LANDLORD AND TENANT—Action for Rent—Defenses.**—A tenant in an office building owned and occupied in part by a national bank cannot set up as a defense in an action against him for rent that such bank has no power under its charter to erect an office building and let offices therein. (Pa.) *Farmers' Deposit Nat. Bank v. Western etc. Co.*, 949.

4. **LANDLORD AND TENANT.**—Lessees cannot Impeach the title of their lessors for any cause except fraud. (Pa.) *Farmers' Nat. Bank v. Western etc. Co.*, 949.

Assignment of Lease.

5. **LANDLORD AND TENANT—Lease, What Amounts to an Assignment of.**—If a lessee of premises executes a lease thereof for the full term of his lease, this operates as an assignment of such lease, and does not create a new tenancy between such original lessee and his lessee. (Wash.) *Weander v. Claussen Brewing Assn.*, 110.

6. **LANDLORD AND TENANT—Lease, Assignment of, When not Converted into a New Lease.**—The fact that a tenant who leases the premises to another for the full unexpired term of the lease reserves the right of re-entry in case of default in the payment of rent, or the breach of any other of the covenants of the lease, does not prevent such leasing from operating as an assignment of the lessor's lease. (Wash.) *Weander v. Claussen Brewing Assn.*, 110.

7. LANDLORD AND TENANT—Assignment of Lease—Nonliability for Act of the Original Lessor.—Where an instrument executed by a lessee amounts to an assignment of the full leasehold term of such lessee, an action does not lie in favor of the last lessee against his lessor for an act of the original lessor. (Wash.) *Weander v. Claussen Brewing Assn.*, 110.

Defective Premises—Repairs.

8. LANDLORD AND TENANT.—A Landlord is not Answerable for Injuries Due to a Hidden Defect existing in premises when leased, if he neither knew nor ought to have known thereof. (Mass.) *Shute v. Bills*, 631.

9. LANDLORD AND TENANT.—A Landlord Discovering a Defect After the Beginning of the Tenancy is under no obligation to communicate it to the tenant. (Mass.) *Shute v. Bills*, 631.

10. LANDLORD AND TENANT.—A Known Usage that the Landlord do the Outside Repairs, such as the roof, gutters, and conductors, when houses are entirely let without any written lease to a single tenant at will, is good, and evidence to establish it is admissible in an action against a landlord. (Mass.) *Shute v. Bills*, 631.

11. LANDLORD AND TENANT.—The Right of Recovery on the Part of a Member of the Tenant's Family, against the landlord for an injury due to a defect in the leased premises is measured by the right of the tenant. (Mass.) *Shute v. Bills*, 631.

12. LANDLORD AND TENANT.—A Landlord is not Liable for Damages Due to Imperfect Repairs made by him or his agent, unless such repairs were made negligently. (Mass.) *Shute v. Bills*, 631.

13. LANDLORD AND TENANT.—Negligence in Making Repairs is Inferable when their purpose is to stop a leak in a roof or gutter, which, notwithstanding the repairs, continues to leak. (Mass.) *Shute v. Bills*, 631.

14. LANDLORD AND TENANT.—A Landlord is Answerable for Damages Due to Negligence in Making Repairs, as where, being notified of a leak in a gutter, he undertakes to repair it, but does the work in so negligent a manner that the leak continues, and the water therefrom, falling on the steps, freezes, causing a daughter of the tenant, who is a member of his household, while in the exercise of due care, to slip and fall and be thereby injured. (Mass.) *Shute v. Bills*, 631.

15. LANDLORD AND TENANT.—A Custom or Usage that the Landlord Retains Control of the Outside, Yard and Roof of a dwelling leased by him contradicts both the agreement of the parties and the rule of law. Evidence thereof should be excluded. (Mass.) *Shute v. Bills*, 631.

Note.

Landlord and Tenant, abandonment, acceptance of, what amounts to, 718.

abandonment, damages recoverable for by landlord after reletting the premises, 720.

abandonment, landlord need not relet premises to reduce the amount of the damages, 719.

abandonment, landlord's entering and caring for property is not an acceptance of, 718.

- Landlord and Tenant**, abandonment, possession taken by landlord, when amounts to acceptance of, 718.
 abandonment, receiving and retaining the keys, when amounts to an acceptance of, 719.
 abandonment, reletting the premises to others may be for the account of the tenant, 719, 720.
 abandonment, reletting the premises, when amounts to an acceptance of, 720.
 abandonment, reletting the premises without an agreement of the tenant, 721.
 lessee cannot relieve himself from liability by abandonment of premises, 717.
 surrender of lease and premises, what amounts to, 722.
 surrender of premium by operation of law, effect of, 717, 718.
 surrender of premises may be by agreement or by operation of law, 717.
 surrender of premises, what amounts to, 717.

LIBEL AND SLANDER.

Defamatory Words and Statements.

1. **LIBEL**, Words, When Defamatory.—A statement that an employé was discharged, not for a trivial offense, and not for the cause generally assigned, but for good cause which she knows, and which the speaker knows and could tell, if necessary, but would prefer not to, and that it was sufficient to say that it was such a cause that she could no longer be retained in the factory, is, when published in a newspaper, libelous. (La.) *Pattison v. Gulf Bag Co.*, 570.
2. **LIBEL**.—Injury and Malice may be Inferred from the Nature and Falsity of the Words and the surrounding circumstances. (La.) *Pattison v. Gulf Bag Co.*, 570.
3. **SLANDER**.—Nonactionable Words.—To say of a business man, "He is not worth a dollar; everything is in his wife's name," unless said of him in relation to his business connections, is not slanderous per se. (Mich.) *Dallavo v. Snider*, 684.
4. **SLANDER**.—Nonactionable Words.—To say to sureties of a merchant, who has signed an indemnity bond in favor of such sureties on the bond of another, that such merchant "is not worth a dollar; everything is in his wife's name," is not said of him concerning his business, and is not slanderous, per se. (Mich.) *Dallavo v. Snider*, 684.
5. **LIBEL**.—Words in Relation to Business.—It is libelous per se to publish of and concerning a merchant false statements touching him in his business, and naturally tending to injure him therein. (Mich.) *Dallavo v. Snider*, 684.
6. **SLANDER**.—Words in Relation to Business.—Allegations and Proof.—In a case where the charge is the uttering of slanderous words, the allegations of the declaration must be sustained by proof that the words were actually spoken of and concerning the plaintiff in relation to his business, in order to make them slanderous per se. (Mich.) *Dallavo v. Snider*, 684.

Privileged Communications.

7. **LIBEL**.—Privileged Communications.—A communication between officers of a corporation made in good faith concerning the conduct of one of its servants is privileged. (Colo.) *Denver Public Warehouse Co. v. Holloway*, 171.

8. **LIBEL—Privileged Communications.**—The question whether the occasion of a communication is such as to make it privileged is for the court to determine. (Colo.) *Denver Public Warehouse Co. v. Holloway*, 171.

9. **LIBEL—Privileged Communications—Burden of Proof.**—If the paper published is a privileged communication, the burden of proof is upon plaintiff to show express malice in its publication. (Colo.) *Denver Public Warehouse Co. v. Holloway*, 171.

10. **LIBEL—Privileged Communications—Burden of Proof.**—In an action for libel, if the occasion of the writing or publication is privileged, the burden to show that defendant has lost his privilege is cast upon the plaintiff. (Colo.) *Denver Public Warehouse Co. v. Holloway*, 171.

11. **LIBEL—Privileged Communications—Presumption—Probable Cause.**—If a writing is shown to have been written upon a privileged occasion, the presumption arises that it was written in good faith and upon probable cause. (Colo.) *Denver Public Warehouse Co. v. Holloway*, 171.

12. **LIBEL—Privileged Communications—Loss of Privilege.**—The privilege of a communication from one officer of a corporation to another, concerning the conduct of one of its servants, is not lost by the fact that the officer receiving it discloses its contents to another of the corporation's servants as a reason why the servant about whom it is written should be discharged. (Colo.) *Denver Public Warehouse Co. v. Holloway*, 171.

Libel of Public Officer.

13. **LIBEL OF PUBLIC OFFICER—Privileged Communication—Burden of Proof.**—Criticism of a public officer as to his official conduct is privileged, but if there is that in the publication which furnishes a basis for reasonable inference that malice was back of it, the burden of proof remains with the person making the charge to establish either its truth or probable ground for believing it true. (Pa.) *Mulderig v. Wilkes-Barre Times*, 967.

14. **LIBEL OF PUBLIC OFFICER—Privileged Communication—Malice.**—A publication charging an officer with misconduct in his office as a civil magistrate, so gross and flagrant as to demand, in an opinion expressed editorially, his impeachment, and a full investigation into his past record, which it was declared might possibly develop other charges for securing his ignominious discharge, and also charging him with being a party to a conspiracy to humiliate a person charged with a misdemeanor by sending him to jail over night, contains expressions which exceed the limits of privilege, and are evidence of malice, and the case must go to the jury. Hence, it is error in such case to direct a nonsuit. (Pa.) *Mulderig v. Wilkes-Barre Times*, 967.

Libel of Benefit Society.

15. **LIBEL—Defamation of Beneficial Association.**—An article published by members of a beneficial association, holding the officers thereof up to ridicule for reasons connected with the society, and tending to disorder and dissension within the association, is defamatory. (R. I.) *Del Ponte v. Societa Italiana*, 17.

Liability of Corporation for Libel.

16. **AGENCY.**—The Statements of the Manager of a Corporation are Admissible Against It to show that it authorized the publication of a libel. (La.) *Pattison v. Gulf Bag Co.*, 570.

17. CORPORATION, Liability of When Business is Conducted in Its Name.—If business is conducted in the name of a corporation, as far as employes and the public are advised, it is answerable for a libel, though the business belongs to another and different corporation whose name appears on the letterheads. (La.) *Pattison v. Gulf Bag Co.*, 570.

18. A CORPORATION is Answerable for a libel, the publication of which is sanctioned by its manager in its interest. (La.) *Pattison v. Gulf Bag Co.*, 570.

See Parent and Child, 10.

LICENSES.

To Engage in Plumbing.

1. CONSTITUTIONAL LAW—Licensing of Plumbing.—A statute providing for the licensing of all plumbers who carry on the business of plumbing, creating a board of plumbing examiners, fixing their compensation, and imposing a penalty on all persons engaged in plumbing unless licensed, cannot be sustained as a health regulation, and is therefore unconstitutional as depriving persons of their liberty to pursue their chosen calling. (Wash.) *State v. Smith*, 114.

To Enter Lands.

2. A PAROL LICENSE to do Something on the Lands of Another is revocable at the option of the licensor. (Idaho) *Howes v. Barmon*, 255.

3. A LICENSE CREATES no Estate in Lands, and may therefore rest in parol. (Idaho) *Howes v. Barmon*, 255.

4. LICENSE OR EASEMENT, When may be Enforced.—If a contract or agreement, whether it amounts to a license or an easement, looks to the acquirement of a right of passage over a stairway and rests entirely in parol, the licensee or grantee must have entered into possession, expended money and made improvements in such manner and to such extent that a refusal to enforce the agreement in specific terms would work a fraud on him. (Idaho) *Howes v. Barmon*, 255.

See Intoxicating Liquora.

LIENS.

See Judgments; Mechanic's Lien.

LIFE TENANTS.

1. LIFE TENANT—Duty to Pay Taxes.—The life tenant of lands is charged with the duty of paying the taxes which accrue upon the property of which he is enjoying the use, rents and profits. (Iowa) *First Congregational Church v. Terry*, 443.

2. LIFE TENANT—Sale of Land for Taxes.—A life tenant cannot exterminate the remainder by collusively permitting the property to be sold for taxes and having his wife and infant children take the accruing title in their names. (Iowa) *First Congregational Church v. Terry*, 443.

3. LIFE TENANT—Tax Sales.—The Wife of a Life Tenant, occupying the premises with her husband as a homestead, cannot acquire a valid tax title as against him or the remaindermen. (Iowa) *First Congregational Church v. Terry*, 443.

LIMITATION OF ACTIONS.

LIMITATION OF ACTIONS—Right to Plead.—The right to interpose the statute of limitations is a privilege, personal to the debtor, that may be availed of by others only when they stand in the relation of privity of estate to the debtor. (Or.) *Tinsley v. Lombard*, 844.

See Adverse Possession; Death, 2; Mortgages, 3, 7, 9.

LOCAL OPTION LAWS.

See Constitutional Law, 8, 9.

Note.

Local Option Laws. See Constitutional Law; Intoxicating Liquors: Municipal Corporations.

MALICIOUS PROSECUTION.

MALICIOUS PROSECUTION—Probable Cause.—In an action for malicious prosecution, a conviction of the plaintiff, which was reversed on appeal, and the plaintiff discharged, is not conclusive, but strong *prima facie* evidence of probable cause, which may be rebutted, not only by evidence tending to show that the conviction was obtained by fraud or perjury, but also by any competent evidence which satisfies the jury that the prosecutor did not have probable cause for instituting the prosecution. (Minn.) *Skeffington v. Elyward*, 711.

See Parent and Child, 8, 9.

MARKETABLE TITLE.

See Vendor and Vendee.

MARRIAGE.

1. MARRIAGE, COMMON-LAW—Declarations to Establish.—Declarations and admissions of a deceased that he was married to the plaintiff are competent evidence to establish the existence of a valid, common-law marriage, in an action by her to quiet the title to land owned by him in his lifetime. (Mo.) *Topper v. Perry*, 777.

2. MARRIAGE, COMMON-LAW, Declarations in Disparagement of.—On the issue as to the existence of a common-law marriage, declarations of the alleged husband not in the presence of his alleged wife, are admissible to disprove such marriage. (Mo.) *Topper v. Perry*, 777.

3. MARRIAGE, COMMON-LAW—Mutual Agreement.—When consent to marry is manifested by words *de praesenti*, a present assumption of the marriage status is necessary in order to constitute a common-law marriage. (Mo.) *Topper v. Perry*, 777.

4. MARRIAGE, COMMON-LAW—Sufficiency of Evidence to Establish.—Evidence that while a woman and man were riding together, he said that she was his wife, that a marriage ceremony was unnecessary if they would hold married relations, that she agreed to hold such relations with him, that afterward he acknowledged her as his wife, but that they did not live openly together as man and wife until five months thereafter, and that they were not regarded in the neighborhood as lawfully married, is not sufficient to establish a legal common-law marriage. (Mo.) *Topper v. Perry*, 777.

MARRIED WOMEN.

See Husband and Wife.

MARSHALING ASSETS.

MARSHALING ASSETS—Procedure.—If a creditor makes application to marshal assets and call in creditors to have his claim increased after all of the parties have been heard, and a report made covering all claims without any exceptions being filed, he must make some showing of excusable neglect, inadvertence or surprise, giving an opportunity to all opposing creditors to be heard, or his application must be denied. (S. C.) *Wardlaw v. Troy Oil Mill*, 1004.

MASTER AND SERVANT.

Contract by Third Person with Servant.

1. **MASTER AND SERVANT—Contract by Third Person With Servant.**—One who knowingly makes a contract with a servant to violate his duty to his master cannot be heard to say that such contract is binding on the master, or that out of that contract such a condition of affairs has arisen as gives him a right of action against the master. (Mo.) *O'Donnell v. Kansas City etc. R. R. Co.*, 753.

Assumption of Risks by Servant.

2. **RAILWAYS Risks Assumed by Employés of.**—One seeking and obtaining employment as a brakeman on a railroad assumes the risk of injury from buildings and other permanent structures unusually near the track, the risk of danger from which is obvious. (Mass.) *McLeod v. New York etc. R. R. Co.*, 628.

3. **MASTER AND SERVANT—Assumption of Risk of Absence of Guard Over an Emery Wheel.**—If no guards ever have been used over emery wheels in a factory, and an employé is aware of this when he begins work, his employer does not owe him the duty of making a change, and is not answerable to him for injuries sustained by the explosion of the emery wheel on which he is working, though his injury would have been prevented had a guard been placed over such wheel. (Mass.) *Saxe v. Walworth Manufacturing Co.*, 613.

4. **MASTER AND SERVANT—Nonliability for Defect in an Appliance.**—Where an employé is injured by the explosion of an emery wheel at which he is working, and such explosion could not have occurred without some defect in the wheel, still he cannot recover of his employer if there is nothing to show what the defect was, and no evidence to indicate that the most careful inspection or the highest degree of diligence on the part of the employer could have discovered any indication of danger in using the wheel, and it was not manufactured by him. (Mass.) *Saxe v. Walworth Manufacturing Co.*, 613.

5. **MASTER AND SERVANT—Assumption of Risk.**—Though the guard-rail above the feed board of a mangle is too high to warn and protect from injury an employé, he assumes the risk of injury if, knowing and appreciating the consequence of this imperfection, he consents to work at the mangle on being threatened with dismissal if he refuses. (Mass.) *Burke v. Davis*, 591.

6. **MASTER AND SERVANT—Servants Assume Such Risks as are naturally and reasonably incident to work within the scope of their employment so far as the hazards are obvious and within**

the apprehension of persons of their experience and understanding. (Ind. App.) *Shaver v. Home Telephone Co.*, 373.

7. MASTER AND SERVANT—Obvious Risks—Orders of Foreman.—Although a servant has the right to presume, in the absence of warning and notice, that in acting under the order of a foreman he will not be subjected to injury, this rule has no application where the danger is obvious and the servant has ample time to see and apprehend the danger. (Ind. App.) *Shaver v. Home Telephone Co.*, 373.

8. MASTER AND SERVANT—Assumption of Risks.—If a servant twenty years of age and of average intelligence is ordered by his master, in unloading a carload of telephone poles, to cut the stay wire of a standard holding the poles to the car, and he knows the purpose thereof, and there is nothing to prevent him from seeing the dangers connected with such act, he assumes the risk of injury arising therefrom. (Ind. App.) *Shaver v. Home Telephone Co.*, 373.

Contributory Negligence of Servant.

9. MASTER AND SERVANT.—A servant asking damages for an injury must have been in the exercise of due care and diligence at the time of his injury. (Ind. App.) *Shaver v. Home Telephone Co.*, 373.

Duty to Servant after Working Hours.

10. MASTER AND SERVANT—Servant as Licensee—Negligence. An employé of a railroad company going home after working hours on a railway velocipede furnished by such company is not a trespasser or a mere licensee upon its track, and the company owes him the duty not to injure him through its negligence. (Ind. App.) *Wabash R. R. Co. v. Erb*, 392.

11. MASTER AND SERVANT—Duty to Servant After Working Hours.—A railroad company must exercise ordinary care to avoid injuring its employé who is riding home after working hours on a railroad velocipede at the request or invitation of the railroad company. (Ind. App.) *Wabash R. R. Co. v. Erb*, 392.

Railway Employé Returning Home on Track.

12. RAILROADS—Willful Injury—Sufficiency of Complaint.—A complaint alleging that plaintiff was an employé of the defendant railroad company, and while returning from work on one of its velocipedes was negligently run down by one of its locomotives, which approached him from behind without giving warning, and that the injury was caused by the negligence of the defendant company in not equipping its locomotive with any guard, and that the operators of such locomotive could have seen plaintiff for half a mile, but neglected to reduce the speed of the engine, and that such operators wantonly and willfully caused the accident, does not state a cause of action for willful injury. (Ind. App.) *Wabash R. R. Co. v. Erb*, 392.

13. MASTER AND SERVANT—Servant Returning Home After Work.—An employé of a railroad company riding on a velocipede on the railroad track at the request of such company after the completion of his day's work, and merely for his own convenience and accommodation, is not an employé of the company so as to render it liable for another employé's negligence. (Ind. App.) *Wabash R. R. Co. v. Erb*, 392.

14. MASTER AND SERVANT—Negligence After Relation Ceases. If a servant is negligently injured by his master after the relation of master and servant has ceased, and, under the circumstances, a stranger could recover of the master, the servant may recover. (Ind. App.) *Wabash R. R. Co. v. Erb*, 392.

Torts of Servant.

15. MASTER AND SERVANT—Liability for Injury by Servant. If an agent or servant is employed to perform a certain piece of work, and, while in the line of his duty, injures another, even though he exceeds his authorized powers or disobeys his instructions, his employer is liable to the person injured for the damages sustained. (Mo.) *Barree v. City of Cape Girardeau*, 763.

MEANDER LINES.

See *Boundaries*.

MECHANIC'S LIEN.

1. MECHANIC'S LIEN.—A verification to a claim of lien "that the matters and things therein stated are true, to the best of his knowledge, information and belief," is fatally defective. (Mont.) *Western Plumbing Co. v. Fried*, 799.

2. MECHANIC'S LIEN.—If There is No Affidavit attached to a claim of lien, there is no lien. (Mont.) *Western Plumbing Co. v. Fried*, 799.

3. MECHANIC'S LIEN—Personal Judgment.—A Party Seeking to Foreclose a Mechanic's Lien, Though He Fails to Establish It, may have a personal judgment in the same action against the person liable for the materials furnished or work and labor done. (Mont.) *Western Plumbing Co. v. Fried*, 799.

4. MECHANIC'S LIENS—Application of Payments.—If a manufacturer sells brick to be used in the construction of a building and, without notice to him, a part of the brick is sold by the buyer, the manufacturer has no right to a mechanic's lien for the part sold, but he has a right to apply payments made on account by the purchaser to the unsecured part of the purchase price. (S. C.) *Wardlaw v. Troy Oil Mill*, 1004.

MINES AND MINERALS.

1. MINES AND MINING—Duty to Support Surface.—If the surface of land is owned by one person and the minerals beneath by another, the owner of the minerals cannot, without liability, remove them without leaving sufficient natural or artificial support to sustain the surface. (Ind. App.) *Western Indiana Coal Co. v. Brown*, 367.

2. MINES AND MINING—Subsidence of Surface—Burden of Proof.—The act of a mine owner in removing all surface support is prima facie the cause of the subsidence of such surface, and the burden of proof is on the mine owner to show that the subsidence was caused by the additional weight of buildings subsequently erected thereon. (Ind. App.) *Western Indiana Coal Co. v. Brown*, 367.

3. MINES AND MINING—Surface Subsidence—Negligence—Contract Limiting Liability.—A contract between the owner of a mine and the owner of the surface above it, that the mine owner

shall have the right to mine without liability, does not relieve the latter from his negligence in failing to leave support for the surface. (Ind. App.) *Western Indiana Coal Co. v. Brown*, 367.

4. MINES AND MINING—Surface Support—Evidence.—If it is sought to recover damages for a mine owner's negligence in failing to provide proper surface support to the injury of the surface owner, subsequent leases, assignments and plats made by the mine owner to which the surface owner was not a party, and purporting to relieve the mine owner from liability, are not admissible in evidence. (Ind. App.) *Western Indiana Coal Co. v. Brown*, 367.

MONOPOLIES.

See Constitutional Law, 6.

MORTGAGES.

In General.

1. A MORTGAGE on Real Property Relates to the Lien Only, and does not Transfer the Legal Title. This remains in the mortgagor unless divested by a foreclosure sale and the execution of a conveyance thereunder. (Or.) *Kaston v. Storey*, 912.

2. EQUITABLE MORTGAGE—Loan to Purchase Land—Parol Promise of Security.—If one advances money to another to buy a specific tract of land, upon the oral promise of the latter to secure its repayment by a mortgage on the property when title thereto is obtained, and after a conveyance has been procured by the use of the money, the borrower refuses to execute the mortgage, equity will regard that as done which the borrower agreed to do, and will treat the transaction as creating an equitable mortgage which takes precedence over a mortgage taken by a third person with notice, and which creates a lien superior to the homestead rights of the borrower. (Kan.) *Foster Lumber Co. v. Harlan County Bank*, 470.

3. MORTGAGES—Impairment of Security—Limitation of Actions.—The removal of timber from mortgaged land, by which the security of a second mortgagee is impaired, constitutes a present injury to him sufficient to put in operation the statute of limitations against his right of action therefor, though his mortgage has not matured. (Mich.) *Jenks v. Hart Cedar and Lumber Co.*, 673.

4. MORTGAGES, Conflict Between—Priority.—One who advances money, to be secured by a mortgage on property, with notice that a pre-existing mortgage thereon has not been regularly satisfied, takes his security subject to such prior mortgage. (Wash.) *Bank v. Doherty*, 123.

5. MORTGAGES—Reinstatement of Canceled Lien.—If an agreement is entered into between a mortgagee who has foreclosed and bought in the property with another that the judgment of foreclosure is to be assigned to the latter in consideration of the payment of the sum due, but instead thereof the premises, by mistake, are redeemed from the sale, a court of equity will restore the lien of the judgment. (Or.) *Burton v. Anthony*, 847.

Series of Notes—Limitation of Actions.

6. IF A MORTGAGE Securing a Series of Notes Due at intervals of one year provides that nonpayment of any one of them, together with nonpayment of the taxes, shall mature the entire debt, the mortgagor has an equal right with the mortgagee to insist

upon the provision and to receive whatever advantages it may confer upon him. (Kan.) *Snyder v. Miller*, 489.

7. MORTGAGE—Series of Notes—Limitation of Actions.—Where a mortgage securing a series of notes due at different times provided that nonpayment of any one of them, together with nonpayment of the taxes due on the property, should mature the entire debt, and none of the notes were paid at maturity, and at the maturity of the first one the taxes were due and unpaid, which default continued until all the notes were due, and a purchaser of the property who did not assume the mortgage then paid the taxes, the statute of limitations commenced to run at the date of the default upon the first note and taxes, and the running of the statute was not suspended by the payment of the taxes, and by paying them the land owner did not lose his right to plead the statute in an action to foreclose the mortgage. (Kan.) *Snyder v. Miller*, 489.

Foreclosure.

8. MORTGAGES—Foreclosure—Execution Sales—Right to Subsequently Accruing Rents.—The right to rents collected by a purchaser of real estate at execution sale upon foreclosure of a mortgage, while he is in possession, does not pass to a purchaser of the equity of redemption, even after redemption, merely under the habendum clause in his deed, and without being specially mentioned and assigned. (Or.) *Kaston v. Paxton*, 871.

9. MORTGAGES—Foreclosure—Priorities—Right to Plead Limitations.—If a first mortgagee sues to foreclose his mortgage and makes a holder of a second mortgage a party to the action, and the latter does not contest the former's claim nor his right of priority, but files a cross-complaint for the foreclosure of his mortgage as a subsequent lien, there is no privity between the parties which enables the first mortgagee to plead the statute of limitations against the second mortgage. (Or.) *Tinsley v. Lombard*, 844.

See *Chattel Mortgages*.

MUNICIPAL CORPORATIONS.

Park Commissioners—Liability for Negligence.

1. MUNICIPAL CORPORATIONS—Park Commissioners.—If city parks are the private and exclusive property of the city, and park commissioners appointed by authority of a special charter have exclusive management and control of such parks, they are municipal, and not public or state, officers. (Colo.) *Denver v. Spencer*, 158.

2. MUNICIPAL CORPORATIONS—Park Commissioners—Record of Proceedings—Evidence.—If a board of municipal park commissioners is not required by statute to reduce its proceedings, or acts transacted at its meetings, to writing in order to make them binding, parol evidence of such proceedings or acts is competent and admissible. (Colo.) *Denver v. Spencer*, 158.

3. MUNICIPAL CORPORATIONS—Liability for Negligence of Park Commissioners.—A city is liable for the negligent act, if any, of its park commissioners in constructing an amusement or entertainment stand in one of its parks. (Colo.) *Denver v. Spencer*, 158.

4. MUNICIPAL CORPORATIONS—Parks—Amusement Stands—Negligence—Presumption.—No presumption of negligence arises from the mere happening of an accident caused by the falling of an amusement stand in a city park. (Colo.) *Denver v. Spencer*, 158.

Liability for Torts of Employé.

5. MUNICIPAL CORPORATIONS—Torts—Liability for Act of Servant.—If a personal injury is inflicted upon another by the servant of a city while in the exercise of a corporate franchise conferred upon such city for the public good, and not for corporate, private advantage, the city is not liable for the wrongful acts of such servant; but if such servant was in the exercise of a power conferred upon the city for its private benefit, then it is liable for his wrongful act. (Mo.) *Barree v. City of Cape Girardeau*, 763.

6. MUNICIPAL CORPORATIONS—Liability for Act of Employé.—Corporations, whether municipal or aggregate, are held to the same liability as individuals; and if an agent or servant of the corporation, in the line of his employment, is guilty of negligence or commits a wrong, the corporation is liable in damages. (Mo.) *Barree v. City of Girardeau*, 763.

7. MUNICIPAL CORPORATIONS—Liability for Wrongful Act of Servant.—A municipality is liable for negligence in the construction of its streets or sewers, and if it does such work by its servants, negligently, or in the line of their employment they injure some one by assauling him or the like, the city is liable in damages. (Mo.) *Barree v. City of Cape Girardeau*, 763.

8. MUNICIPAL CORPORATIONS—Assault by Employé.—If an employé of a city deposits on its street a large quantity of gravel, while repairing the street, thus obstructing a street-car track thereon, and a street-car employé is assaulted by such city employé while engaged in removing such gravel, for the purpose of passing such obstruction, the city is liable for the injury thus inflicted by its employé. (Mo.) *Barree v. City of Cape Girardeau*, 763.

See Intoxicating Liquors.

Note.

Municipal Corporations. See Intoxicating Liquors.

NEGLECTENCE.

1. NEGLIGENCE—Runaway Team—Proximate Cause.—If a farmer leaves his team standing in front of a store, having tied one of the horses to a hitching rail with a halter apparently in good condition, while he goes back and forth from the wagon to the store unloading his produce, and a boy in turning over the hitching rail strikes one of the horses, which causes them to break loose and run away, resulting in injury to a third person, the striking of the horse by the boy is the proximate cause of the accident. (Kan.) *Stephenson v. Corder*, 500.

2. NEGLIGENCE—Pleading.—Several acts of negligence of the same nature, all of which may be true and either of which, or all of which together, may have caused the accident, may be pleaded in one count. (Mo.) *Haley v. Missouri Pac. Ry. Co.*, 743.

See Death.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEW TRIAL.

NEW TRIAL.—Newly Discovered Evidence as ground for a new trial must be such as clearly shows that it might affect the result. (S. C.) *Wardlaw v. Troy Oil Mill*, 1004.

NOTARY PUBLIC.

1. **NOTARY PUBLIC De Facto.**—A notary public who has been duly commissioned and has taken an oath, and at divers times has filed bonds, and who has acted for twenty-five years, remains a notary de facto, though he has failed to file a copy of his oath with the Secretary of State and the clerk of the court as required by law, and has not renewed his bond in time to keep his commission alive. (La.) *Davenport v. Davenport*, 575.

2. **NOTARIES DE FACTO, Duty to Inquire into Title of.**—One needing the services of a notary is not required to ascertain, under pain of nullity, whether he has filed his oath or bond with the Secretary of State. If the notary is a notary de facto, it is safe to have recourse to him. (La.) *Davenport v. Davenport*, 575.

NUISANCE.

1. **NUISANCE—License, Whether Authorizes Maintenance of.**—A license to keep a bowling-alley, granted by municipal authorities under power conferred on them by the legislature, protects the person licensed, though such maintenance by the making of noises operates as a substantial disturbance of the occupants of adjacent property and results in their pecuniary loss, if the bowling-alley is constructed and operated in the usual manner and with the usual safeguards. (Mass.) *Levin v. Goodwin*, 616.

2. **NUISANCE.**—The Operation of a Bowling-alley cannot, by the court, be restrained to certain hours of the night to relieve occupants of adjacent property from noise, if such alley has been licensed by the municipal authorities acting under a power conferred on them by statute. (Mass.) *Levin v. Goodwin*, 616.

PARENT AND CHILD.*Emancipation of Child.*

1. **EMANCIPATION OF INFANT—What Constitutes.**—If a minor engages in business on his own account, and, with his father's assent, turns over all his earnings to his mother, who invests them in her own name, and supplies him the money to pay his bills, the fund being regarded by all three as belonging to the son, he is thereby emancipated and the father is not entitled to the fund accumulated. (Iowa) *Jacobs v. Jacobs*, 402.

Custody of Child.

2. **PARENT AND CHILD—Custody of Child—Parent's Moral Character.**—To establish that a parent's bad moral character and low financial condition make him unfit to have the custody of his children, it is necessary to show clearly that provision for the ordinary comfort and contentment and the intellectual and moral development of the children cannot be expected at his hands. (S. C.) *Ex parte Reynolds*, 86.

3. **PARENT AND CHILD—Custody of Child—Wishes of Child.**—In awarding the custody of a child, its wishes are consulted, not be-

cause it has a legal right to demand it, but because it is material for the court to understand them, that it may be the better prepared to exercise its discretion in the matter wisely. (S. C.) *Ex parte Reynolds*, 86.

Gift of Child.

4. PARENT AND CHILD—Parol Gifts of Children—Estoppel.—The right of a parent to the custody of his child cannot be defeated by a mere parol gift of the child by the parent to another, but if a parent undertakes to make a parol contract absolutely bestowing the custody of the child upon another, and allows the child to acquire a new home and strong attachments and tender associations to spring up, he may be estopped from asserting his right to the custody of the child. (S. C.) *Ex parte Reynolds*, 86.

5. PARENT AND CHILD—Parol Gift of Child—Evidence to Establish Estoppel.—Those who receive children from parents under a parol gift, relying upon estoppel of the parents to reclaim them, are charged with notice that the presumption is very strong that a right so precious as that of a parent to a child will not be unconditionally given away except for very cogent reasons, especially when such gift does not free from parental obligation, and it devolves upon them to prove a certain and definite agreement and estoppel by conduct by evidence clear and convincing. (S. C.) *Ex parte Reynolds*, 86.

Gifts Between Parent and Child.

6. PARENT AND CHILD—Gifts Between.—A gift of property, real or personal, made by a parent to a child, is valid, where no creditors intervene, who, by the gift, are subjected to loss. (Ill.) *Barnes v. Banks*, 331.

7. EQUITABLE GIFT of Real Property from Parent to Child.—A letter from a father to his daughter reciting that "I present you, on this your thirty-third birthday, with the house and premises now occupied by you, which includes the garden and orchard back of the house, and the pasture north of the house, more fully described in my last will, in the forty-acre tract," followed by the subsequent absolute possession by such daughter, constitutes a valid equitable gift of the fee in the premises described, but not of the entire forty-acre tract, in the remainder of which the daughter is given by the will of her father an estate for life only in trust. (Ill.) *Barnes v. Banks*, 331.

Torts Committed Against Child.

8. PARENT AND CHILD—Damages for Mental Suffering Due to Malicious Prosecution of Child.—The father of minor children cannot recover for mental suffering due to their malicious prosecution. (La.) *Sperier v. Ott*, 587.

9. MALICIOUS PROSECUTION of Minors—Exemplary Damages. A father, suing as the tutor of his minor children, may maintain an action for exemplary damages for their malicious prosecution and arrest. (La.) *Sperier v. Ott*, 587.

10. LIBEL.—A Father cannot Recover for Libel on His Minor Child. (La.) *Pattison v. Gulf Bag Co.*, 570.

See Accord and Satisfaction; Bastards; Husband and Wife, 8-10.

Note.

- Parent and Child, divorce, duty of supporting children after, 700-703.**
 divorce, power of court after to provide for support of children, 703.
 duty of supporting children awarded to mother in divorce, 700, 701.
 support of children, death of father does not relieve his estate of duty of, 701.
 support of children, duty of father after divorce, 700, 701.
 support of children, duty of father who has obtained divorce from mother for her misconduct, 702.
 support of children, second husband of mother, when cannot recover of father for, 702, 703.

PARTITION.

1. **PARTITION—Final Judgment.**—An order or decree for the sale of the lands sought to be partitioned is a final judgment from which an appeal will lie. (Ind. App.) *Barnett v. Thomas*, 385.
2. **PARTITION—Rents and Profits—Accounting for.**—In a proceeding for partition one cotenant who has received the rents and profits from the common property may be compelled to account therefor. (Ind. App.) *Barnett v. Thomas*, 385.
3. **PARTITION—Advancements—Debts—Accounting.**—In a proceeding between the heirs of a decedent for the partition of his real estate, where some of them have received advancements and some are indebted to the estate, such advancements and debts should be taken into account, and distribution of the assets of the estate made in accord with the amounts equitably due each of such cotenants. (Ind. App.) *Barnett v. Thomas*, 385.
4. **PARTITION—Purchaser of Heir's Share.**—The purchaser of the interest of an heir at a judicial sale in partition stands in the same relation to the estate as did the heir and receives whatever interest the heir had therein. If the heir has received an advancement, that fact may be shown to reduce the interest to be received by the purchaser. (Ind. App.) *Barnett v. Thomas*, 385.
5. **PARTITION—Purchaser of Heir's Share in real estate has a right, in a suit for partition thereof, to an accounting as to personal estate left by the decedent and converted to their own use by the other heirs, and also as to advancements made to them.** (Ind. App.) *Barnett v. Thomas*, 385.
6. **PARTITION—Inclusion of Two or More Parcels.**—A complaint for the partition of two tracts of land, alleging a tenancy in common between plaintiffs and one defendant in one tract, and between plaintiffs and another defendant in another tract, and title from a common source in both tracts, states but one cause of action. (R. I.) *Woodward v. Santee River etc. Lumber Co.*, 76.

Note.

- Partition, by a grantee in severalty of a part only of the lands of the cotenancy, 81.**
 of a part only of the property of the cotenancy, 80.
 parties to suits for, 81.
 right to join two or more parcels in suits for, 81.
 where one of the cotenants has conveyed a part of the property in severalty, 80, 81.

PARTY-WALLS.

1. **PARTY-WALL—Covenant Running with Land.**—If the respective owners of two adjoining lots enter into an agreement, expressly binding their heirs and assigns, which provides that the wall of a building one of them is about to erect shall be placed upon the dividing line, and that when the other builds he shall use it as a party-wall and pay the first party one-half its value, and after the building is erected both lots are conveyed, the grantee of the vacant lot who builds thereon and makes use of the wall must make payment therefor to the grantee of the improved lot. (Kan.) *Southworth v. Perring*, 527.

2. **PATENT RIGHT—Constitutionality of Statute Requiring Registration.**—A statute requiring copies of letters patent and affidavits of their genuineness to be filed with the clerk of the district court, before selling, or offering for sale, such patent right, and also requiring all obligations for the payment of money in consideration of such a sale to have inserted therein "given for a patent right," is not invalid as an attempt to restrict the rights granted to holders of patents under the federal statutes. (Kan.) *Allen v. Biley*, 481.

PAYMENT.*Drafts as Payment.*

1. **PAYMENT.**—Drafts are not Payment until they themselves are paid, in the absence of evidence showing that they were expressly taken in payment. (Ga.) *Kinard v. First National Bank*, 201.

2. **PAYMENT—Drafts for the Amount of a Mortgage, When do not Amount to.**—The fact that a draft for the amount of a mortgage debt was given by the debtor to his creditor, who marked the note and mortgage paid, and delivered them to the debtor, does not establish that the draft was accepted as a payment, nor preclude the mortgagee, on the dishonor of the draft, from foreclosing the mortgage. (Ga.) *Kinard v. First National Bank*, 201.

Parol to Contradict Indorsement.

3. **INDORSEMENT OF PAYMENT—Parol to Contradict.**—An indorsement of payments on a negotiable instrument is in the nature of a receipt, not of a contract, and may be contradicted or explained by parol. (Minn.) *McCaffery v. Burkhardt*, 688.

4. **INDORSEMENT OF PAYMENT—Parol to Contradict.**—It may be shown by parol evidence that notes secured by mortgage have not been paid, although they bear indorsements of payment. (Minn.) *McCaffery v. Burkhardt*, 688.

PHOTOGRAPHS.

See Evidence, 4, 5.

Note.

Photographs, care in taking, proof of, when necessary, 440, 441.

competency of persons to testify as to correctness of, 441.

evidence, admissibility of as in cases of homicide, 438, 439.

evidence, general admissibility of in, 438.

evidence, discretion of the trial court in admitting or excluding as, 441.

evidence, preliminary evidence, necessity for before admitting as, 439.

Am. St. Rep., Vol. 114—69

Photographs evidence, what preliminary testimony necessary to warrant the admission of as, 439, 440.

of documents, admissibility of in evidence, 438, 439.

of handwriting, admissibility of in evidence, 440.

of real property, admissibility of in evidence, 438.

of the scene of a wreck, admissibility of in evidence, 438, 439.

X-ray, admissibility as of evidence, 442.

Police Power, liquor, control over, authorized exercise of, 298.

POSTOFFICE.

A POSTAL ORDER Having Thereon More Than One Indorsement is made invalid by section 4037 of the Revised Statutes of the United States. (Mont.) Moore v. Skyles, 801.

PRINCIPAL AND AGENT.

1. AGENCY is to be Ascertained by considering the business transacted for and the acts performed by one person for another, with his previous authorization or subsequent knowledge and approval. (Or.) Hildebrand v. United Artisans, 852.

2. AGENCY—Special Agent, Who is.—One intrusted with a postal order and directed to see if it is all right, and, if so, to cash it, is a special agent. (Mont.) Moore v. Skyles, 801.

3. AGENCY.—All Persons Dealing With an Agent are Bound to Ascertain the Scope of His Authority; and if they do not, they deal with him at their peril. (Mont.) Moore v. Skyles, 801.

4. AGENCY—Sale of Property, When Does not Bind Principal.—One intrusted with a postal order to ascertain whether it is all right, and, if so, to collect it, has no authority to sell it, and if he does so, receiving and retaining the purchase price, and the order subsequently coming to the principal is collected by him, he is under no liability to such purchaser. (Mont.) Moore v. Skyles, 801.

5. AGENCY—Action by Agent in His Own Name.—If an agent by mistake, pays to a third person money in his possession belonging to his principal, he may maintain an action in his own name to recover it back. (Minn.) Parks v. Fogelman, 703.

PROCESS.

See Corporations, 10-13.

PUBLIC LANDS.

1. PUBLIC LANDS—Title of the State in Unsurveyed Lands.—The grant of the sixteenth section of lands to the state for school purposes, though for some purposes a grant in praesenti, conveying the fee, does not, until the official survey is made and the plat approved, vest title in the state, nor give it any power to lease such land. (Mont.) Clemmons v. Gillette, 814.

2. PUBLIC LANDS.—The Inclosure of Public Lands, without color of title, made or acquired in good faith, or an asserted right thereto, by or under claim made in good faith with a view to entry thereof at the proper land office under the laws of the United States, is unlawful. (Mont.) Clemmons v. Gillette, 814.

3. PUBLIC LANDS—Injunction to Protect a Person Inclosing and Possessing.—One who incloses and takes full possession of unsurveyed public land, with a view to its entry under the laws of the United States, is a trespasser and misdemeanant whose possession will not be protected by a recovery of damages nor by injunction against another person intending to tear down the fences and enter thereon for the purpose of depasturing sheep. (Mont.) *Clemmons v. Gillette*, 814.

4. PUBLIC LANDS—Inchoate Right to Homestead, Jurisdiction to Protect.—One who has settled on unsurveyed public lands with a view to maintaining and acquiring a homestead therein under the laws of the United States is entitled to the aid of the state courts as against persons subsequently entering thereon, and whose possession, if continued, will deprive him of his right to take the measures necessary to acquire title under such laws. (Or.) *Huffman v. Smyth*, 938.

5. PUBLIC LANDS—Homestead Right is not Abandoned or Forfeited by Absence in Prison.—One who has entered upon unsurveyed public lands with a view of making his homestead thereon, and to thereby acquire title under the laws of the United States is not deemed to have waived or forfeited his claim by his absence therefrom while in prison under a conviction for crime. (Or.) *Huffman v. Smyth*, 938.

QUO WARRANTO.

QUO WARRANTO does not Lie to Test a Corporation's power to hold property as a trustee, for the public has no interest in such merely private affairs. (Iowa) *State v. Higby Co.*, 409.

See Carriers; Eminent Domain; Master and Servant.

RAILROADS.

Right of Way.

1. DEED OF RIGHT OF WAY—Nature of Title Conveyed.—An instrument in form a general warranty deed conveying a strip of land to a railroad company for a right of way does not vest an absolute title in the grantee. The interest conveyed is limited by the use for which the land is acquired, and upon the abandonment of that use the property reverts to the adjoining owner. (Kan.) *Abercrombie v. Simmons*, 509.

Lease of Railways.

2. RAILROADS—Effect of Leases of, on Liability of the Lessor.—A lease of a railroad with all of its franchises and privileges under a statute authorizing it and providing that the company so "leasing shall hold and operate such road and said property and franchises subject to all the duties and obligations and with all the rights and privileges prescribed by the general railroad laws of the state," relieves the lessor from liability for acts done by the lessee in the subsequent maintenance and repair of the road. (Mich.) *Ackerman v. Cincinnati etc. R. R. Co.*, 640.

3. PLEADING—Defenses—General Issue.—If it is sought to recover damages from a railroad company to lands from flooding by reason of an embankment on its right of way, the defense that such embankment was built by another company to which the defendant company had leased its property and franchises is available under the general issue. (Mich.) *Ackerman v. Cincinnati etc. R. R. Co.*, 640.

Excessive Speed of Trains.

4. **RAILROADS—Negligence—Sufficiency of Complaint.**—An allegation in a complaint that the defendant railroad company ran its train at a speed greater than fifteen miles an hour, and in that connection alleges the conditions then and there existing, which are such as to suggest the degree of care that ought to be exercised, is equivalent to alleging that the running of the train at that rate of speed under such conditions was negligence, and states a good cause of action for common-law negligence. (Mo.) *Haley v. Missouri Pac. Ry. Co.*, 743.

5. **RAILROADS—Negligence—Excessive Speed.**—It is the duty of a railroad company running its train through the street of a populous city to use ordinary care to regulate the speed of the train so as not to injure anyone, and a failure to exercise such care is common-law negligence. (Mo.) *Haley v. Missouri Pac. Ry. Co.*, 743.

6. **RAILROADS—Negligence—Speed in Cities.**—In the absence of statute or ordinance regulating the rate of speed at which railroad trains may be run through city streets, the question of whether or not a given rate of speed is negligence is, ordinarily, one of fact, depending on the conditions surrounding the act. (Mo.) *Haley v. Missouri Pac. Ry. Co.*, 743.

7. **RAILROADS—Negligence—Speed in City Streets.**—If, in an action to recover for injuries sustained by plaintiff in a collision between his team and a railroad train, the evidence shows such train, consisting of twenty freight-cars, propelled by two engines, came through a curve into a public street, where it was so narrow that the train could not pass a wagon therein without striking it, but where such wagon was liable to be; that the train was running at the rate of twenty miles per hour and at such speed that plaintiff did not have a reasonable time in which to drive out of danger; and that it was doubtful if the trainmen could, by the exercise of ordinary care, have stopped the train in time to have avoided the accident after discovering the danger, the question whether it was negligence to run such train at that rate of speed must be submitted to the jury. (Mo.) *Haley v. Missouri Pac. Ry. Co.*, 743.

8. **RAILROADS—Negligence—Speed in City.**—The fact that the grade of a railroad track in a street of a populous city is such that a freight train cannot ascend it without the aid of the momentum to be acquired by a high rate of speed does not justify the railroad company in running its train at such rate of speed, if to do so renders it liable to kill or cripple people who, without negligence on their part, are liable to be on the street, or if to do so renders it impossible for the engineer to stop in time to avert an accident after he has come in view of the danger. (Mo.) *Haley v. Missouri Pac. Ry. Co.*, 743.

9. **RAILROADS—Negligence—Pleading.**—If it is sought to recover against a railroad company for injury to one on its track, allegations charging negligence in the matter of speed, and also that it negligently failed to stop its train in time to avoid the accident after the danger was apparent, are not necessarily inconsistent. (Mo.) *Haley v. Missouri Pac. Ry. Co.*, 743.

10. **RAILROADS—Negligence—Excessive Speed.**—While it is negligence to run a railroad train into a place where danger of collision is to be expected, at such a rate of speed that it cannot be quickly stopped on the appearance of danger, still it is not negligence on the part of the railroad company, if it fails to stop its train after

discovering the peril, if in fact the speed was such that the engineer could not stop in time to avoid the peril. (Mo.) *Haley v. Missouri Pac. Ry. Co.*, 743.

Injuries to Persons on or Near Tracks.

11. **RAILROADS—Owe No Duty to Trespassers or mere licensees** to keep their premises in a safe condition. (Ind. App.) *Wabash R. R. Co. v. Erb*, 392.

12. **RAILROADS—License to Use Track.**—Consideration is not essential to create a valid license to use a railroad track. (Ind. App.) *Wabash R. R. Co. v. Erb*, 392.

13. **RAILROADS—Contributory Negligence.**—If a person injured in collision between his wagon and a railroad train knew that he was liable to encounter a train in the street where he was driving when the accident occurred, and that the street was so narrow at that point that he could not pass a train with his wagon, these facts do not render him guilty of contributory negligence per se. (Mo.) *Haley v. Missouri Pac. Ry. Co.*, 743.

Crossings—Safety Gates.

14. **RAILROADS—Accident at Crossing—Negligence—Safety Gates.**—If, in an action against a railroad company to recover for injuries received by being struck by a train at a crossing, the evidence shows that plaintiff stopped to look and listen at a point eighty feet from the crossing, where people usually stopped to look and listen, and that at such crossing the safety gates were raised at the time of the accident, the question of plaintiff's contributory negligence is for the jury to determine. (Pa.) *Messinger v. Pennsylvania R. R. Co.*, 970.

15. **RAILROADS—Safety Gates—Negligence.**—Safety gates at railroad crossings, which should be closed in case of danger, if standing open, are an invitation to a traveler on the highway to cross, and while this fact does not relieve him from the duty of exercising care, it is a fact for the consideration of the jury in determining whether he exercised care according to the circumstances. (Pa.) *Messinger v. Pennsylvania R. R. Co.*, 970.

Cinders and Smoke.

16. **RAILROADS—Cinders and Smoke as a Nuisance.**—That which is done under authority of law at a place and in a manner authorized cannot be a nuisance. Hence a railroad company is not liable in damages as for a nuisance to one whose residence is permeated by smoke, cinders and gas emitted from its engines to the injury of the health of the occupants, if it constructs and operates its road where authorized and in a proper manner. (Kan.) *Atchison etc. Ry. Co. v. Armstrong*, 474.

17. **RAILROADS—Liability for Smoke and Cinders.**—One whose residence is permeated by smoke, cinders, and gas from railway locomotives cannot recover damages therefor, unless a recovery is authorized by some constitutional or statutory provision, if the railway company has not abused or exceeded its authority in locating, constructing or operating its road. (Kan.) *Atchison etc. Ry. Co. v. Armstrong*, 474.

Fires Set by Engines.

18. **RAILROADS—Fire Set by Engines—Evidence of Other Fires.**—If it is sought to recover for injury from fire set by a passing rail-

road engine, and plaintiff does not identify the particular engine that caused the fire either in his pleadings or his proof, the jury are entitled to consider evidence as to other fires caused about that time by the engines of the defendant, and as to the scattering of sparks from such engines about the time in question. (Or.) *Manchester Assurance Co. v. Oregon R. R. Co.*, 863.

RECEIVERS.

1. **RECEIVER—Recovery of Goods by Vendor.**—If goods are sold to an insolvent corporation in reliance upon false representations as to its financial condition, the seller, if he promptly rescinds the sale, may recover the goods or their proceeds in hands of the receiver of the corporation. (Iowa) *Seeley v. Seeley-Howe-Le Van Co.*, 452.

-2. **RECEIVER OF MINING PROPERTY, Lien When cannot be Created on Property in Custody of to Take Precedence of Pre-existing Liens.**—A court of equity placing a receiver in charge of mining property cannot authorize him to operate it and carry on the general mining business, and when it turns out to be a loss, charge the deficiency up as a preferred claim and make it a lien having precedence over prior recorded liens on the same property. (Idaho) *Dalliba v. Winschell*, 267.

3. **RECEIVER, When Forfeits Right to Compensation.**—A receiver who has been guilty of a glaring and flagrant abuse of his office, including extravagance and recklessness, ought not to be allowed any compensation. (Idaho) *Dalliba v. Winschell*, 267.

4. **A RECEIVER is not Entitled to an Allowance for His Attorney When the services of such attorney consist only in presenting the receiver's accounts and securing orders for their allowance.** (Idaho) *Dalliba v. Winschell*, 267.

5. **RECEIVERS, Loans Made to, Allowance for, Though Irregular.**—Though the orders of court authorizing a receiver to procure loans were made *ex parte*, still if they were such as to induce the belief in the average person that they were legal and valid, the repayment of such loans out of funds in the hands of the receiver should be allowed. (Idaho) *Dalliba v. Winschell*, 267.

RECORDS.

See Deeds, 5; Judgments, 5, 6; Vendor and Vendee, 2.

REMAINDERMEN.

See Life Tenant.

Note.

Remaindermen and Life Tenants, duties of toward each other, distinction dependent upon whether the estates were acquired by purchase or devise, 450.

local assessments, respective duties of in the payment of, 450.

remedies of the former where the latter fail to pay the taxes, 451.

tax title, the latter cannot acquire as against the former, 449.

taxes, respective duties of in the payment of, 448, 449.

REPLEVIN.

REPLEVIN.—The Surety in a Bond Given to Release an Attachment has no such property in or right of possession to the goods

attached as entitles him to maintain replevin against the vendee of his principal. (R. I.) *Schultz v. Grimwood*, 33.

RESCISSION.

See Contracts, 4.

RES GESTAE.

See Homicide, 4.

SALES.

1. **SALES—Delivery—Title.**—In case of a sale by a mortgagor of a part of an entire mass of goods, some of which is mortgaged, where the purchaser is allowed to take possession of the whole for the purpose of enabling him to separate the part purchased, the title to that part passes to him. (Mich.) *Croze v. St. Mary's Canal Mineral Land Co.*, 677.

2. **SALE—Title, When Dependent on Payment.**—If chattels are sold on condition that they are to be paid for on delivery, and are delivered upon the faith that this condition will at once be performed, no title passes, and the vendor, on the refusal or failure of the purchaser to pay after demand, may maintain trover for the property. (Ga.) *Wilson v. Comer*, 245.

3. **SALE—Election of Remedies by Vendor.**—If the vendor of goods treats the sale as valid and attempts to collect the purchase price from the insolvent vendee corporation in the hands of a receiver, after knowledge that the sale was procured by fraud, he cannot rescind the sale and recover the goods upon a failure to make the collection. (Iowa) *Seeley v. Seeley-Howe-Le Van Co.*, 452.

4. **SALE OF MACHINERY—Delay in Installation.**—Where a vendor, in making a proposition to sell apparatus for use in a brewery, writes to the vendee: "We will have the apparatus shipped the latter part of this week so that same can be installed on Sunday. . . . It might be possible that part of the work would have to go over until the following Sunday, but there will be no delay in the operation of your plant," the clause in relation to "delay in the operation" applies to the work in installing the apparatus, and not to the operation of the plant after the installation is complete. (R. I.) *Beggs v. James Hanley Brewing Co.*, 44.

5. **SALE BY MANUFACTURER—Implied Warranty.**—Where a known, described, and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still if such article actually is supplied, there is no implied warranty that it will answer the particular purpose intended by the purchaser. (R. I.) *Beggs v. James Hanley Brewing Co.*, 44.

6. **SALE BY MANUFACTURER—What not a Warranty.**—A statement by a vendor of apparatus and boilers, known as the "McClave System," for use in a brewery, that such system "is adapted for the burning of fine anthracite fuel," is not a warranty that the boilers will furnish sufficient steam for the operation of the brewery. (R. I.) *Beggs v. James Hanley Brewing Co.*, 44.

SALOONS.

See Intoxicating Liquors.

SEDUCTION.

See Breach of Marriage Promise.

SELF-DEFENSE.

See Homicide, 2.

SETOFF.

1. **JUDGMENTS.**—Equity Will not Set Off One Judgment Against Another Unless the remedy at law is inadequate. (Or.) Whelan v. McMahan, 906.

2. **JUDGMENTS.**—Setoff in Equity.—If both parties are solvent, equity will not assume jurisdiction to set off one judgment against another. (Or.) Whelan v. McMahan, 906.

3. **JUDGMENTS.** Setoff of, in Equity.—The Return of Nulla Bona does not Justify a Decree to set off one judgment against another if the evidence shows that the person against whom the return was made was not insolvent, and has property subject to execution more than sufficient to satisfy the debt. (Or.) Whelan v. McMahan, 906.

SHIPPING.

1. **VESSELS.**—The Presumption is Against the Demise of a Vessel, and the contract is construed as one for affreightment, unless its terms show a clear intention to the contrary. (Or.) Grimberg v. Columbia Packers' Assn., 927.

2. **VESSELS.**—The Presumption in Favor of a Contract of Affreightment Instead of a Lease is not Rebutted by the fact that the persons entitled to the possession of the vessel thereunder employed the plaintiff and other sailors, and also the officers, except the captain. (Or.) Grimberg v. Columbia Packers' Assn., 927.

3. **VESSELS.**—The General Construction Relating to a Charter-party is that if the vessel, the subject of the agreement, is so let that there is a transfer or relinquishment to the charterer of the entire command, possession, and subsequent control, he will be treated as the owner for the time being—that is, for the voyage or other particular service stipulated for; but if the charter-party is but an agreement or covenant for the general use of the vessel or some designated part thereof, the general owner at the same time retaining the command, possession and control of its navigation, the charterer must be regarded as a charterer only for the designated or specified service, which does not alter the duties and responsibilities of the owners. (Or.) Grimberg v. Columbia Packers' Assn., 927.

4. **VESSELS.**—The Word "Freighting" Signifies the loading of goods or commodities for transportation. (Or.) Grimberg v. Columbia Packers' Assn., 927.

5. **VESSELS.**—The Word "Charter" does not Necessarily Mean the letting of the ship by way of demise, and is equally consistent with the idea of a contract of affreightment. (Or.) Grimberg v. Columbia Packers' Assn., 927.

6. **VESSELS.**—Contract, When Amounts to an Affreightment, and not a Demise.—An agreement between the owners of a vessel and another that the latter covenants and agrees to the freighting and chartering of the vessel for a voyage between designated ports, during which the vessel shall be kept tight, staunch, and in good condition, and provided with every requirement necessary for the voyage,

and that the whole of the vessel, except the private apartments of the master, shall be at the sole use and disposal of the other party who charters and hires the vessel, and agrees to pay a stipulated price therefor until the voyage is terminated and the vessel is discharged of her cargo, constitutes a contract of affreightment rather than a demise. (Or.) *Grimberg v. Columbia Packers' Assn.*, 927.

7. **VESSELS.**—The Presumption in Favor of a Contract of Affreightment and Against a Demise is not Rebutted by the fact that the charterer is to pay all the wages of the crew excepting the captain, all port charges and labor bills, and furnish all necessary provisions, fuel, etc., during the whole of the voyage, and at the termination of the charter to deliver the vessel at the port of destination in good condition, and employ the vessel only in lawful trade. (Or.) *Grimberg v. Columbia Packers' Assn.*, 927.

8. **VESSEL**—Liability of, for Injury to One of the Crew.—A charterer of a vessel under a contract of affreightment is not liable for injury suffered by one of the crew through carelessness in suffering an appliance to become insecure and unsafe. (Or.) *Grimberg v. Columbia Packers' Assn.*, 927.

SLANDER.

See Libel and Slander.

SPECIFIC PERFORMANCE.

1. **SPECIFIC PERFORMANCE** in Favor of a Complainant Who has not Signed the Memorandum or Contract.—If the memorandum required by the statute of frauds has been signed by the defendant, but not by the complainants, and the contract is, therefore, to that extent unilateral, the latter, by promptly filing a bill in equity demanding specific performance, become liable to pay the purchase price and are entitled to the relief sought. (Wash.) *Western Timber Co. v. Kalama River Lumber Co.*, 137.

2. **SPECIFIC PERFORMANCE** of Contracts for the transfer of real property will not be enforced on the ground that one of the contracting parties has taken possession thereof, when the contract is itself void and incapable of being enforced. (Or.) *McCrary v. Biggers*, 882.

SPENDTHRIFT.

See Deeds, 2.

STATUTE OF FRAUDS.

See Frauds, Statute of.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTES.

1. **STATUTES**, Construction of, to Render Constitutional.—The intention of the legislature must be inferred from the plain meaning of the words used by it, and a different construction will not be placed on such words, even for the purpose of making them carry out a provision of the constitution of the state, nor to prevent their conflicting with the constitution of the United States. (Mont.) *State v. Cudahy Packing Co.*, 804.

2. MUNICIPAL ORDINANCES, Title of.—The title, "An ordinance regulating the hours in which intoxicating liquors shall be sold in Boise City, and for Sunday closing, and providing for a penalty for the sale thereof during prohibited hours," is sufficiently comprehensive to sustain an ordinance specifying the hours when all places for the sale of liquors must be closed, and making it criminal and punishable for the proprietor of such a place to permit, during such closing hours, any person except himself or a member of his family to enter any room therein. (Idaho) *State v. Calloway*, 285.

STREET RAILROADS.

See *Carriers*, 37-55.

TAXATION.

1. TAXATION, Estoppel of Taxpayer.—One Who has Furnished the Assessor with a List of His Property for the purposes of taxation is estopped, in the absence of fraud, accident, or mistake, from subsequently denying the ownership of such property for the purpose of avoiding the payment of taxes. (Idaho) *Inland Lumber etc. Co. v. Thompson*, 274.

2. TAXATION—Notice of Assessment and Equalization.—One who has given the county assessor a list of property for the purposes of assessment and taxation is not, on such property being assessed pursuant to such list, as property that has escaped assessment, entitled to any notice, other than that prescribed by statute, of the meeting of the board of equalization at which such property is ordered assessed. (Idaho) *Inland Lumber etc. Co. v. Thompson*, 274.

3. TAXATION.—A List of Property Furnished to the Assessor by a person subject to taxation, whether sworn to or not, and whether strictly official or not, estops him from denying that it is correct, and from urging that such property is not assessable to him. (Idaho) *Inland Lumber etc. Co. v. Thompson*, 274.

See *Life Tenant*.

Note.

Taxes, curtesy, tenant by, duty of to pay, 450.

dower, tenant in, duty of to pay, 450.

life tenant cannot acquire tax title as against remainderman, 449.

life tenant, duty of to pay, 448.

life tenant, liability of to pay is restricted to the income of the property, 449.

remedies where the tenant for life fails to pay, 451.

TELEGRAPHS AND TELEPHONES.

Dangerous Wires and Appliances.

1. TELEPHONE COMPANIES—Negligence.—If a person is killed by an electric current from a telephone on his premises, this fact of itself is evidence of negligence on the part of the telephone company. (Pa.) *Delahunt v. United Tel. & Tel. Co.*, 958.

2. TELEPHONE COMPANIES—Duty to Patrons—Negligence.—A telephone company owes a duty to its patrons to exercise at all times the highest degree of care and vigilance to protect them from a dangerous electric current over its wires from any source. (Pa.) *Delahunt v. United Tel. & Tel. Co.*, 958.

3. TELEPHONE COMPANIES—Negligence—Burden of Proof.—When it is shown that telephone wires have become conductors of dangerous currents of electricity inflicting bodily injury to a patron of the telephone company, there is reasonable evidence that there has been a neglect of duty and the burden is cast upon the telephone company of showing that it has not been negligent. (Pa.) *Delahunt v. United Tel. & Tel. Co.*, 958.

Negligence in Delivery of Message.

4. TELEGRAPH COMPANIES—Office Hours—Damages for Mental Anguish.—If a telegram is received after office hours of the company, announcing the serious illness of a relative of the sendee, and the death of such relative occurs before succeeding office hours, the company is not liable for mental anguish caused the sendee by not being with the deceased at the time of death. (S. C.) *Roberts v. Western Union Tel. Co.*, 100.

5. TELEGRAPH COMPANIES—Negligence—Nonsuit.—If a complaint against a telegraph company alleges both negligence and willfulness in delay in delivering a telegram, and there is an entire failure of proof to support the allegation of willfulness, a nonsuit should be granted as to that cause of action, leaving the cause of action for negligence to be submitted to the jury. (S. C.) *Roberts v. Western Union Tel. Co.*, 100.

6. TELEGRAPH COMPANIES.—Mere Delay in Delivering a telegram is not sufficient to send the issue to the jury on the question of willfulness, if there is evidence of an effort to deliver. (S. C.) *Roberts v. Western Union Tel. Co.*, 100.

7. TELEGRAPH COMPANIES—Negligent Delay—Mental Anguish.—If the negligent delay of a telegraph company in delivering a message prevents a relative from attending the funeral of a deceased person, the company is liable for the mental anguish suffered by a normal person, in the absence of evidence as to individual temperament or peculiar apprehension of the sendee of the message. (S. C.) *Roberts v. Western Union Tel. Co.*, 100.

8. TELEGRAPH COMPANIES—Negligent Delay—Mental Anguish.—If it is sought to recover for delay in delivering a telegram, and the only mental anguish which plaintiff could have suffered was from her inability to attend the funeral of a relative, she cannot recover if she had no intention of attending the funeral. (S. C.) *Roberts v. Western Union Tel. Co.*, 100.

TORTS.

JOINT TORT-FEASORS—Evidence.—A person who is injured by a bullet negligently and unlawfully shot from a rifle by one of three defendants, who were using it in turns in shooting at a mark, is not required to show which of the defendants fired the shot, as the concert of action made them liable as joint tort-feasors. (Mich.) *Benson v. Ross*, 675.

See Assignment.

TRADEMARKS AND TRADE NAMES.

1. BUSINESS, Goodwill in, When Exists.—If a baker manufactures bread with ingredients somewhat different from other bread, gives it a distinctive name, and adopts a loaf of peculiar visual appearance, and creates a demand for and an extensive trade in such bread, he

creates and acquires a valuable goodwill in the manufacture and sale of such bread, which goodwill is property and a valuable asset in his business. (Mass.) *George G. Fox Co. v. Glynn*, 619.

2. BUSINESS and Trademark and Name, Restraining Infringements of.—One who has the goodwill of a business, dependent on a trade name which is also registered as a trademark, in his manufacture and sale of a product of unusual visual appearance, is entitled to an injunction against anyone who attempts to deprive him of such goodwill and business by manufacturing and selling goods of a name somewhat different from the trade name of the complainant, but having such a resemblance in visual appearance that the goods of the one may well be mistaken and purchased as the goods of the other. (Mass.) *George G. Fox Co. v. Glynn*, 619.

3. TRADE NAMES and Appearance of Goods, When Will be Protected.—A complainant is entitled to protection by injunction when the combination of name, size, shape and condition of surface, producing a peculiar visual appearance, were all adopted by him when not in use by anyone else, and are such a combination as no one needs to use. The general right of the defendant to use any size or shape or condition of surface he may choose does not give him the right to adopt a combination of these which will mislead the public to the complainant's detriment and the defendant's advantage. (Mass.) *George G. Fox Co. v. Glynn*, 619.

4. TRADE NAMES—Wholesalers, When may be Enjoined.—Wholesalers cannot successfully defend on the ground that they do not mislead, nor intend to mislead, the retail dealers to whom they sell. It is enough to require an injunction against the wholesalers that they knowingly place an instrument of fraud in the hands of a retailer with which he may deceive the public. (Mass.) *George G. Fox Co. v. Glynn*, 619.

5. TRADE NAMES, Resemblance of, When a Question of Fact.—The finding of the master that the words "Crown Malt" bear such a close resemblance to the plaintiff's trade name and trademark "Creamalt," as to be likely to produce frauds by dealers and mislead the public, is a finding of fact which must stand unless plainly wrong. (Mass.) *George G. Fox Co. v. Glynn*, 619.

6. TRADE NAME and Mark Against, What Entitled to Protection—"Creamalt" and "Crown Malt."—A wholesale baker originating a kind of bread in which milk and malt are combined, and who, to identify it before the public, made it into oval loaves of distinctive size, shape and surface, and coined and adopted the word "Creamalt" as a trade name, and registered it as a trademark, and on each loaf printed such trademark in blue ink on a white label, and built up a valuable business, is entitled to an injunction to protect him from the manufacture and sale of other loaves of the same size, shape and visual appearance, on each of which is printed in blue ink on a white label the words "Crown Malt." (Mass.) *George G. Fox Co. v. Glynn*, 619.

TRADE UNIONS.

1. LABOR UNIONS—Construction of Pledges or Obligations of Members.—The obligations or pledges of members of a labor union on their initiation must be construed with reference to the declared purposes of the organization, and are binding only in so far as their purposes are lawful are to be attained by lawful means. (La.) *Schneider v. Local Union No. 60*, 549.

2. LABOR UNIONS—Attempts to Compel Their Members to Aid in Securing Appointments of Certain Persons to Public Office.—The attempt of a labor union, by threats and by imposing fines, to coerce some of its members to vote for certain persons for a public office is a violation of law, whether such members had committed themselves to such voting or not. (La.) *Schneider v. Local Union No. 60*, 549.

3. LABOR UNIONS—The Damages Recoverable for the Unlawful Fining and Expulsion of a Member of a Labor Union may, in addition to his loss of wages, include punitive damages. (La.) *Schneider v. Local Union No. 60*, 549.

4. LABOR UNIONS cannot Compel Their Members Improperly Fined or Expelled to Seek Redress Solely Within the Order when there is no provision in the constitution or by-laws of the union or association for the trial of such matters, and attempts made to secure the accessory provisions proved futile. (La.) *Schneider v. Local Union No. 60*, 549.

TREATIES.

1. TREATIES—When Anything in the Constitution or Laws of a State Conflicts with a Treaty, the latter must prevail. (Mass.) *Wyman*, Petitioner, 601.

2. TREATIES, Effect of on the Right to Administer on the Estates of Decedents in the State Courts.—A treaty between the United States and a foreign nation purporting to give to the consul general or consul of such nation the right to intervene in the possession, administration and judicial liquidation of the estate of a citizen of such nation who has died, leaving property within the United States, is binding on the state courts, and requires them to appoint such consul or consul general administrator of such estate, rather than the public administrator. (Mass.) *Wyman*, Petitioner, 601.

TRIAL.

Instructions to Jury.

1. JURY TRIAL—Erroneous Instruction as to the Circumstances of the Parties.—If the court instructs the jury in an action for damages that the worldly circumstances of the parties and all the attendant facts are to be weighed, when there is no evidence respecting such circumstances, a new trial must be awarded the defendant, though the verdict in favor of the plaintiff is not large, and possibly a verdict for a larger sum might have been permitted to stand as a recovery of general damages had such instruction been omitted. (Ga.) *Georgia Ry. etc. Co. v. Baker*, 246.

2. INSTRUCTIONS—Substantial Compliance with Requests.—It is not the privilege of counsel to dictate the words that shall be given in a charge to the jury; if the law applicable to the case is correctly stated, it is all that can be required. (R. L.) *McGowan v. Probate Court*, 52.

3. TRIAL—Erroneous Instructions.—Confusing and misleading instructions injecting into a case an issue not proper to be tried therein are reversible error. (Or.) *Smith v. Bayer*, 858.

4. JURY TRIAL—Expression of Opinion of Court on Facts.—In a civil case the court may express to the jury, in instructions, its opinion upon the facts, provided the ultimate determination thereof is left to the jury. If a party is apprehensive that the jurors may be unduly influenced thereby, he should specially request the court to instruct them that they, not the court, are the exclusive judges of all question of fact. (Minn.) *Bonness v. Felsing*, 707.

Argument of Counsel.

5. **ARGUMENT OF COUNSEL—Restriction by Court.**—The justice who presides at a jury trial must exercise a sound discretion in confining counsel to the discussion of vital issues; and unless that discretion is abused, its exercise is not cause for a new trial. (*R. I. Wrynn v. Downey*, 63.)

See Jurors.

TROVER AND CONVERSION.

See Chattel Mortgages, 6-10.

TRUSTS.

1. **TRUST FUND.**—The Measure of Recovery Against the Assignee of a trust fund is limited to the amount received by him, and is not determined in the amount of the original fund. (*Iowa*) *Jacobs v. Jacobs*, 402.

2. **TRUST FUNDS.**—If a Son Turns Over His Earnings to his mother under an implied agreement that she is to keep them for him and ultimately return them to him, the same becomes a trust fund to which her husband acquires no right by a transfer thereof to him without consideration. He takes securities, so assigned, with an obligation to account for them to the real owner, and his second wife, so far as the proceeds of such securities are put in her name, holds them under a like obligation. (*Iowa*) *Jacobs v. Jacobs*, 402.

3. **TRUSTS.**—Violation of Parol Promises made by the grantee to the grantor to hold land in trust, or to convey it to a person designated by the grantor, does not create a constructive trust in the grantee unless he is guilty of fraud in procuring the conveyance. (*Ill.*) *Crossman v. Keister*, 305.

4. **STATUTE OF FRAUDS—Constructive Trusts.**—The statute of frauds makes invalid an express trust created by parol, but has no application to cases where the law raises a constructive trust by reason of the fraudulent acts and purposes in procuring title to the land. What constitutes fraud in such cases, sufficient to take the case out of the statute of frauds, depends in a large measure on the relation to each other of the parties to the transaction. (*Ill.*) *Crossman v. Keister*, 305.

5. **STATUTE OF FRAUDS—Constructive Trusts.**—If a conveyance is made between parties standing in a fiduciary relation to each other, on a parol agreement of the grantee to hold the land in trust for, or to convey it to, some one else, when in fact the grantee has no intention of performing the agreement, but intends to retain the benefit of the conveyance for his own use, the law raises a constructive trust, and takes the case out of the operation of the statute of frauds, and equity will compel the performance of the trust. (*Ill.*) *Crossman v. Keister*, 305.

6. **TRUSTS—Constructive Enforcement.**—If a father, upon conveying certain land to his daughter in exchange for a deed to other land he had previously conveyed to her, tells her that he intends the land last conveyed to her to be in full of her share of his estate, and in the event that he should die before recording the first conveyance made to her she is to repossess herself of the deed, and convey the land therein described to her sister, and she accepts the deed last executed upon such conditions, they may,

after her father's death, be specifically enforced against her as a constructive trustee. (Ill.) *Crossman v. Keister*, 305.

See Corporations, 8; Parent and Child, 8-10.

USURY.

1. **USURY.**—Compounding of Interest After it Becomes Due at the End of a Year does not amount to usury. (Wash.) *Blake v. Yount*, 106.

2. **USURY.**—Whenever the Debtor by the Terms of a Contract can avoid the payment of the larger by the payment of a smaller sum at an earlier date, the contract is not usurious, but conditional, and the larger sum becomes a mere penalty. (Wash.) *Blaker v. Yount*, 106.

3. **USURY, Laws Respecting, When Affect the Remedy Only and not the Substance of the Contract.**—Though the usury law of a state affects only the remedy and not the substance of contracts, this rule does not apply to valid contracts made without the state, and which are governed by the laws of another state as to their character, construction and validity. (Wash.) *Bank v. Doherty*, 123.

4. **USURY.**—Notes Secured by Mortgage on Lands Situate in Another State.—If a note and mortgage are executed in a state between citizens and residents, and are not usurious by the laws of such state, the mortgage may be enforced against real property described therein and situate in another state by whose laws the note would have been usurious had it been executed therein. (Wash.) *Bank v. Doherty*, 123.

VENDOR AND VENDEE.

Bona Fide Purchaser.

1. **VENDOR AND PURCHASER.**—Bona Fide Purchasers.—A person, who gives up his security for part of his claim, and takes in its place a deed to certain lands, is as to such lands a bona fide purchaser as against a prior grantee thereof whose conveyance is imperfectly and invalidly recorded. (Mich.) *Grand Rapids National Bank v. Ford*, 668.

Duty to Search Records.

2. **REGISTRATION OF LIENS.**—Similarity of Names.—Index.—Duty of Purchaser.—A prospective purchaser from the heirs of "Francis Ross" is bound to look in the record of liens for liens recorded and indexed in the lifetime of the decedent against "Frank Ross." (Pa.) *Burns v. Ross*, 963.

Fraud of Vendor.

3. **VENDOR AND VENDEE.**—False Representations by Former.—The vendors of standing timber cannot, in an action to recover back the purchase money paid, relieve themselves from the consequences of their false representations as to the existence of the timber, merely because the vendee could have ascertained the facts respecting its existence or nonexistence, or because he made an ineffectual attempt to do so. (Minn.) *Bonness v. Felsing*, 707.

Marketable Title.

4. **MARKETABLE TITLE.**—Evidence Dehors Record.—A purchaser of land under a contract calling for a marketable title and

entitling him to rely on the record title is not required to accept a title if there is a defect in the record title which can be cured only by a resort to parol evidence. (Minn.) *Howe v. Coates*, 723.

5. **MARKETABLE TITLE.**—A Title is not Marketable where it depends necessarily upon matter in pais which is in itself a doubtful fact and never can be determined or established except by bringing every party interested into court, certainly others besides the immediate party to the suit for specific performance. (Minn.) *Howe v. Coates*, 723.

6. **MARKETABLE TITLE.**—A Vendee is not Required to Accept a title on the court's assurance that it is good and marketable, and assume the risk of contesting the question in another action wherein the issues of law and fact may be differently determined by the same as some other court. (Minn.) *Howe v. Coates*, 723.

7. **A MARKETABLE TITLE Means a Title free from reasonable doubt and assures to the vendee the peaceable enjoyment of the property.** (Minn.) *Howe v. Coates*, 723.

8. **A MARKETABLE TITLE Means a Title which a reasonable purchaser, well informed as to the facts and their legal bearing, willing and anxious to perform his contract, would, in the exercise of that prudence which business men ordinarily bring to bear upon such transactions, be willing to and ought to accept.** (Minn.) *Howe v. Coates*, 723.

9. **A MARKETABLE TITLE is One Reasonably Free from Any Doubt which should interfere with the sale or market value of the land.** (Minn.) *Howe v. Coates*, 723.

10. **MARKETABLE TITLE—Opinion of Attorneys.**—If a vendee's attorney in good faith declines to accept a title on behalf of his client, and two district judges selected by the parties as arbitrators are unable to agree upon the questions of law involved, the title cannot fairly be said to be marketable. (Minn.) *Howe v. Coates*, 723.

VESSELS.

See Shipping.

Note.

Voluntary Associations, expulsion of members by, grounds for, 27.
 expulsion of members by, proceedings for, 27.
 power to expel members, 24.
 power to expel members, source or basis of, 27.

WATERS AND WATERCOURSES.

Accretion.

1. **ACCRETION—Burden of Proof to Show Title.**—One who asserts title to land beyond a meander line on the theory of accretion or reliction has the burden of proof as against the party in possession. (Iowa) *Wright v. Council Bluffs*, 412.

2. **ACCRETION—Meander Line.**—Where government surveyors in meandering a lake proper to be meandered included in the lake land only temporarily covered with water, this does not make such land a part of the lake so that title thereto can be acquired through accretion or reliction by owners abutting on the meander lines. (Iowa) *Wright v. Council Bluffs*, 412.

Drainage and Diversion.

3. **WATERS—Injunction—Judicial Notice of Rainfall.**—A court of equity will take judicial notice of the fact that, in certain seasons of the year, in certain localities, there are heavy rainfalls and consequent liability, to freshets and excessive accumulation of water, and if a wrongful act is threatened which, in connection with this fact, will injuriously affect the property rights of a citizen, equity will interfere by injunction to anticipate and prevent such threatened injury. (Ill.) *Elser v. Village of Gross Point*, 326.

4. **WATERS—Drainage.**—No one has the right to collect water in an artificial channel and cast it upon the land of another in undue and unnatural quantities, contrary to its natural course, and if he attempts to do so, a court of equity will interpose to prevent the act. (Ill.) *Elser v. Village of Gross Point*, 326.

5. **WATERS—Right of Municipality to Divert.**—A municipal corporation has no greater right than a natural person to divert surface water in large quantities by an artificial channel upon the land of another, except that it may do this in the exercise of the right of eminent domain, upon making just compensation as required by the constitution. (Ill.) *Elser v. Village of Gross Point*, 326.

See *Boundaries*.

WILLS.*Validity.*

1. **WILLS—Gift to Wife of Scrivener a Suspicious Circumstance.** Where a person writes or prepares a will for another, under which the wife of the writer takes a benefit, it is a circumstance to be considered by the jury, requiring the court and jury to be vigilant and zealous in examining the evidence in support of the instrument; and unless it appears clearly that no advantage was taken by the writer, it is sufficient to exclude the will from probate. (R. I.) *McGowan v. Probate Court*, 52.

Construction.

2. **WILLS—Rule of Construction.**—In construing wills, the cardinal and fundamental rule is to ascertain the intent of the testator, and if it is not contrary to some positive rule of law or against public policy, to give it effect. This intention is to be derived from the language of the will itself. Words not technical are interpreted in their ordinary and popular signification, and when occurring more than once, are presumed to be used in the same sense, unless the context shows a contrary intention. (Colo.) *Platt v. Brannan*, 147.

3. **WILLS—Rule of Construction.**—The first taker in a will is presumed to be the favorite of the testator, and the tendency is to adopt such a construction as will give an estate of inheritance to the first donee. (Colo.) *Platt v. Brannan*, 147.

4. **WILLS—Rule of Construction.**—If an estate in fee is devised in one clause of a will in clear and decisive terms, it cannot be cut down or taken away by raising a mere doubt in some subsequent clause or by some other inference therefrom. (Colo.) *Platt v. Brannan*, 147.

5. **WILLS—Construction.**—Under a will by which a testatrix devises to her husband all of her interest in a certain lot of land, "also all my right" in two certain other lots, "to have the said interests in the said described parcels of land" for life, with a gift over to

Am. St. Rep., Vol. 114—70

others, the husband takes only a life interest in all of the land. (Colo.) *Platt v. Brannan*, 147.

6. **WILLS—Construction—Repugnant Clauses.**—A will bequeathing and devising to his wife all of the testator's property "to be hers absolutely," gives her an absolute estate in fee, and a succeeding repugnant provision in the will "that if at her death any of said property is still hers, then the residue still hers shall go to my, not her, nearest heirs," must fail, and fail of effect. (Mich.) *Moran v. Moran*, 648.

Witnesses.

7. **WILLS, Who may be Witnesses to.**—An Executor may, in Louisiana, be a witness to the will naming him as such executor. (La.) *Davenport v. Davenport*, 575.

8. **WILLS, Witnesses, Evidence to Identify.**—Where a witness to a will signs his name *Fresco Cutero*, parol evidence is admissible to show that he is the same person who gave his name as *Francesco Cutero*. (La.) *Davenport v. Davenport*, 575.

9. **WILLS.—The Subscribing Witnesses Must Sign After the Testator.** If they sign first and he immediately afterward, though the whole constitutes part of one transaction, the will cannot be admitted to probate. (Ga.) *Lane v. Lane*, 207.

Note.

Wills, acknowledgment of need not be made by the witnesses at the same time, 213.

acknowledgment of to the witnesses, form and sufficiency of, 214, 215.

attestation and subscription, differences between, 210.

attestation clause, absence of is not fatal, 231.

attestation clause of, acknowledgment of deed, whether may be taken as a part of, 233.

attestation clause of, effect of as evidence, 238, 239.

attestation clause of, form of, 231.

attestation of, absence of clause of, 231.

attestation of, absence of clause of and its effect, 231, 232.

attestation of, and subscription to, time of, 224.

attestation of, at the foot of, what does not amount to, 223.

attestation of, before the testator signs, 233, 234.

attestation of, by witnesses knowing nothing of the testamentary capacity of the executor, 233.

attestation of, effect of as evidence, 238, 239.

attestation of, order of signing by the testator and witnesses, 234.

attestation of, physical presence of the testator at, what amounts to, 226.

attestation of, place where witness may sign, 223.

attestation of, presence of testator at, necessity for, 224.

attestation of, presence of testator at, what amounts to, 226.

attestation of, presence of the testator at, where he is blind, 227.

attestation of, publication as a part of, 235.

attestation of, requests to the witnesses, 236.

attestation of, subscription is involved in, 210.

attestation of, testamentary capacity must exist at the time of, 225, 226.

attestation of, testator must be aware of, 225.

attestation of, testator must be conscious at the time, 225.

attestation of, where testator cannot see the witnesses, 237, 238.

- Wills**, attestation of, whether must be signed by the testator, 227.
attesting and witnessing of, construction of statutes respecting, 212.
attesting and witnessing of interlineations and alterations, 211.
attesting and witnessing of must be by the number of witnesses required by the statute, 212.
attesting and witnessing of, necessity for, 211.
attesting and witnessing of, purposes of, 209, 210, 224, 225.
attesting and witnessing of, substantial conformity to the law is all that is required, 212.
contents of need not be known to the witnesses, 231.
evidence of execution as against the testimony of the subscribing witnesses, 237.
evidence of execution, effect of testamentary clause as, 238.
evidence of execution of subscribing witnesses and its effect, 236, 237.
evidence of execution of subscribing witnesses, when may be dispensed with, 236, 237.
nuncupative need not be witnessed nor attested, 211.
object of requiring the attestation of, 224.
of personalty, attesting and witnessing, 211.
publication of by another at the request of the testator, 219.
publication of holographic, 220.
publication of, necessity for, 218.
publication of to the witnesses, sufficiency of, 216, 217.
publication of to the witnesses, where unnecessary, 220.
publication of, when complete, 219.
publication of where the testator cannot at the time speak, 218.
request to the witnesses, sufficiency of, 216.
signature to, witnesses, whether must see, 221.
signing of, whether must be in the presence of the witnesses, 213.
subscription of by the witnesses, necessity for, 221.
witnesses, absence or death of, entitles the proponent to offer other evidence of, 238, 239.
witnesses, acknowledgment by them of their signature made to the testator, 230.
witnesses, acknowledgment of to, sufficiency of, 214, 215.
witnesses, acts of, whether must be at the request of the testator, 217.
witnesses, contents of need not be known to, 231.
witnesses, declaration by a testator to that it is a fake will, 221.
witnesses, in a room other than that in which the testator is, 229.
witnesses, inability of the testator to see them, 228, 229.
witnesses must sign as such, 221.
witnesses, necessity of their action in each other's presence, 230, 231.
witnesses, necessity of their being where the testator can see them, 227, 228.
witnesses, necessity of their knowing the character of the instrument witnessed, 220.
witnesses need not all subscribe at the same time, 224.
witnesses need not know one another, 233.
witnesses out of the sight of the testator, 228, 229.
witnesses, opinions of as evidence, 238.
witnesses, place where may sign, 222.
witnesses, presence of at the signing of, 214, 215.
witnesses, presence of, burden of proof respecting, 230.
witnesses, obstructions between and the testator which will prevent him from seeing them, 228.

others, the husband takes only a life interest in all of the land. (Colo.) *Platt v. Brannan*, 147.

6. **WILLS—Construction—Repugnant Clauses.**—A will bequeathing and devising to his wife all of the testator's property "to be hers absolutely," gives her an absolute estate in fee, and a succeeding repugnant provision in the will "that if at her death any of said property is still hers, then the residue still hers shall go to my, not her, nearest heirs," must fall, and fail of effect. (Mich.) *Moran v. Moran*, 648.

Witnesses.

7. **WILLS, Who may be Witnesses to.**—An Executor may, in Louisiana, be a witness to the will naming him as such executor. (La.) *Davenport v. Davenport*, 575.

8. **WILLS, Witnesses, Evidence to Identify.**—Where a witness to a will signs his name Fresco Cutero, parol evidence is admissible to show that he is the same person who gave his name as Francesco Cutero. (La.) *Davenport v. Davenport*, 575.

9. **WILLS.—The Subscribing Witnesses Must Sign After the Testator.** If they sign first and he immediately afterward, though the whole constitutes part of one transaction, the will cannot be admitted to probate. (Ga.) *Lane v. Lane*, 207.

Note.

Wills, acknowledgment of need not be made by the witnesses at the same time, 213.

acknowledgment of to the witnesses, form and sufficiency of, 214, 215.

attestation and subscription, differences between, 210.

attestation clause, absence of is not fatal, 231.

attestation clause of, acknowledgment of deed, whether may be taken as a part of, 233.

attestation clause of, effect of as evidence, 238, 239.

attestation clause of, form of, 231.

attestation of, absence of clause of, 231.

attestation of, absence of clause of and its effect, 231, 232.

attestation of, and subscription to, time of, 224.

attestation of, at the foot of, what does not amount to, 223.

attestation of, before the testator signs, 233, 234.

attestation of, by witnesses knowing nothing of the testamentary capacity of the executor, 233.

attestation of, effect of as evidence, 238, 239.

attestation of, order of signing by the testator and witnesses, 234.

attestation of, physical presence of the testator at, what amounts to, 226.

attestation of, place where witness may sign, 223.

attestation of, presence of testator at, necessity for, 224.

attestation of, presence of testator at, what amounts to, 226.

attestation of, presence of the testator at, where he is blind, 227.

attestation of, publication as a part of, 235.

attestation of, requests to the witnesses, 236.

attestation of, subscription is involved in, 210.

attestation of, testamentary capacity must exist at the time of, 225, 226.

attestation of, testator must be aware of, 225.

attestation of, testator must be conscious at the time, 225.

attestation of, where testator cannot see the witnesses, 237, 238.

- Wills, attestation of, whether must be signed by the testator, 227.**
 attesting and witnessing of, construction of statutes respecting, 212.
 attesting and witnessing of interlineations and alterations, 211.
 attesting and witnessing of must be by the number of witnesses required by the statute, 212.
 attesting and witnessing of, necessity for, 211.
 attesting and witnessing of, purposes of, 209, 210, 224, 225.
 attesting and witnessing of, substantial conformity to the law is all that is required, 212.
 contents of need not be known to the witnesses, 231.
 evidence of execution as against the testimony of the subscribing witnesses, 237.
 evidence of execution, effect of testamentary clause as, 238.
 evidence of execution of subscribing witnesses and its effect, 236, 237.
 evidence of execution of subscribing witnesses, when may be dispensed with, 236, 237.
 nuncupative need not be witnessed nor attested, 211.
 object of requiring the attestation of, 224.
 of personalty, attesting and witnessing, 211.
 publication of by another at the request of the testator, 219.
 publication of holographic, 220.
 publication of, necessity for, 218.
 publication of to the witnesses, sufficiency of, 216, 217.
 publication of to the witnesses, where unnecessary, 220.
 publication of, when complete, 219.
 publication of where the testator cannot at the time speak, 218.
 request to the witnesses, sufficiency of, 216.
 signature to, witnesses, whether must see, 221.
 signing of, whether must be in the presence of the witnesses, 213.
 subscription of by the witnesses, necessity for, 221.
 witnesses, absence or death of, entitles the proponent to offer other evidence of, 238, 239.
 witnesses, acknowledgment by them of their signature made to the testator, 230.
 witnesses, acknowledgment of to, sufficiency of, 214, 215.
 witnesses, acts of, whether must be at the request of the testator, 217.
 witnesses, contents of need not be known to, 231.
 witnesses, declaration by a testator to that it is a fake will, 221.
 witnesses, in a room other than that in which the testator is, 229.
 witnesses, inability of the testator to see them, 228, 229.
 witnesses must sign as such, 221.
 witnesses, necessity of their action in each other's presence, 230, 231.
 witnesses, necessity of their being where the testator can see them, 227, 228.
 witnesses, necessity of their knowing the character of the instrument witnessed, 220.
 witnesses need not all subscribe at the same time, 224.
 witnesses need not know one another, 233.
 witnesses out of the sight of the testator, 228, 229.
 witnesses, opinions of as evidence, 238.
 witnesses, place where may sign, 222.
 witnesses, presence of at the signing of, 214, 215.
 witnesses, presence of, burden of proof respecting, 230.
 witnesses, obstructions between and the testator which will prevent him from seeing them, 228.

Wills, witnesses, presence of where the testator does not see them though he might do so, 228.
 witnesses, proving by the testimony of one only, 236.
 witnesses, publication of the will to and its sufficiency, 217-221.
 witnesses, request to act as such, by whom may be made, 215, 216.
 witnesses, subscribing by their mark, 222.
 witnesses, subscription by, mode of, 222.
 witnesses, subscription by must be in their own name, 222.
 witnesses of, testimony of, effect of as compared with that of other witnesses, 237.
 witnesses of, testimony of must be taken before calling other witnesses, 236.
 witnesses of, testimony of without the, 237.
 witnesses to, credible, who are, 211.
 witnesses to, number required, 211, 212.

WITNESSES.

1. **WITNESSES—Testifying Against a Deceased Adversary.**—If at the second trial of an action one of the parties offers himself as a witness and is excluded as incompetent because of the death of his adversary, the ruling of the court is not made erroneous by the subsequent offering and receiving in evidence of the testimony of such adversary as given by him at the former trial, where the presentation of such evidence was not disclosed to the court when its ruling was made, and the party so rejected was not offered as a witness after such testimony was received. (Mont.) *Harrington v. Butte and Boston Mining Co.*, 821.

2. **WITNESSES—Testifying Against a Deceased Adversary as to Transactions with Third Persons.**—That the transaction sought to be testified to by a party to the action was with a third person does not exempt such party from the rule declaring that parties or assignees of parties to an action or persons in whose behalf it is prosecuted against an executor or administrator, upon a claim or demand against the estate of a deceased person, cannot be witnesses as to any matter of fact occurring before the death of such deceased person. (Mont.) *Harrington v. Butte & Boston Mining Co.*, 821.

3. **WITNESSES—Husband and Wife.**—Neither plaintiff nor defendant is competent to testify in a suit in equity by a wife against her husband to cancel a deed made to him by her through his fraud, and to compel a reconveyance of her separate estate. (Pa.) *Heckman v. Heckman*, 953.

4. **WITNESSES Before Legislative Committees—Evidence—Hearsay—Privileged Communications.**—If a legislative committee is appointed to investigate the affairs of a state dispensary with power to compel witnesses to answer any questions relevant to such investigation, a question asked a witness at such investigation as to whether another person who had had dealings with such dispensary had said to the witness that he had given rebates, graft or money, or had improperly influenced the board of directors of the dispensary to give him business, does not call for hearsay evidence, nor can it be excluded on the ground that an answer would violate the implied confidence of a private conversation. (S. C.) *Parker, Ex parte*, 1011.

5. **WITNESSES—Admission of Testimony of, Given at Former Trial.**—If there is evidence of an effort to subpoena a witness who does not appear, it is within the discretion of the trial court whether

his testimony given at a formal trial shall be admitted or not. (Pa.) *Delahunt v. United Tel. & Tel. Co.*, 958.

6. **WITNESS—Impeachment by Previous Declarations.**—If there is an inconsistency between the belief of a witness, as indicated by his previous declarations, and that which would naturally be indicated by his examination in chief, they may be shown, although not directly contradictory of any specific statement in his testimony. (Iowa) *State v. Matheson*, 427.

See Evidence.

X-RAY PHOTOGRAPHS.

See Evidence, 4, 5.



